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Property as the Right to Use

By Kathleen Ganley

Cases Considered:

Stout & Co. LLP v. Chez Outdoor Ltd. , 2009 ABQB 444

The conception of property that a person has underlies the way in which that person thinks about property. Attempts to define the concept of property can be seen as a way to explain legal decision-making in property law. At the same time, the way in which we think about property can impact on such decisions. In this post, I will examine the decision of the Alberta Court of Queen's Bench in *Stout & Co. LLP v. Chez Outdoor Ltd*. ("*Stout*"). I will consider whether the court is applying a definition of property that is similar to the view of Larissa Katz in her article, "Exclusion and Exclusivity in Property Law" (2008) 58 University of Toronto Law Journal 275. Katz views ownership as a coherent concept that focuses on the right to use and manage the property. I will begin with a brief overview of Katz's theory, and then set out some important facts and issues in the *Stout* case. I will then discuss what I consider to be the main reasons for the decision in the case in the context of Katz's article. I will save discussion of the implications of some things being property only in the context of specific legislation for the end.

In "Exclusion and Exclusivity in Property Law," Larissa Katz argues (at 275) that the central tenet of the concept of ownership is the owner's position as the exclusive agenda setter for the property. Katz disagrees with the view that ownership is a bundle of rights. She begins by setting out what she calls the boundary approach and states (at 277) that it "…unlike the bundle of rights approach, properly recognizes that there is a concept of ownership at work in law…" Katz then criticizes the boundary approach for confusing an exclusive right with the right to exclude. The important feature of ownership, for her, is its purpose; the central right is not the right to exclude, but the right to use. She uses (at 290-91) the example of the law of adverse possession to illustrate her point that the central tenet of ownership is the right to be the exclusive agenda setter. In order to become the owner of a property, a squatter must not only be in possession for a certain length of time, but his use of the property must be inconsistent with the original owner's plans. This example is meant to demonstrate that it is only when the original owner's right to set the agenda for the property is challenged that she is no longer considered to be the owner. Katz compares ownership to sovereignty (at 294), but she is quick to point out that this is not because ownership gives someone power over other people; it simply gives the owner the right to be the exclusive agenda setter for the property. For Katz, an owner is a person who has the right to determine how a property will be used.

In *Stout,* the Alberta Court of Queen's Bench considers whether entitlement and allocations under the *Wildlife Act,* R.S.A. 2000, c. W-10 are property under the *Civil Enforcement Act,* R.S.A. 2000, c. C-15 ("*CEA"*). The plaintiff had obtained a small claims judgment against the defendant and argued that the defendant's entitlements under the *Wildlife Act* were exigible assets under the *CEA*. The issue turned on whether the entitlements were property within the meaning of the *CEA.*

The defendant had a class T outfitter guide permit and several allocations. The class T permit allowed the defendants to contract with non-resident hunters to provide guide services to hunt certain game and to apply on behalf of their clients for a license to hunt under s. 59 of the *Wildlife Act*. In order to obtain an allocated license for their clients under the *Wildlife Act,* the outfitter guide must also hold allocations and the defendant held several such allocations. Because the class T permit was non-transferable, the plaintiff dropped the claim that the permit was exigible and the court dealt only with the allocations.

The plaintiff argued that the allocations were a bundle of rights and represented property within the meaning of the *CEA.* The court held that the allocations and entitlements of the defendant under the *Wildlife Act* were property within the meaning of the *CEA.* In coming to the decision Justice Moreau carefully considered the judgment of the Supreme Court of Canada in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 ("*Saulnier*"). In *Saulnier,* the Supreme Court considered whether a commercial fishing license was property in the context of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA"*) or in the context of the *Personal Property Security Act,* S.N.S. 1995-6, c. 13 ("*PPSA"*).

The main reason for the decision in *Stout* that the allocations are property within the meaning of the *CEA* is that they are similar to a *profit à prendre*. In *Saulnier,* the Supreme Court found that the fishing license under consideration in that case was property within the meaning of the legislation under consideration, in part because it is similar to a *profit à prendre*. A *profit à prendre* is a property interest recognized at common law. Binnie J. describes a *profit à prendre* as a property entitlement that allows the holder to enter onto another's land and extract something from that land, as in, for instance, apples growing on the trees on the land. Once the items are extracted, the owner of the *profit à prendre* gains a proprietary interest in them. In the case of the fishing license, the fisher who holds the license is permitted to enter into prescribed waters and harvest the fish, which then become his property. In *Stout,* Justice Moreau extends Binnie J.'s analysis to the allocations under the *Wildlife Act.*

Recall that Katz's view is that the owner of property is the ultimate agenda setter for the property. In the case of a *profit à prendre,* the owner of that interest does have a right to set an agenda in a certain way. She may decide when to exploit the resource and harvest the property that will become hers. In the apple tree example, the holder of the *profit à prendre* may enter the land and take as many apples as she wishes. Even though there are two owners involved in the apple tree example -- the owner of the property the apple trees are on and the owner of the *profit à prendre* -- the fact that the holder of a *profit à prendre* can enter onto the land does not pose a problem for Katz's theory. Katz argues that ownership is an exclusive right, but that exclusivity is merely an aspect of the owner's position as the agenda-setter for the resource. The owner of the property the apple trees are on set her agenda when she granted the *profit à prendre*.

