PROPERTY RIGHTS IN DEFENCE OF NATURE by Elizabeth Brubaker (Toronto: Earthscan, 1995)

I. INTRODUCTION

Although this book displays the visual trappings of a legal treatise like case analyses, plentiful footnotes, index of cases and case summaries, it is far from a conventional legal study. The book is primarily a government bashing diatribe which, through often mysterious ways, is meant to support the view that asserting and strengthening private property rights will save the environment. The book is somewhat entertaining, and perhaps even convincing for a person who is untrained in law or logic or for someone who already has completely bought into the book's underlying libertarian ideology. However, Elizabeth Brubaker's, *Property Rights in Defense of Nature*,[1] will be a trying book to read for any one with any familiarity with property law or for any one who believes that valid arguments should be given in support of conclusions. The book, from its case studies, through to its arguments, assertions and conclusions, contains an array of misstatements, exaggerations, missing information, misplaced emphases and sometimes, down right mistakes of law or argument. Because of these, the book does not convince. On the contrary, at least for this reader, the book casts suspicion on theses that protection and strengthening of property rights are the panacea for environmental ills.

II. THE GOLDEN AGE[2] OF PROPERTY RIGHTS

Chapter 1, "*Thou Shalt Not Trespass*," begins with the facts from *Friesen et al.* v. *Forest Protection Limited*,[3] a case in which the plaintiffs recovered judgment of just over $1300 in damages for the defendant's trespass of spraying pesticides on the plaintiff's property. From this stunning victory, Brubaker proceeds to extol the virtues of the tort of trespass in persuasive, sometimes almost sensationalistic ways. However, continuously she fails to give the whole picture, which if drawn, greatly diminishes the appeal of property rights. For example:

> In another case ... the [Alberta, 1988] Court of Appeal ruled that the cross-arms and wires of a transmission line belonging to an electric utility trespassed over the airspace of a neighbouring farm. The court noted that early common law cases had determined that signs, telegraph wires, eaves, or any other structures that hang over anothers' land should be forbidden as trespasses. That the owner was not using his land was irrelevant: "[A] landowner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land."[4]

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1 (Toronto: Earthscan, 1995).

2 No where in the three chapters of Part I does Brubaker set out the period which constitutes the "golden age." The cases she relies on span a period from about 1875 to the present.

3 (1978), 22 N.B.R. (2d) 146 (S.C.Q.B.).

4 *Supra* note 1 at 32, referring to *Didow et al.* v. *Alberta Power Limited*, [1988] 5 W.W.R. 606 at 616 (Alta. C.A.).

True, trespass to a degree extends to airspace. However, Brubaker fails to mention that notwithstanding anybody's property rights, if a utility wishes to locate electrical transmission lines and cross-arms over private land in Alberta and the land owner objects, Alberta legislation enables the utility to apply to the Surface Rights Board for a right of entry order. Notwithstanding a landowner's protestations, the Board may grant the order and set compensation.[5]

Or take this example:

> Trespass law has also been used to stem water pollution. (More frequently people have relied upon a branch of the common law called riparian law to protect lakes and rivers.) In one turn-of-the-century case, a New York court issued an injunction against a town's sewage disposal practices: in emptying sewers into a creek that flowed through a farmer's land, causing filth to accumulate on the creek's bed and along its banks, the town had trespassed against the farmer. This violation of the farmer's property rights could not be permitted, regardless of the public necessity of the sewage works or the great inconvenience that could result from shutting them down.[6]

Here Brubaker merrily uses U.S. common law without even hinting that jurisdictional differences might be relevant to the Canadian situation. For example, in Alberta and other Canadian provinces legislation provides that the Crown owns the bed and shores of water bodies.[7] Accordingly, no trespass action could lie in these provinces in circumstances comparable to those in the New York case. As well, Brubaker's remark, "More frequently people have relied upon a branch of the common law called riparian law to protect lakes and rivers,"[8] exemplifies a misstatement or misemphasis giving property rights illusory legal power. Nothing inherent to common law riparian rights give "people"[9] the right to "protect lakes and rivers."[10] Riparian rights are much more limited. At common law, riparian rights include the right of riparian owners or occupiers to the flow of water past their property appreciably undiminished in quantity and unimpaired in quality. If successfully asserting riparian rights has the by-product of protecting lakes or rivers, well, that's fine, but it would be a by-product and not the essence of the rights.

