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BOOK REVIEW

Whose Property? The Deepening Conflict between Private Property and Democracy in Canada

By ROY VOGT

(Toronto: University of Toronto Press, 1999)¹ 242 pages.

In my first year of law school I struggled with the idea that property law is about relationships—that it “comprises bundles of mutual rights and obligations between ‘subjects’ in respect of certain ‘objects.’”² As I took courses in environmental, labour, family, aboriginal, and corporate law, however, the conceptual and relational nature of property became clearer, as did the variety of objects encompassed by “property” and the contested nature of both its meaning and the legal relationships that existed between property’s subjects and objects. I came to understand that “[t]he meaning of property is not constant. The actual institution, the way people see it, and hence the meaning they give to the word, all change over time The changes are related to changes in the purposes which society or the dominant classes in society expect the institution of property to serve.”³

It is this contestation over the meaning of property and whose purposes it serves that is at the heart of Roy Vogt’s *Whose Property?* A work published posthumously from his 1997 manuscript, Professor Vogt’s aim was to examine what he saw as a fundamental and growing conflict in Canada between the interests of capitalism and the interests of democracy.⁴

Vogt points out that as capitalism’s “logic” promotes the accumulation of property and production units in the hands of smaller and smaller segments of the population, an ever increasing proportion of the population is excluded from property ownership. At the same time, Vogt, who sees capitalism as a necessary precursor to democracy, argues that the democratic ideals and institutions necessary for the development of capitalism become more deeply entrenched in the wider population.⁵ He

¹ [hereinafter *Whose Property?*]. The reviewer would like to thank Douglas Harris for helpful discussions and comments on an earlier draft.

² K.J. Gray & P.D. Symes, *Real Property and Real People: Principles of Land Law* (London: Butterworths, 1981) at 9.

³ C.B. Macpherson, “The Meaning of Property” in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1 at 1.

⁴ *Whose Property?*, *supra* note 1 at 4.

⁵ *Ibid.* at 4-7.

focuses on efforts to democratize decision making about property, both private and public, and thereby distribute the control of property to a wider segment of the population.

Key property concepts are reviewed in the first section of *Whose Property?*—including property as a network of rights,⁶ distinctions between private and common property, various theoretical justifications for private property, and the idea that property rights are social constructs, legitimated and protected by the state. Vogt traces the development of property rights in Canadian history from what he refers to as the “common property” systems established by aboriginal peoples, to the more individual common and civil law property systems brought by European settlers, describing how features of the common and civil law systems, particularly the concept of the Crown’s power of eminent domain and the importance of private property established through legal title, have influenced Canadian property law.

Vogt clearly sees state involvement in providing social assistance and other services, and in regulating private enterprise, as necessary elements in a truly participatory democracy. He argues that for a variety of reasons, private ownership of resources became increasingly limited.⁷ The Crown retained title to land, granting private stakeholders leasehold interests to extract resources. In the early twentieth century, the state, while continuing to support business access to resources, was increasingly called upon to support other citizens through social and economic programs which redistributed income, regulated business activity, and provided universally accessible services such as health care and education.

Vogt expresses deep concern about how this constantly evolving balance of state and private control of resources and their distribution has been undermined by the “late-twentieth-century attack on state property and the renewed, vigorous defence of private property.”⁸ He cites profound changes in the public and the private capitalist business sector since World War II as influencing this shift. These changes include increases in the size of production units, the concentration of corporate ownership, the separation of corporate owners from managers, foreign ownership, and

⁶ Vogt emphasizes user rights, income or enjoyment rights, and disposal rights.

⁷ He argues that the Canadian landscape, populist sentiments of European settlers in central Canada, business support for state control of property, and the fact that the Constitution gave the provinces control over private property, each contributed to this development.

⁸ *Whose Property?*, *supra* note 1 at 35.

increases in government spending, regulation, and the number of crown corporations.

These factors, coupled with the rise of neo-liberalism and the emergence of property rights theory that denigrates government participation in the economy, led to widespread calls for government deregulation, privatization, reductions in spending, and reduced taxes. Vogt attempts to show that these attacks on state property, social spending, and government involvement in the economy are ideologically driven, and not based on a concern for a larger public good. However, his analysis does not adequately address the continuing impacts of global neo-liberalism, the rise of multinational enterprises, and the globalization of production, and their effects on the Canadian economy and social policy.

