ENVIRONMENTAL PROTECTION AND THE ABJECT FAILURES OF THE COMMON LAW

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A. Introduction

I am honoured to be presenting the Ivan C. Rand Memorial lecture on the twenty-fifth anniversary of this important public event in the UNB law school calendar.

In preparing this lecture, I sought to find intersections between Justice Rand's illustrious career and the present occasion—a talk about environmental law delivered by a visitor from Alberta. As to the latter, it is likely well known that Ivan Cleveland Rand began his professional life as a lawyer in Medicine Hat, Alberta. It might seem like a curious first destination for a freshly minted Harvard law grad from New Brunswick, but at the time, *circa* 1913, Medicine Hat was a town with a promising future. Natural gas had been discovered nearby, and there was plenty of legal work available. All in all, it was predicted that Medicine Hat, situated close to the American border, was destined to become a leading urban centre in the recently created province of Alberta. That was not to be. Among other things, the onset of WW1 had a chilling effect of the region's growth. By 1920, Rand decided to return home, where he set up practice in partnership with Clifford Robinson, a seasoned lawyer.

William Kaplan's biography of Rand's time ably chronicles his time in Medicine Hat.[1] But Kaplan does not mention Rand's other connection with Alberta. Shortly after hanging his shingle in Moncton, Rand received a telegram from Henry Marshall Tory, the founding president of the University of Alberta. Tory's message concerned the position of dean of the faculty of law at the university. "Would you consider" Tory wrote in the clipped style of telegrams of the day, "appointment as Dean Law Faculty University Alberta." The starting salary was stated to be $4,400. Tory was impressed by Rand's Harvard pedigree. In the last line of the telegram, he advised that "Pound recommends you strongly."[2] Pound was none other than the famous jurist, Roscoe Pound, then the dean of the Harvard Law School. Rand declined, though the extant record does not reveal much else.

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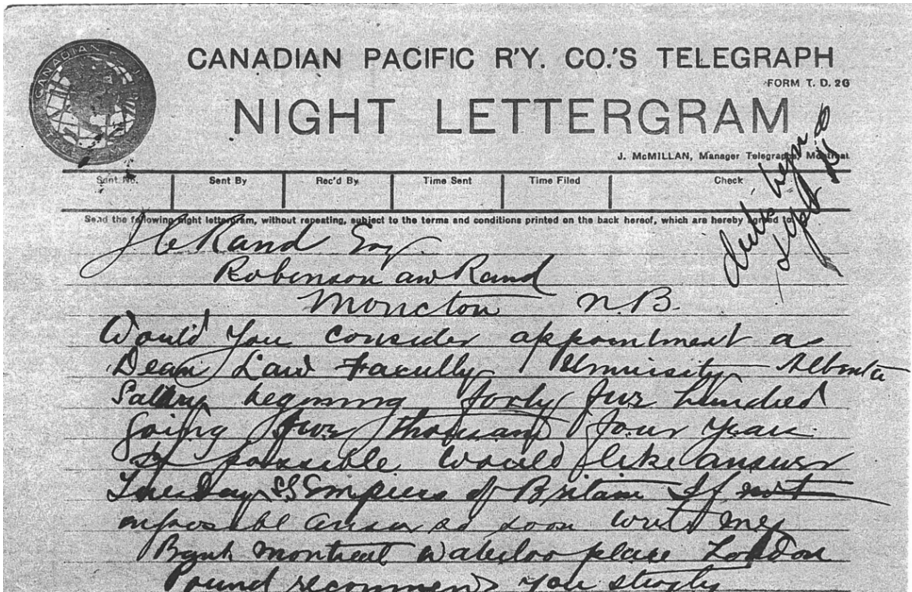
[1] William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: Osgoode Society for Canadian Legal History & University of Toronto Press, 2009) at 18–28.

[2] Canadian Pacific Telegraph, Henry Marshall Tory to Ivan C Rand, (nd), copy on file with the author. See figure 1.