The chapters "*So as Not to Harm Another*," and "*Without Obstruction, Diversion or Corruption*," offer parallel expositions to chapter 1, but deal with nuisance and riparian

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5 In Alberta, before any transmission lines may be built, the utility must secure necessary easements or rights of way. If the utility cannot successfully negotiate these rights it may apply to the Surface Rights Board for a right of entry order. See *Surface Rights Act*, S.A. 1983, c. S-27, s. 15. In its discretion in accordance with the *Act*, the Board may grant the order and set compensation.

6 *Supra* note 1 at 32 referring to *Sammons* v. *City of Gloversville*, 34 Misc. Rep. 459, 70 N.Y. Supp. 284 (Sup. Ct. 1901), aff'd 67 App. Div. 628, 74 N.Y. Supp. 1145, 175 N.Y. 346, 67 N.E. 622 (1903).

7 See D. Percy, *Wetlands and the Law in the Prairie Provinces of Alberta* (Edmonton: Environmental Law Centre, 1993) at 23-31.

8 *Supra* note 1 at 32.

9 *Ibid.*

10 *Ibid.*

rights, respectively. Like chapter 1, these chapters contain an assortment of "off-statements" which further erode the credibility of the book.

For example, note this inexcusable exaggeration on the potency of nuisance:

> The simple rule that one may not harm his neighbour's property, or interfere with his enjoyment of it, has protected the environment from an infinite variety of insults for over seven hundred years.[11]

As more conventional legal studies make clear, the rule is not that simple. Private nuisance requires an *unreasonable* interference with use and enjoyment of property, which to a degree involves a *balancing* of conflicting rights and interests including the utility of the defendant's conduct; the interference with use and enjoyment of property must be *substantial*, the wrong must be continuing or have created a dangerous situation, and the tort does not apply to *abnormal* or *delicate* uses of property.[12]

Or, consider this inflammatory as well as erroneous statement regarding water law:

> [L]ike other common law doctrines, riparian law survives only where politicians or bureaucrats haven't extinguished it through statutes and regulations. Riparian rights remain strongest in Atlantic Canada and Ontario. In the Western provinces, where riparian law would have impeded mining and irrigation, statutes have governed water allocation since the late nineteenth century; even there, riparians may retain rights to clean water.[13]

Contrary to Brubaker's claim, it is not true that only politicians or bureaucrats can extinguish riparian rights. Western United States' courts have upheld customary rules establishing water rights on the basis of prior appropriation ("first come first served") which extinguished common law riparian rights.[14] Prior appropriation could have similarly replaced riparian rights in western Canada had not the federal government passed water rights legislation in the nineteenth century incorporating a first come first served doctrine.[15]

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11 *Ibid.* at 48.

12 See for example, E. Swanson & E. Hughes, *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990) at 27-30; and A. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988) at 500-09.

13 *Supra* note 1 at 55.

14 Mining, agriculture and other industries all required water to be diverted in the dry western states and accordingly the riparian doctrine was not suitable. Because of the unsuitability new water rights principles arose, first out of mining custom. Under mining camp rules the first prospector at a site could keep as much ground as he worked for as long as he worked it. This "first come first served" *prior appropriation* principle also applied to water required in mining operations. Courts subsequently enforced appropriative water rights over riparian rights for mining and other "beneficial uses" of water, such as for irrigated agriculture. See *e.g. Coffin et al.* v. *Left Hand Ditch Co.* 6 Colo. 443 (Col. Sup. Ct. 1882). Ultimately states passed laws to govern prior appropriation water rights. Currently a number of western states (California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington) adopted the "California doctrine" which allows both riparian and prior appropriation water rights. The other western states (except Hawaii) recognize only prior appropriation water rights. See G. Coggins & C. Wilkinson, *Federal Public Land and Resources Law* (New York: Foundation Press, 1987) at 358-60.

15 *The North-west Irrigation Act*, S.C. 1894, c. 30.