The agenda-setting problem is even more complicated in the fishing license example, where multiple people have been granted fishing licenses for the same waters. All these people will be trying to harvest the fish, which exist in limited quantities, so they could easily interfere with each other's ability to set the agenda for the resource. No one would be the exclusive agenda setter. One possible way to resolve this problem is to say that the licensees hold one *profit à prendre* communally. So, they collectively have the right to set the agenda for the resource, much like any other form of communal property. How they deal with their individual desires in the context of this group ownership is a problem they must work out amongst themselves. More likely, however, in the context of a licensing scheme, there are rules that govern how many fish each licensee can take. This may solve the problem of the licensees' agendas conflicting. On Katz's view, there is no problem with state regulation of the use of property, because she considers (at 295) owners to be supreme only *vis-à-vis* other private individuals, not with respect to the state, which may regulate the use of resources.

In *Stout,* Justice Moreau holds that, like the fishing license in *Saulnier*, the allocations are property. The analogy has to be extended because the outfitter-guides do not themselves get a property interest in the animals killed during the hunt; the non-resident hunters they guide do. Justice Moreau argues (at para. 46) that, because the outfitter-guide's allocations are rationally connected, through the scheme of the *Wildlife Act*, to the product of the hunt – the product in which the non-resident hunters gain a proprietary interest -- they are akin to a *profit à prendre*. In this case, the property captured is another step removed from the person argued to have the property interest. The allocations (in combination with the class T permit) give the defendant the right to contract with non-resident hunters and apply for hunting licenses on their behalf. The hunters then pay the defendant to guide them. Essentially they buy the right to enter onto the land and harvest what game they can kill from the outfitter-guides. While the defendants are instrumental in the hunters acquiring the property right, it seems more like they are merely helping the hunters gain access to something like a *profit à prendre* for a fee.

A related argument is that the outfitter-guides have a beneficial interest in the allocations that constitute property. The court of appeal in *Saulnier* also held (at para. 15) that the fishing license was property on the grounds that the license holder has a beneficial interest in the license. That is, the license holder may not hold the resources, but they do have access to the benefit of the resources (the fish and the income from the fish). In both *Saulnier* and *Stout* the courts refer to the defendant's beneficial interest. It is not clear that this is a separate argument from the previous one; (at para. 21) Justice Moreau sees Justice Binnie as saying that the beneficial interest is part of the *profit à prendre*. It is possible that what is meant by beneficial interest is simply the right to acquire property in the fish. But, the term beneficial interest seems to imply a split between the right to the benefit from the property and the title or right to control the property. So, it is possible that the underlying idea is something like the separation between equitable and legal title.

Katz's theory implies that the owner must be the ultimate agenda setter for the property. But she also points out that the owner need not be the only decision maker, so long as she is the supreme decision maker. The problem with the idea that beneficial and legal title can be split, for Katz, is that it becomes unclear who the owner or supreme decision maker is. The person with legal title

could well be setting the agenda, but would have to do so in such a way that it is in the best interest of the person with equitable title. The equitable owner is not one setting the agenda, but the legal owner is not free to set whatever agenda he wants; no one seems the supreme decision maker. If the idea of beneficial interests is being used in this way, Justice Moreau's reasoning implies there should be no problem for Katz's theory.

Another argument considered in the *Stout* decision is the commercial realities argument. The trial judge in *Saulnier* had held that the fishing license was property within the meaning of both statutes applicable in that case because the license was marketable and valuable and to ignore this commercial reality would deny creditors access to something of considerable value. Justice Binnie, writing for the Supreme Court, held (at para. 41) that there is no necessary connection between marketability and the status of something as property, but that commercial realities provide a good context in which to interpret the legislation at issue. Justice Moreau also considers the marketability of the allocations in her decision (at para. 51).

On Katz's view the central concept in ownership is use; *viz.* the ability to set the agenda for the property. But use can mean a series of things. One use of a property might be to inhabit it, another use might be to let someone else inhabit it in exchange for value or to sell it to someone else for value. Katz's use view does not imply that the owner must enjoy the property herself, only that she must be able to "set the agenda" for the property. The "commercial realities approach" seems to be using a concept of property in which one specific use is central: the ability to exchange the property for money. It can be argued that in this case the owner (the defendant) is not being allowed to set the agenda for the property; he is being forced to sell it to pay his debts. However, Katz does not imply (at 295) that the owner's agenda setting capacity is without limits: "Owners are supreme *vis-à-vis* other private individuals, but not *qua* owners." The commercial realities approach could also be seen as being at odds with Katz's view because it emphasizes fungibility and exchange value as central, not use specifically.

In *Stout* the court had to decide whether the allocations are property within the meaning of the *CEA*. Similarly, in *Saulnier* the court was considering whether the fishing license was property within the meaning of the *BIA* and the *PPSA*. The idea that the definition of property could vary with the circumstances seems at odds with Katz's view. Katz's view holds as central the fact that there is one coherent concept of ownership, and not a messy bunch of property rights. If property is relative to legislative context, then there may be may not be one coherent concept. In that case property looks more like a bundle of rights. One could argue that there still is a central concept of ownership underlying these considerations, and that we are simply expanding it to accommodate the legislature. On this latter view, many of the problems of applying Katz's conception to the *Stout* case disappear since this problematic example is only property in the context of the act. However, the purpose of the legislation in these cases seems to be altering the relationships between creditors and debtors (persons) so the debtors cannot run out on their creditors. Explaining how legislation that affects relationships between people could change the concept of ownership is much easier on the bundle of rights approach.