CANADIAN PACIFIC R'Y. CO.'S TELEGRAPH

FORM T. D. 26

NIGHT LETTERGRAM

J. McMILLAN, Manager Telegraphs, Montreal

Sent No.	Sent By	Rec'd By	Time Sent	Time Filed	Check

Send the following night lettergram, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.

J C Rand Esq
Robinson and Rand
Moncton N.B.
Would you consider appointment as
Dean Law Faculty University Alberta
Salary beginning forty five hundred
going [illegible] thousand four year
if possible. Would like answer
Tuesday SS Empress of Britain If not
[illegible] write me
Bank Montreal Waterloo place London
[illegible] recommends you strongly

Figure 1. Canadian Pacific Telegraph, Henry Marshall Tory to Ivan C. Rand, (nd).

The second point of intersection concerns Justice Rand's connection to Supreme Court of Canada jurisprudence on environmental issues. Rand served on the Supreme Court from 1943 to 1959. During that time, he presided in 697 reported decisions. If those cases are cross-referenced in the Westlaw database under the heading "Environmental Law", only <u>one</u> case is cited. This was a unanimous decision of Court (discussed below[3]), penned not by Rand, but rather by Justice Patrick Kirwin.

This single reference may be misleading. During Ivan Rand's tenure on the Supreme Court of Canada, the category of environmental law was not in common usage; it is a cognate legal category of more recent origin. Environmental law in Canada as that term is now understood emerges in the late 1960s, and early 1970s. As Jamie Benedickson noted in the preface of his text on Canadian environmental law, "[w]hen I graduated from law school in 1972, nowhere in the curriculum could one find a course called Environmental Law."[4]

As the 1960s were drawing to a close, a number of public interest advocacy groups were created, including preeminently, Pollution Probe (1969) and Greenpeace, which was founded in Vancouver in 1971. In that same year, the Canadian Environmental Law Association was formed. David Estrin, a recent graduate of the Faculty of Law at the University of Alberta, was the driving force behind its creation. The following year, Estrin pecked out the first edition of the Canadian Environmental

[3] *McKie v KVP Co*, *infra* note 26.

[4] Jamie Benidickson, *Environmental Law*, 4th ed (Toronto: Irwin Law, 2013) at xv. See also David R Boyd, *The Right to a Healthy Environment* (Vancouver: UBC Press, 2012) where an account of the history of Canadian environmental law (chapter 3, *passim*) begins in 1969.

Newsletter on an IBM electric typewriter. A few years later it became the Environmental Law Reports. In 1976, Estrin opened the first law office in Canada devoted exclusively to environmental law matters. He was, in essence, the founding father of Canadian environmental law.

The relevant 'law' governing the environment was viewed fundamentally as being statute-based. A large array of statutory instruments was introduced in and around the same period.[5] This alone signals a central theme of my talk: the common law offered very little potent legal protection for the natural and built environment. Legislation filled a huge chasm.

A brief exercise in discourse analysis highlights this point. Benidickson's work, referred to above, is a student textbook of more than 400 pages. He devotes 14 pages to what he sees as the pertinent common law causes of action.[6] A similar scope of coverage can be found in the published casebooks.[7] Likewise, a detailed practitioner's reference book devotes virtually no space to the common law.[8] The same is true of the leading resource on Brownfields remediation.[9]

Benedickson's analysis is somewhat typical. The causes of action discussed are: nuisance, negligence, strict liability under the rule in *Rylands v Fletcher*, breach of statutory duty, trespass, and riparian rights.[10] The author identifies the shortcomings of these doctrines. In short, except for public nuisance, these causes of action rely on the willingness of private actors to pursue legal recourse; there are issues of standing that can arise; the costs of litigation can be prohibitive; and plaintiff's may need to contend with formidable issues of proof, especially where scientific questions arise. Limitation periods can also pose a barrier if latent harms take years to gestate into discernable damage. And in the end, the available remedies may be inadequate. In particular, seeking an injunction is pointless in instances in which irreparable environmental destruction has already occurred.[11]