III. THE EROSION OF PROPERTY RIGHTS

Part II consists of a four chapter blast of governments or courts for affecting property rights. In the chapter entitled "*The Name of the Public Good*" Brubaker blasts the Ontario government for legislating an end to an injunction against a pulp mill, as demonstrated by the following statements:

> The courts tried to protect the river, the government, concerned as always about jobs, protected the pollution..."[16]

> The debate on the new legislation reeked of hypocrisy....[17]

> [The government's]... introducing legislation to crush ... property rights...[18]

> The politicians trampled once-sacred property rights...[19]

The chapter "*Growth at all Costs*" continues the blast, this time over the Ontario government's amendments to the *Public Health Act*[20] which, according to Brubaker, dissolved injunctions against two municipalities from discharging effluent into certain waters. "*The Defence of Statutory Authority*" chapter specifically blasts the federal government for passing the *Nuclear Liability Act*[21] which limits liability for nuclear damage caused by industrial accidents and also blasts the defence of statutory authority developed by courts. The fourteen page chapter then proceeds to blast environmental regulation as a poor substitute for common law nuisance with rhetoric such as:

> Under a common law liability regime, it is in an industry's own financial interests to avoid harming others. Otherwise, it may face injunctions or large damage awards.[22]

Brubaker makes no serious attempt to analyze the relative value of statutory derived fines and penalties, not to mention imprisonment, as deterrents to violation of environmental regulation. Worse, she does not address the inadequacies of the common law to lead to environmental protection.[23] Further, she makes no attempt to square the

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16 *Supra* note 1 at 72.

17 *Ibid.* at 74.

18 *Ibid.*

19 *Ibid.* at 75.

20 R.S.O. 1980, vol. 6 c. 409.

21 R.S.C. 1985, c. N-28.

22 *Supra* note 1 at 105.

23 For example: (1) in order to achieve standing for common law property remedies the plaintiff must own or occupy property; (2) as mentioned above, private nuisance requires the plaintiff to show *unreasonable* interference with use and enjoyment of property, which to a degree involves a *balancing* of conflicting rights and interests including the utility of the defendant's conduct; the interference with use and enjoyment of property must be *substantial*, the wrong must be continuing or have created a dangerous situation, and the tort does not apply to *abnormal* or *delicate* uses of property; (3) plaintiffs must demonstrate a causal link between emissions and damage which is often very difficult, if not impossible, because of mixture or dissipation of pollutants in receiving air or water or inexact science; (4) common law remedies provide no systematic mechanism for

last quoted assertion with her earlier one concerning certificates under the *Ontario Water Resources Act*[24] that:

> One would be hard pressed to find in such certificates water quality standards that are as stringent as those imposed under riparian law, which traditionally allowed *no* alteration of water quality.[25]

Perhaps for Brubaker the real reason why her illusory protected sacrosanct property rights world would enjoy pristine environmental quality is that there would be no industry in it at all to muss it up.

The chapter "*Blinded Justice*" concludes Part II with Brubaker's blast of courts for having "modified both the rules governing liability and the remedies available to those whose rights have been violated...."[26] Brubaker seems to think that common law property rights should be immune from modification or further articulation even from the courts whose role includes continuing to invent common law.

IV. COMMON LAW FAILINGS

In the chapter entitled "*The Courts* v. *The Common Man*," conveniently forgetting Part II's expedition into how bureaucrats, politicians, legislatures and courts have ruthlessly eroded, modified and crushed property rights, Brubaker continues to hail property rights' viability over regulation for dealing with environmental degradation. She even offers an argument for this view. Unfortunately it is both fallacious and misleading. Her argument involves the difficulty of proving causation of source of pollutants causing damage. She asserts:

> In those instances where proof remains impossible, victims [of pollution] using the common law may still be able to stop pollution. A civil case asserting one's common law rights demands a less rigorous standard of proof — a 51 per cent likelihood — than does a statutory prosecution, which requires proof beyond a reasonable doubt.[27]

As to fallaciousness, civil suits for interference with property rights do not aim to stop pollution, *per se*. They aim at stopping an alleged interference with a property right, or at obtaining damages from a defendant for an alleged interference with a property right or for the consequences of such interference. The difficulty in proving causation in civil cases concerns the often elusive causal relationship between emissions and the alleged effects, such as damage to property or sickness or disease. By contrast, in a typical prosecution for an environmental offence there is no need to prove such causal connections. A typical statutory environmental offence will involve, for example, emitting regulated substances without a required permit, or beyond the limit set in the

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supervising discharges; (5) private litigation is expensive, and where numerous defendants are involved, procedurally problematic; and (6) common law property right remedies do not adequately address non-human related environmental damage, such as to wildlife or biodiversity.