After devoting considerable energy to supporting his argument that capitalist democracies such as Canada need a balance between both state and private property and state and private enterprise to meet the needs of all citizens, Vogt suddenly shifts to a focus on citizen decision making about property. He suggests that the more significant issue is not state versus private property, but rather the need for greater citizen control of both state and private property. Despite the fact that this is the central argument of his work, Vogt devotes surprisingly little time to addressing the apparent contradiction between the need for greater citizen control of property and his argument that Canada's "history attests to the fact that strong but not overly intrusive governments can combine with a vigorous private sector to produce a prosperous and relatively fair and free society."⁹

In the second section of *Whose Property?*, Vogt examines "new property rights"¹⁰ in three areas. First, he traces the radical changes to family law since 1960. In the area of family property, these include an expansion of the meaning of "property" to include assets such as pensions and insurance, in addition to traditional family property such as the family house, and recognition of the importance of the unpaid work and child care performed mainly by women in the home. Drawing on the large body of feminist work on the family and the impact of these changes to women and children on the breakdown of relationships, Vogt points out that although these changes have resulted in significant improvement for women's economic situation, they still do not adequately address the systemic financial disadvantage that women experience in the market. Nor do they adequately account for the increased family responsibilities usually taken

⁹ *Ibid.* at 63.

¹⁰ *Ibid.* at 9.

on by single mothers, or provide adequate support for a single mother and her children.

Vogt echoes many feminists and anti-poverty activists in his recommendations designed to allow single mothers to realize the equality and independence assumed in the family law system. These recommendations include state provision of a guaranteed basic income, training, universal child care, and better enforcement of child support orders. His focus is largely on the impact of divorce and common-law marriage breakdown on heterosexual mothers. There is little discussion of the difficulties faced by women without dependent children upon the breakdown of a relationship, nor is there significant discussion of the problem of access to, and control of, property for all women. Finally, Vogt focuses on the heterosexual family, and makes no mention of the lack of family property rights for gay or lesbian couples.¹¹

In the section of *Whose Property?* dealing with aboriginal property rights, Vogt examines the continuing struggle of aboriginal peoples to have their property rights recognized by governments and the courts through equitable resolution of their comprehensive land claims and of specific claims arising out of existing treaties. His discussion of aboriginal property rights is disappointing, particularly when contrasted with his lengthy discussion of the development of common-law property rights in Canada. Despite his recognition that one of the reasons aboriginal peoples have had difficulty establishing title based on occupation and use of land is that Canadian courts have failed "to accept ... that Canadian Aboriginals occupied their land in an acceptable way,"¹² Vogt accepts that the common law can accommodate aboriginal conceptions of property. He fails to acknowledge the diversity of the ways that aboriginal peoples hold and use land, and that these "are all incidental, and arising from, very different ontological conceptions of what a being in the world is."¹³ Vogt also ignores the more fundamental question of whether such "accommodation" effectively erases this diversity by requiring that aboriginal claims fit within common law notions of property, occupation, and use.¹⁴ While Vogt supports political measures to resolve aboriginal property rights grievances

¹¹ See generally K.A. Lahey, *Are We 'Persons' Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) c. 8-9.

¹² *Whose Property?*, *supra* note 1 at 98.

¹³ B. Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 1 *Can. J. L. & Jur.* 3 at 24.

¹⁴ See generally *ibid.*

through land claims negotiations, self-governance agreements, and implementation of the recommendations of the Royal Commission on Aboriginal Peoples, his support appears to be premised on the idea that aboriginal property rights can be fit within the structures of the common law system, rather than on a more radical understanding that these solutions must create separate and parallel property and governance systems.

The final chapter of this section examines what Vogt refers to as “citizens property rights”—property rights emerging in response to environmental degradation. Vogt sees these rights largely as correctives to weaknesses inherent in both the market and the political system, rather than attempts fundamentally to restructure economic and political institutions. His recommendations for greater citizen participation in decisions about land and resource use, more legislative protection of the environment, and more acceptance of the need for state involvement in regulating the environmental impacts of economic activity echo much of the work of environmental law and policy makers in the early 1990s.¹⁵ Also, there is no discussion of the critical issue of the resources needed to regulate and enforce environmental protection standards. His discussion of greater participatory decision-making mechanisms places emphasis on the need for business and government to consult with citizens rather than on mechanisms for the actual sharing of decision making

The final section of *Whose Property?* looks at two forms of “new property”—workplace property rights and property in jobs and investments. In the workplace, the rights discussed are designed to democratize the workplace, giving employees greater influence over decision making about both corporate policy and day-to-day management decisions. Vogt’s concise but comprehensive discussion of the philosophical and economic rationales for increasing workplace democracy, with examples from within Canada and abroad, is the strongest section of the book.