These concerns are cogently presented. Still, I am surprised by the confined ambit of the analysis. With one exception (riparian rights), the common law is viewed through the doctrinal lens of the law of torts. However, there is far more to the interplay

[5] The keystone provision in New Brunswick is the *Clean Environment Act*, RSNB 1973, c C-6. See also more recent measures: *Clean Water Act*, SNB 1989, c C-6.1; *Clean Air Act*, SNB 1997, c C-5.2; *Climate Change Act*, SNB 2018, c 11; *Beverage Containers Act*, RSNB 2011, c 121.

[6] Benidickson, *supra* note 4, at 101–14.

[7] See Elaine Hughes, *Environmental Law and Policy*, 3rd ed (Toronto: Emond Montgomery, 2009), 45 of 685 pages; Meinhard Doelle & Chris Tollefson, eds, *Environmental Law: Cases and Materials*, 3rd ed (Toronto: Thomson Reuters, 2019), 120 of 1,000 pages.

[8] Allister R Lucas et al, *Canadian Environmental Law*, 3rd ed (Toronto: LexisNexis Canada, 2017).

[9] See Ahab Abdel-Aziz & Nathalie J Chalifour, eds, *The Canadian Brownfields Manual* (Markham, ON: LexisNexis Canada, 2004).

[10] Benidickson, *supra* note 4, at 102–14.

[11] *Ibid* at 114–16.

between environmental protection and the common law than just this. To be more precise, I am thinking of core principles of property law. This omission is ironic, since a good deal of the environment *is* property. Correlatively, most of the law of property has direct implications for the environment. Accordingly, the remainder of this presentation is devoted to some significant ways in which the common law of *property* has proven inadequate to the challenge of environmental stewardship. As I hope will be apparent, this is not merely an exercise in semantics and pedantic legal categorization. A large number of ownership principles come into focus when the lens is property law not tort, broadening the analysis in critical ways.

B. Property Law and the Environment

(a) *Fundamental principles*

Private property has been justified on the basis of a range of values.[12] One claim, of major significance in the framing of Canadian property law, is that private property enhances material well-being. It is trite to say that private property is the mainstay of all market economies. Moreover, this has implications that extend beyond economic efficiency. It has been argued that the financial incentives connected to property rights will typically prompt owners to use their holdings in a way that reduces the imprudent destruction of land and goods. To put the matter starkly, it can be argued that the most important concept in the law of property pertaining to environmental protection is very idea of private ownership itself.

A well-known parable known as the tragedy of the commons is sometimes used to illustrate that assertion.[13] The story involves a common pasture. Ranchers and farmers in the region are able to use this pasture for grazing at no cost. It looks ideal: those using the pasture reap the full benefit of the supply of feed, but bear none of the costs of doing so. A rational wealth-maximizer would therefore wish to graze as many cattle as possible. However, so would all others owning livestock. At some point, overgrazing is likely to lead to the destruction of the pasture.

One way in which to avoid this tragedy is to privatize the commons. At that point, an owner using the land for grazing will now absorb the full costs of so doing. A rational wealth-maximizer will need to take steps to ensure that the pasture is not destroyed by overuse. Put another way, both the benefits and burdens of grazing are internalized, that is, reposed in the owner of the land.

The American scholar Robert Ellickson has succinctly described this link between private property (especially fee simple title) resource management, and conservation:

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[12] See further Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018) at 11ff.

[13] Garrett Hardin, "The Tragedy of the Commons" (1968) 162:3859 Science 1243.