24 R.S.O. 1990, c. O-40.

25 *Supra* note 1 at 104.

26 *Ibid.* at 113.

27 *Ibid.* at 133.

permit or by regulation. In such an offense there just is no causal link to property damage or sickness or disease to prove. Brubaker's "argument" is a red herring and proves nothing.

As to misleadingness, the majority of statutory environmental offenses in Canada are "strict liability" offenses and not *mens rea* offenses requiring proof beyond a reasonable doubt as Brubaker apparently assumes. With strict liability offenses, after proving the act constituting the offence, for example, emitting a pollutant over an amount specified in a permit (which often can be proved through reference to monitoring data), the burden shifts to the defendant to prove on a balance of probabilities that he, she or it exercised due diligence, reasonable care or lack of negligence.[28]

Part III continues with the chapters, "*Governments Gutting Their Holdings*" and the "*Taxman's Axe*" which discuss legislative or policy incentives to deplete public resources, such as financial incentives to harvest forests or woodlots. Her solution to combat these policies and incentives? — transfer public resources to the private sector:

> Property rights, which can so effectively protect private resources, have been of no use. One can only protect that which one owns, and all too often it is the government — not the public — that owns Canada's natural resources. As long as they continue to own public lands and resources, governments will be free to destroy them.[29]

Even ignoring the obvious contradiction,[30] Brubaker is wrong again. The essence of government owning public lands and resources is that it is *not* free to destroy them. Governments are bound by statutes, regulations and policies prescribing and limiting what they can do with public lands and resources. Although a full blown "public trust" might be hard to establish in Canada, governments rightly see themselves as managing resources and environmental matters for their constituencies, both present and future.[31]

On the other hand, contrary to Brubaker's insinuation that private ownership leads to protection of nature and environment, classic private property rights principles would indicate otherwise. Private property rights advocates, relying on philosopher John Locke, assert a natural right to enjoy property. For Locke, unowned natural land is without any value. The essence of property rights is humans' mixing land with their labour, by breaking it, cultivating it, draining it, and controlling it in order to give value. For Locke, mixing labour with land *improves* it. Locke's theory of property

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28 See *e.g.* E. Hughes, *The Reasonable Care Defences* (1992) 2 J.E.L.P. at 216.

29 *Supra* note 1 at 146.

30 She claims resources must be owned to be protected; the government owns the resources, so it follows that the government can protect them.

31 For example the legislated purpose of Alberta's *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, s. 2, is to "support and promote the enhancement and wise use of the environment ... recognizing [among others] (a) the protection of the environment is essential to the integrity of ecosystems and health and to the well-being of society ... (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations."

founds landowners' claims that society or government should not tell landowners what to do with their land.[32] Leaving land in its natural state, not disturbing wildlife habitat, watershed, vegetation or biodiversity, on the face of it, are abrasive to classic private property rights principles. If *Property Rights in Defense of Nature* were to even begin to be convincing of the values of private property rights in defending nature it would have to address the apparent inconsistency of Lockean principles with nature protection. The book does not.

V. NATURE'S CASE FOR RESTORING STRONG PROPERTY RIGHTS

The first chapter, "*Alienable Rights*," is meant to make a case for why property rights should be protected in the Canadian Constitution, as they are in the United States' Constitution. By way of background, through the fifth and the fourteenth amendments (the "due process" clause) to the United States Constitution, the federal and state governments are prohibited from taking private property for public purposes without just compensation.[33] To make her case that property rights should be constitutionally protected in Canada, Brubaker states:

> Experience in the United States demonstrates that property rights need not impede government's ability to legislate environmental protection.[34]

She supports this claim through undated references to articles in the *Globe and Mail* and *Hamilton Spectator*. She goes onto claim that the U.S. "generally enjoys higher environmental standards than Canada"[35] but gives no specifics and makes no connection to constitutionally protected property rights. Brubaker simply asserts that:

> There, property rights have not interfered with the federal government's ability to make strong environmental laws — even those that infringe property rights.[36]

Brubaker cites no examples of such laws.