Vogt justifies greater employee rights in the workplace in market terms—greater corporate efficiency and employee commitment to the workplace—and argues that shifting the balance of property rights held by

¹⁵ See e.g. Commission on Resources and the Environment, *Finding Common Ground: A Shared Vision for Land Use in British Columbia* (Victoria: Commission on Resources and Environment, 1994); Task Force on the Ontario Environmental Bill of Rights, *Report of the Task Force on the Ontario Environmental Bill of Rights* (Toronto: Ministry of the Environment, 1992); and R.D. Lindgren, “Toxic Substances in Canada: The Regulatory Role of the Federal Government” in D. Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990s* (Edmonton: Environmental Law Centre (Alberta) Society, 1990).

labour (employees) and capital (shareholders) within corporate enterprises can be accomplished “without threatening our system of private property.”¹⁶ Despite the fact that many of his examples of democratic private enterprise are worker-owned enterprises, he spends little time on the larger issue of the distribution of wealth and power between corporate owners and employees, merely pointing out that “ownership of shares has no effect on corporate performance unless it is combined with a plan to increase employees’ participation in decision making.”¹⁷ His prescription for reform in Canada amounts to greater worker participation in decision making by government, unions, managers, and shareholders.

In the final chapter, Vogt addresses the fact that the majority of Canadians rely not on land and capital, but on the income from their jobs, retirement savings plans, insurance, public and private pension plans, and universal social services such as health care and education. Vogt argues that these are new forms of property that should be protected in the same way that land and capital have been. In arguing for greater protection of these investments from significant government restructuring, Vogt argues first that governments hold taxes and other social investments on behalf of individual contributors, and second, that the expectations of these contributors, as evidenced by public opinion polls, are for greater protection for income security, health care, education, and other social programs, and a greater regulatory role in the social and economic lives of citizens. However, this second claim seems contradicted by the continuing support for neo-liberal governments.

Ultimately, *Whose Property?* provides a justification for continued government intervention in the economy and in the provision of basic economic and social resources to its citizens. However, the book is unlikely to convince opponents and Vogt provides little new insight for those supportive of his position. Many may take issue with his premise that capitalism is a necessary condition for democracy. This premise certainly limits his analysis of the appropriate manner in which property ownership and decision-making rights should be distributed. As well, many of Vogt’s

¹⁶ *Whose Property?*, *supra* note 1 at 150.

¹⁷ *Ibid.* at 169. For a more comprehensive discussion of the relationship between labour and capital, and the variety of worker-owned companies in Canada, see generally J. Quarter, *Crossing the Line: Unionized Employee Ownership and Investment Funds* (Toronto: James Lorimer & Company, 1995).

examples are outdated,¹⁸ and he makes little reference to the significant social policy issues raised in the fields of intellectual property and information technology, such as the property rights in DNA, or in various kinds of information about individuals, or the control of, and access to, the Internet. As well, the largely descriptive character of *Whose Property?* and the brevity of the discussion of larger philosophical and political questions will disappoint an academic audience, as will the fact that some of the works cited in the text, as well as all of the court cases discussed, are not in the bibliography.

Despite these shortcomings, *Whose Property?* does provide a good overview of property issues and comprehensive summaries of the developments in various areas. Each chapter provides a succinct overview of the property rights issues in various domains, even if many of the chapters could be more current, particularly those dealing with family, aboriginal, and citizens' property rights. The first section, in particular, provides a good overview of the concept of property, philosophical justifications for private property, and the historical development of property rights in Canada and would be a useful introductory piece for first year undergraduate students in law, political science, or economics.

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¹⁸ For example, there is no discussion of the efforts to institute to multi-stakeholder decision-making processes for land and resource planning, such as those undertaken in the 1990s in British Columbia by the provincial Commission on Resources and Environment. See e.g. R. A. Kelly & D.K. Alper, *Transforming British Columbia's War in the Woods: An Assessment of the Vancouver Island Regional Negotiation Process of the Commission on Resources and Environment* (Victoria: University of Victoria Institute for Dispute Resolution, 1995).