> [T]he preeminent advantage of an infinite land interest is that it is a low-transaction cost device for inducing a mortal landowner to conserve natural resources for future generations. … A rational and self-interested fee owner therefore adopts an infinite planning horizon when considering how to the use [a] parcel, and is spurred to install cost-justified permanent improvements and to avoid premature exploitation of resources. The fee simple in land cleverly harnesses human selfishness to the cause of altruism toward the unborn, a group not noted for its political clout or bargaining power.[14]

This is an attractive argument when examined from a distance. The premise is that self-interest is the motivation for conservation. However, on closer inspection, some critical flaws are revealed. Notice first that in the parable, the cattle are privately owned. The inducement to exploit the pasture results from that allocation. In addition, the commons that Hardin imagined is one of full open-access: there are no built-in restrictions. A well-managed commons can be regulated so as to avoid the tragedy.

The use of private property as a mechanism for environmental stewardship has other limitations. The private owner is incentivized to use the property efficiently and for maximum benefit, which is why he or she will be drawn to adopt appropriate husbandry measures. However, the actual goal of the rational wealth-maximizer is material (economic) and not environmental well-being. All else being equal, nothing would prevent a private owner of pastureland from converting it into a shopping centre, if that is thought to be the best use of the parcel. Moreover, while each owner may make sensible decisions as to their individuals holdings, there is no assurance whatsoever that these will be co-ordinated with neighbouring owners. A complex web of ecosystems transcends any one property holding. To take a simple example, a decision to clear land for agriculture may destroy wildlife habitats. That may be of little consequence to an eco-system as a whole if only one parcel is affected. But every landowner may see the value in similar action, thereby transforming the habitat beyond recognition. Nothing in the common law compels co-operative use allocations that might prevent that result.[15]

In recent years, the label of brownfields has been coined to describe lands that have been contaminated by commercial activity. Often these properties contain the toxic by-products of some manufacturing process. The law now requires that owners remediate these properties. Lengthy legal manuals describe the myriad rules governing the mandated restoration processes.[16] The tragedy of the commons reasoning suggests that owners would not wish to create brownfields; there is an economic incentive to do otherwise. Yet, the need for legislative responses to the brownfields problem demonstrates the failure of the private-property-as-environmental stewardship model.

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[14] Robert C Ellickson, "Property in Land" (1993) 102:6 Yale LJ 1315 at 1368–69.

[15] Eric T Freyfogle, *The Land We Share* (Washington, DC: Shearwater Books, 2003) at 157ff. See further Amy Sinden, "The Tragedy of the Commons and the Myth of the Private Property Solution" (2007) 78 U Colo L Rev 533.

[16] See e.g. Abdel-Aziz & Chalifour, *supra* note 9.

(b) ***Key relevant doctrines***

Among the many property law principles that can have an impact on the environment, there are several that have a particularly strong nexus with conservation and stewardship. Some of these, such as the law governing restrictive covenants, the support of land, and riparian rights, are geared towards conservation. Others are antithetical, or at best agnostic, about that goal. Of particular importance here are the right of destruction and the rule of capture. All of these discrete areas are reviewed below.

(i) ***Restrictive covenants***

The law of covenants running with land can be traced to the 1848 English case of *Tulk v Moxhay*.[17] The dispute there involved Leicester Square, located in the heart of London in an area now known as the theatre district. Some 40 years before the dispute in *Tulk* arose, the owner of the property had covenanted to preserve and maintain the lands as a garden. The Court of Chancery held that this promise was enforceable in equity against a purchaser of the land who had notice of the covenant. Leicester Square remains a park, in some measure due to the enduring efficacy of the original covenant.

It did not take long for the principle to take root in Canada. About a year after *Tulk v Moxhay* was decided, it was cited with approval by a court in Upper Canada.[18] The first reported New Brunswick judgment to invoke that authority was decided in 1872. The case involved the enforcement of a positive or affirmative covenant, that is, not one that restricted use, but required action by a subsequent owner (e.g., one acquiring title from the original covenantor).[19] Over the next several decades, prerequisites to the application of the concept developed. In addition to the requirement of notice (which was central to the *Tulk* ruling), it became established that only negative covenants could run with the land. In other words, one could restrict use of the land via a covenant, but one could not compel action by a subsequent owner. Moreover, there had to be some other parcel of land that truly benefited from the promise.[20]