Again, Brubaker is wrong. She ignores the abundant evidence of a chilling effect on the U.S. federal and state governments generated by fear of compensable regulatory

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32 See E. Hargrove, "Anglo-American Land Use Attitudes" (1980) 2 Environemntal Ethics 2, 121 at 140-41.

33 The fifth amendment to the U.S. Constitution, which applies only to the federal government, provides that "private property shall not be taken for public use without just compensation." The fourteenth amendment bars both the federal government *and* states from depriving any person of life, liberty or property, without due process of the law. The U.S. Supreme Court has construed the Fourteenth amendment as containing a similar requirement of states as the Fifth amendment does of the federal government. Consequently, for the purposes of "takings" cases, U.S. courts do not distinguish between the federal and state governments.

34 *Supra* note 1 at 173.

35 *Ibid.*

36 *Ibid.*

takings.[37] In 1994, the U.S. Supreme Court decision in *Dolan* v. *The City of Tigard*[38] sharpened this effect's bite. The case imposed a new standard for determining the constitutional validity of land-use regulations and, for aspects of the development permit process, shifted the burden of proof from the landowner to the permitting agency.

On the chilling effect one legal commenter notes:

> The property rights movement initially celebrated its victory in the *Dolan* decision, but these folks, along with the rest of America, may well end up regretting it. When federal agencies become paralysed in the effectuation of national environmental policies; when local governments, many of whose debentures are already classified as "junk bonds," deny or delay responses to building permits because they do not have the financial resources to satisfy *Dolan's* evidentiary requirements; when people everywhere realize that federal, state, and local governments will go bankrupt if the *Dolan* majority continues its present trend in takings jurisprudence ... when taxes skyrocket to pay for all of these "takings"; when new housing prices escalate because of the delays engendered by *Dolan*; when all of this happens, Oliver Wendall Holmes' aphorism ... will be remembered with nostalgia, and property rights advocates, along with the rest of us, will yearn for the good old days.[39]

Although critically relevant, and possibly fatal to her point, Brubaker doesn't mention that in 1994 nearly 100 federal or state "takings" bills considered in the United States called for the government to make cash payment to landowners whose property value is decreased by regulation.[40]

Brubaker continues:

> The U.S. Supreme Court has never used property rights to strike down federal environmental protection statutes and regulations....[41]

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37 See *e.g.* J.P. Byrne, "Ten Arguments for the Abolition of the Takings Doctrine" (1995) 22 Ecology Law Journal 1 at 89; J.P. Byrne, "The Recent Conservative Departures in Regulatory Takings Doctrine Reflect an Illegitimate Attempt to Employ the Constitution to Roll Back Environmental Regulation" and M. Blumm, "The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit" and "The Takings Clause and the Future of Environmental and Land Use Regulation" both in *Colloquium on Dolan* v. *City of Tigard* (1995) 25 Environmental Law 1: 111 at 171 and 199; and many articles from the proceedings of the *Association of Environmental and Resource Economists 1995 Workshop* (Annapolis MD, 5-6 June 1995) on Government Regulation and Compensation: Implications for Environmental Quality and Natural Resource Use including L. Shabman & D. White, *Implementing Private Property Rights Legislation.*

38 114 S. Ct. 2309 (1994).

39 J.R. Kossow, *"Dolan* v. *City of Tigard*, Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater" (1995) 14 Stanford Law Review 2 at 2. Holmes' aphorism is "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change...": *Pennsylvania Coal Co.* v. *Mahon*, 200 U.S. 393, 413 (1922).

40 Shabmand & White, *supra* note 37 at 1.

41 *Supra* note 1 at 173.

and starting in her next paragraph, on the basis of s.1 of the Charter[42] she asserts:

> Property rights are even less likely to strait-jacket Canadian governments.[43]

Contrary to Brubaker's virtually unsupported assertions, over the last two centuries, U.S. courts have at times interpreted the constitutional "due process" clause protection provisions to limit, and at other times, not to limit governments' ability to enact social welfare legislation. The matter turns on whether courts interpret the "due process" constitutionally guaranteed to be *procedural* or *substantive*. If procedural due process only, then the Constitution prohibits governments from taking property from a person, except in accordance with the rules of procedural fairness.[44] However, if substantive, then the Constitution prohibits governments from *arbitrarily* or *unreasonably* depriving a person of property. A court may determine whether circumstances vindicate the challenged regulation as a reasonable exercise of governmental authority, or condemn it as arbitrary and discretionary. A court, thus, may pass judgment on government's social legislative policies, and if in its view such policies are unreasonable or arbitrary, it may strike down legislation reflecting them. Substantive due process interpretation dominated the period from the 1890's to the 1930's when it ended with the New Deal, with its extensive social welfare and economic regulation.[45] However, the doctrine has recently made its return with the *Dolan* decision.[46]

Owing to differences between the U.S. Constitiution and Bill of Rights and the Canadian *Constitution Act* and *Charter of Rights and Freedoms*, it is not easy as Brubaker assumes to say whether entrenchment of property rights in the Canadian Constitution would or would not lead to striking down of social welfare legislation. Elsewhere I have argued that Supreme Court interpretations of sections 7 and 1 indicate that entrenchment of property rights might well enable Canadian courts to review legislation affecting them in a manner similar to the U.S. substantive due process review.[47]

The second chapter in Part IV is entitled "*No Expropriation Without Compensation*," as if this is the absolute law in Canada. Brubaker states:

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42 Section 1 of the *Charter* guarantees the *Charter*'s rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

43 *Supra* note 1 at 173.

44 The rules of procedural fairness, depending upon the circumstances, might include a right to a hearing, an unbiased adjudication, a written record, to give evidence, to cross-examine witnesses, and so on.

45 In its heyday, substantive due process paralysed social welfare and employment legislative action by limiting governments' "police power" — the power to regulate to secure the public safety, morals, health or prosperity. *See* A. Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) XXIV C.J.P.S. 2 at 319.

46 See *e.g.* E. Sullivan, "Substantive Due Process Resurrected Through the Takings Clause" (Winter, 1995) 25 Environmental Law 1 at 155.

47 See A. Kwasniak, "Entrenchment of Property Rights: Lessons From the U.S.?" 6 News Brief 4 (Edmonton: Environmental Law Centre, 1991) at 3.

> [Canadian] Courts have maintained that unless explicitly stated therein, laws are presumed not to condone expropriation without compensation.[48]

Oh were the Canadian law on expropriation so simple! As a matter of fact, in contrast to the United States there is no absolute right in law to compensation for expropriation. As stated by the Supreme Court of Canada in *R.* v. *Tener*:

> Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage on the ground that his land is "injuriously affected," unless he can establish a statutory right.[49]

Yet, Brubaker goes onto assert:

> They [Canadian Courts] have also found that expropriation by regulation can occur and can require compensation.[50]

Brubaker bases this assertion on the *Tener* case. In reality, it is far from clear that *Tener* involved an expropriation by mere regulation, similar to U.S."regulatory takings." If *Tener* is a case of expropriation by mere regulation, then it uproots longstanding Canadian law that a plaintiff may claim compensation only in a case where the Crown actually takes possession of property or property is placed at the disposal of the government.[51] In that case one might think the *Tener* Court would expressly state it is doing so.[52]

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48 *Supra* note 1 at 192.

49 *R.* v. *Tener*, [1985] 1. S.C.R. 533, 17 D.L.R. (4th) 1, 3 W.W.R. 673 at 696 [hereinafter *Tener*].

50 *Supra* note 1 at 192.

51 *E.g. France Fenwick and Co.* v. *R.*, [1927] 1 K.B. 458; *La Ferme Filiber Ltee* v. *R.*, [1980] 1 F.C. 130, where the Federal Court referring to a policy resulted in a refusal to renew a fish license: "An expropriation implies dispossession of the expropriated party and appropriation by the expropriating party; it necessarily requires a transfer of property or rights from one party to the other. There is nothing of that kind here. The defendant has not acquired anything belonging to the plaintiff."