The deployment of covenants as a mode of conservation—the function of the covenant in *Tulk*—is still possible. However, the prerequisites grafted onto that ruling—the need for benefitted lands and the prohibition on the enforceability of positive duties—have proven to be limiting. In consequence, legislative improvement has been undertaken in many common law jurisdictions. The New Brunswick

[17] [1848] EWHC Ch J34. For an account of the backstory, see James C Smith, "Tulk v Moxhay: The Fight to Develop Leicester Square", in Gerald Korngold & Andrew P Morriss, eds, *Property Stories*, 2nd ed (New York: Foundation Press, 2009) 171.

[18] *Province of Canada (AG) v McLaughlin* (1849), 1 Gr 34, 1849 CarswellOnt 2 (UC Ch).

[19] *Ryan v Lockhart* (1872), 14 NBR 127, 1872 CarswellNB 13 (CA), *en banc*.

[20] See further Ziff, *supra* note 12 at 454 *et seq*.

Conservation Easement Act[21] is typical of these initiatives. Under the Act, positive covenants are capable of running with the land.[22] And the covenant can exist in gross, provided that the right to enforce the promise is reposed in a government authority or a designated conservation agency.[23]

(ii) S*upport of land*

The law of support protects against the physical impairment of land by nearby landowners. All else being equal, a landowner is entitled to the physical support of land by all neighbouring properties. Accordingly, excavation on Blackacre that results in subsidence of the surface on Whiteacre is actionable. Indeed, liability is strict, for it does not matter if all reasonable precautions have been taken. In one sense, this protection is potentially far reaching: it applies not only to directly contiguous lands, but any land within the vicinity that happen to undergo subsidence as a result of excavation activities taking place somewhere else. In addition, these rules can apply when otherwise lawful mineral extraction affects the surface owner situated directly above.

Even so, there are some practical limitations on the effectiveness of this protection. One's land is entitled to support, but not the buildings on that land. Hence, if subsidence results in damage to a structure, recovery for loss of support can only be maintained if it can be shown that subsidence would have resulted even absent the presence of the building. The weight of the building may exacerbate the subsidence, but it must nevertheless be shown that subsidence would have occurred had there been no structure. Only then would damage (and consequential damage to the building) be compensable.[24]

(iii) *Riparian rights*

Riparian rights are those enjoyed by landowners in relation to an adjacent body of water. For example, at common law the owner of a riparian tenement is entitled to draw water from a river for certain designated purposes. There are no restrictions on the right of appropriation for ordinary domestic uses. However, the law imposes general limits on more extensive uses, such as manufacturing and large-scale irrigation. When such uses are undertaken by owners of upstream tenements, the downstream owners remain entitled to the natural flow of water "without sensible diminution or increase and without sensible alteration in its character or quality"[25]. If

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[21] RSNB 2011, c 130.

[22] *Ibid,* s 11(1).

[23] *Ibid*, s 5.

[24] See further Ziff, *supra* note 12 at 134–35, and the references cited there.

[25] 30 SLR 964, [1893] UKHL 964 at 965, Macnaughten LJ.

we focus on the 'quality' element, it can be seen that the law confers a protection against water pollution caused by those who own land upstream.

The Supreme Court of Canada decision in *McKie v KVP*[26] exemplifies of this principle in action. The case concerned the Kalamazoo Vegetable and Parchment Co (KVP), which operated a pulp and paper mill on the Spanish River in Ontario. The by-products of the manufacturing process were dumped into the river, resulting in extensive pollution. In 1947, the downstream owners, having exhausted other avenues of recourse, brought suit, seeking an injunction against the company. The action, the basis of which was a breach of the owners' riparian rights, succeeded at trial, and an injunction was ordered.[27] That ruling was affirmed with minor variation by both the Court of Appeal[28] and the Supreme Court of Canada.