52 *Tener* involved a Crown mineral grant which expressly gave the holder both a mineral right and the right to access the minerals through surface disturbances. By virtue of subsequent park and wilderness preservation legislation, the government refused to issue to the holder, Tener, the necessary permit to further explore or develop the mineral claims. Tener claimed that the circumstances amounted to a compensable expropriation. The Supreme Court of Canada found a right to compensation for expropriation under the *Park Act* and so it could further investigate whether the circumstances amounted to an expropriation. The Court unanimously found an expropriation, but was divided on the nature of this expropriation. Estey J., for the majority, found that the Tener's right of access to the mineral claims constituted a separable property right from the mineral claims itself. The Crown, he found, confiscated this right of access when the Minister determined that no permit would be issued for further development or exploration. Wilson J. for the minority, found Tener's confiscated interest to be a *profit a prendre* which is also a property right. Accordingly, on the basis of all judicial decisions, the case reasonably may be interpreted as an expropriation because the Crown actually took a property right from the plaintiff for public purposes, and not because the Crown merely regulated a right.

Like others in the book, the final chapter, "*The Gospel According to St. John*," calls on "higher" authorities to support property rights rhetoric. She quotes from St. John[53] to the effect that a hired shephard will let the wolf get the sheep whereas an owner will not. From this, and some successful 1950s private fisheries nuisance cases, she champions private ownership of *inland fisheries*. Without wincing, Brubaker cites among her arguments to support her view, the government's failure at adequately managing *coastal* fisheries. Then, in the whizzing three and one half final pages of text, based on the assertion that increasing scarcity of resources calls for increasing property rights and "supported" only by an example where this allegedly occurred,[54] she advocates tradable property rights in the form of individual transferable quotas for Canada's fisheries, tradable quotas for "other resources," and tradable emission permits, all which must be "clearly assignable" or else they will "fail as tools for environmental protection and second-best measures must be relied on."[55]

The text[56] of *Property Rights in Defense of Nature*, ironically, ends with this quote from Arthur Young:

> Give a man the secure possession of a bleak rock, and he will turn it into a garden; give him a nine years lease of a garden and he will convert it into a desert ... The magic of property turns sand into gold.[57]

The irony, of course, is that neither turning a natural rock landscape into a garden nor, for that matter, a natural sand landscape into gold, is in any sense a *defense* of *nature*.

VI. FINAL COMMENTS

My comments on *Property Rights in Defense of Nature* should not be taken as a condemnation of asserting property rights to protect nature. Elsewhere, I argue vigorously for legislative reform to enable private landowners to, in perpetuity, protect privately owned natural areas.[58] As well, in appropriate cases, property based torts of nuisance, trespass, riparian rights and the rule in *Rylands* v. *Fletcher*[59] can be very useful tools to achieve environmental related relief. I would also suggest that asserting

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53 The Gospel According to St. John, *The Holy Bible*, King James Version, c. 10, verses 11-13.

54 Brubaker claims that as furs became scarce and more valuable, aboriginal groups in Quebec and Labrador developed property rights in order to prevent others from hunting: *supra* note 1 at 211.

55 *Ibid.* at 214.

56 Case studies appendices follow the text.

57 *Supra* note 1 at 214.

58 See A. Kwasniak, ed. and contributor, "Private Conservancy: The Path to Law Reform — Conference Proceedings" (Edmonton: Environmental Law Centre, 1994); *Private Conservancy Through Law Reform* (1994) 31 Environment Network News 14 at 17, reprinted in (February/March 1994) Game Warden Magazine and *Facilitating Conservation: Private Conservancy Law Reform* (1993) 31 Alta L. Rev. 4 at 607.

59 (1866), L.R. 1 Ex. 265, aff'd (1868), L.R. 3 H.L. 330, 37 L.R. Ex. 161. 61. To succeed under this rule the plaintiff must show: (1) the defendant, in a place owned or occupied by the defendant, kept or accumulated a substance for his or her own purposes likely to cause damage on escape; (2) escape of the substance; and (3) damage or loss as a result of the escape.

aboriginal rights arising either out of or outside of treaties shows promise for obtaining relief for certain interferences with environmental quality.[60]

Nor should my comments be taken as an endorsement of the job that governments do in protecting nature and environmental quality. As a lawyer with the Environmental Law Centre, a substantial part of my legal career involves pointed criticism of governments' legislation, policy or enforcement as well as involving making proposals or recommendations on how government might achieve better environmental and natural resource protection.

I hope my comments will be taken only as intended: to criticize one author's work, lest it be taken to be a genuine, defensible, legal study on how property may be asserted to defend nature.

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[60] See M. Blumm, "Native Fishing Rights and Environmental Protection in North America and New Zealand" (1989) 8 Wisconson International Law Review 1.