In this case, the riparian rules were shown to have considerable potency, perhaps excessively so. The injunction threatened the survival of a major industry in the community. In response, the province of Ontario decided, controversially, that the court order was an imperfect mediation of local interests, and following the Supreme Court decision, legislation was passed to dissolve the injunction.[29] Even so, the *KVP* case and others that followed in its wake signaled the need for a new legislative framework to control pollution, and balance commercial and environmental needs. As a result, modern legislative frameworks impose highly detailed water use frameworks.[30] As with the law of covenants, legislation has been required to shore up the deficiencies of the common law.

(iv) *The right of destruction*

As alluded to above, not only do property doctrines offer little to promote conservation, there is at least one core entitlement that is patently at odds with that goal. The common law offers nothing to prevent an owner, while alive, from destroying his or her holdings.[31] Ancient oak trees can be felled; architectural treasures can be razed; historically significant papers can be reduced to ashes; precious jewellery can be transformed into bullion, and so forth. As Robert Sax graphically put, an art lover may play darts with the Rembrandt in a private collection if that is desired.[32]

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[26] *KVP Co Ltd v McKie et al*, [1949] SCR 698, 4 DLR 497. See further Jamie Benidickson, "KVP: Riparian Resurrection in 20th Century Ontario", in Eric Tucker et al, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Osgoode Society for Canadian Legal History & Irwin Law, 2012) 71.

[27] *McKie et al v KVP Co Ltd*, [1948] 3 DLR 201, OR 398 (HC).

[28] *KVP Co Ltd v McKie et al*, [1948] OWN 812, [1949] 1 DLR 39 (CA).

[29] *The KVP Company Limited Act*, SO 1950, c 33.

[30] *Clean Water Act*, SNB 1989, c C-6.1.

[31] See generally Lior J Strahilevitz, "The Right to Destroy", 114:4 Yale L J 781 (2005).

[32] Joseph Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (Ann Arbor: University of Michigan Press, 2001).

Absent legislation, the only protection against such action is the self-interest of the owner to do otherwise.

There are a few limited exceptions to the owner's right to destroy at common law. One is offered by the law of waste. Where one has a limited proprietary interest in land, such as a life estate, that interest-holder is prevented from undertaking most acts of destruction, and even the extensive improvement, of the land. This measure is designed to preserve the property for those ultimately entitled to the fee simple in the lands.[33]

It would also appear that the right to destroy may be circumscribed when contained in a testamentary disposition. There are only few authorities on point. The leading authority on point in Canada is the New Brunswick decision in *Re Wishart*.[34] That case involved a will in which the testator directed that his four horses be put down. The validity of the clause was called into question; indeed the matter came to national attention. In the end, the Court gave a rather generous (and dubious) interpretation of the language in the will. It was concluded that the testator had been motivated by deeply held concern that the horses would not be properly treated after his passing. Their future having been assured by arrangement made by his estate, it was held that the testator's worries had been allayed, rendering the clause unnecessary. Importantly, it was held in the alternative that, if that reading was not tenable, the clause was void as being contrary to public policy:

> In my opinion, the destruction of four healthy animals for no useful purpose should not be upheld and should not be approved. To destroy the horses would benefit no one and would be a waste of resources and estate assets even if carried out humanely.[35]

But, to return to the main rule, had Wishart decided that the horses should be put down prior to his own demise, the common law posed no impediment. Moreover, as long as the animals are killed in a humane manner, there does not appear to be criminal liability, as matters now stand.[36]

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[33] Still, the right to commit waste may be waived in the granting document, or permitted by those entitled to the remainder. See further Ziff, *supra* note 12 at 208–10. Waste makes a cameo appearance in the law governing Aboriginal rights, where it is invoked as a means of defining the permissible uses of lands held under Aboriginal title. The restrictions were said to resemble the limits defined by the concept of equitable waste: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 130, 153 DLR (4th) 193. I do not think the analogy is apt: see Bruce Ziff, "The Supreme Court, Fundamental Principles of Property Law, and the Shaping of Aboriginal Title", in Paul Daly, ed, *Apex Courts and the Common Law* (Toronto: University of Toronto Press, 2019) 385 at 396–98.

[34] *Re Wishart Estate (No 2)* (1990), 129 NBR (2d) 397, 1992 CarswellNB 69 (QB) [*Re Wishart* cited to NBR].

[35] *Ibid* at para 23, Riordon J.

[36] Morris Manning & Peter Sankoff, *Criminal Law*, 5th ed (Toronto: NexisLexis, 2015) at para 24.59.

(v) *First occupancy*

Some forms of unowned property can be acquired by the first party taking possession. The classic instance of this doctrine involves the capture of wild animals. A party first acquiring possession of such an animal obtains title.[37] The title is qualified in that it may be lost if the animal escapes. At first glance, one might take this idea to be sensible, fair, and environmentally neutral. However, these assessments are contestable. As James Krier has warned, capture "has been shown in a number of instances to result in relatively rapid depletion rather than long term conservation because it induces people who seek to exploit common property resources to gear up, to get more, and to get it faster."[38] Two examples illustrate Krier's concern.

The case law regulating the Newfoundland seal hunt bears this out. For centuries the annual seal hunt occurs in a span of just a few weeks, usually in early Spring. In the 19th century, the practise was for sealing crews to stockpile pelts on ice pans (floes), mark them, and set off on the hunt again, returning to retrieve the catch a later time. Occasionally, the initial ship (call it Ship #1) would not be capable of returning to recover the pelts; those might later be collected and stowed by a competitor (Ship #2).

During the latter half of the 19th century, a handful of cases confronted the question of the entitlement, if any, of Ship #2. Of concern to the courts and the sealing industry was the avoidance of waste. In one case it was noted that some 3,000 sculped pelts had been left behind, their fate being unknown.[39] In the 1870 decision of the Full Court of the Newfoundland Supreme Court in *Clift v Kane*,[40] a majority held that Ship #1 retained title to pelts left on a pan, but that Ship #2 would entitled to levy a salvage fee in circumstances in which the pelts might otherwise have been lost. An alternative approach, which also garnered judicial support, holds that where Ship #1 is unable to recover the pelts, they should be treated as having returned to the commons, and can therefore be fully claimed by Ship #2.[41]

The rule in which the ownership of Ship #1 is preserved, subject to a salvage claim by Ship #2, seems fair enough. It allows the contributions and interests of both crews to be recognised. But consider how this rule might affect incentives. If Ship #1 has collected enough pelts to fill is hull, it need not return to port. Rather, it could continue the hunt, for any pelts it then collects on the pans remain its property (subject only to the payment of a salvage fee). To be blunt, there is no reason for Ship #1 to stop killing. Moreover, the sealers on Ship #2 may elect not to salvage those pelts.

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[37] The *locus classicus* is *Pierson v Post*, 3 Cai 175 (NY Sup Ct 1805).

[38] James E Krier, "Capture and Counteraction: Self Help by Environmental Zealots" (1996) 30:4 U Rich L Rev 1039 at 1052.

[39] *Doyle v Bartlett* (1872), 5 Nfld LR 445 at 454 (SC), *en banc*.

[40] *Clift v Kane* (1870), 5 Nfld LR 327 (SC), *en banc*.

[41] See further the analysis in Bruce Ziff, "The Law of Property in Animals, Newfoundland-Style", in Tucker et al, eds, *supra* note 26 at 9.

Rather, it may prefer to allow those pelts to be lost in favour of its own catch, for which it can receive one hundred cents on the dollar. The salvage rule is, therefore, potentially quite wasteful.

The rule of capture for wild animals has been applied by analogical extension to other fugacious substances, such as oil and gas deposits. A natural reservoir of these substances may be found to extend below any number of surface parcels. Extraction on Lot #1 can lead to a depletion of the minerals under the others. As long as the owner of Lot #1 does not commit trespass, say, by undertaking drilling operations on or under nearby lands, the entire reservoir can be lawfully drained from a well on Lot #1. That principle was affirmed in the Privy Council decision in *Borys v Canadian Pacific Railway*:

> If any substance is withdrawn from [its] property, thereby causing any fugacious matter to enter [its] land, the surrounding owners have no remedy …. *The only safeguard is to be the first to get to work,* in which case those who make the recovery become owners of the material which they withdraw from any well which is situated on their property or from which they have authority to draw.[42]

The moral of this case is that, as the quote reveals, the law actually encourages the rapid depletion of the oil and gas reserves, just as Krier has warned.

C. Conclusion

In this presentation I have tried to demonstrate that the common law principles governing property—and not just those pertaining to tort—have largely failed to advance the interests of environmental protection. Every book you pick up on environmental law, layered as it invariably is with statutory fixes of all kinds, reminds us of the inadequacies of the common law.

The main reasons for the law's failings are not difficult to discern. One involves structural or institutional issues. The same difficulties that impair the use of tort law (costs, issues of proof, standing, and so forth[43]) apply to civil actions brought to enforce property rights. Moreover, the common law is a blunt tool. The case-by-case development of the law can produce broad guiding principles, but will often be unable to provide a nuanced and calibrated conservation regime that is responsive to growing needs and emerging scientific discoveries. Of greater importance, while one can detect a conservationist strain immanent in certain common law doctrines (such as riparian rights), these principles are often in tension with other values that inform private property rights in liberal-democratic politics. The law promotes development

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[42] *Borys v Canadian Pacific Railway*, 1953 CarswellAlta 25 at para 6, [1953] 2 DLR 65 (PC), Porter LJ [emphasis added].

[43] See Part A, above.

and the pursuit of material well-being. As mentioned above,[44] while that end can be congruent with stewardship of the natural environment, that may not always be so.

In the last 30 years, a supposedly new way of thinking about legal frameworks for environmental protection has emerged. The label often used to describe this reform is “free market environmentalism” (FME).[45] Terry Anderson, a leading proponent of FME, has described its fundamental nature:

> … the first premise of FME is that “wealthier is healthier,” meaning that markets generate the wealth that gives us the wherewithal to solve environmental problems. Although many people mistakenly think that markets can only generate consumerism[,] … in reality it is markets that produce wealth and thus help the environment.
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> The second major premise of FME is that “incentives matter.” Positive incentives can turn the environment from a liability into an asset for a resource owner. If we own the water and land, we have the incentive to manage and conserve them properly.[46]

In 2015, Anderson reflected back on his earlier writing on the subject, offering that in the early 1990s, “property rights economics was still in its infancy, our application of property rights to environmental issues was only a bit beyond the gestation stage”.[47] I find this characterization of FME revealing, for it ignores, or at least downplays considerably, the historical antecedents discussed in this talk. At root, free market environmentalism is not new; it's as old as the right to private property itself. The underlying premise of FME draws us right back to the tragedy of the commons, and in fact FME has been promoted by reference to that parable.[48] The framing of free market environmentalism as a fresh approach exposes the problems that can surface by seeing the common law's contribution to the field of environmental law as primarily a matter of tort law. Property doctrines have a sad story to tell as well. For centuries, the main protective device has been private property. That must be seen as a critical reason why we now find ourselves in environmental peril.

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[44] See Part B(a), above.

[45] See Terry L Anderson & Donald R Leal, eds, *Free Market Environmentalism for the Next Generation* (New York: Palgrave Macmillan, 2015).

[46] Terry Anderson & Candace Jackson Mayhugh, “Free Market Environmentalism Explained”, *Hoover Digest*, 1998, vol 2, online: <www.hoover.org/research/free-market-environmentalism-explained>.

[47] Anderson & Leal, *supra* note 45 at xi.

[48] See e.g. PolicyEd, “Free Market Environmentalism by Terry Anderson: Perspectives on Policy” online (video): *YouTube* <www.youtu.be/ADowFfaeWoU >.