

A Web from a Bundle: A Reconstitution of Stout & Company LLP. v. Chez Outdoors Ltd.

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Cases Considered:

[Stout & Company LLP. v. Chez Outdoors Ltd.](#), 2009 ABQB 444

“When we try to pick out anything by itself, we find it hitched to everything else in the universe”: John Muir, *My First Summer in the Sierra* (1911)

John Muir’s famous quote has encapsulated North American conservation thought for nearly 100 years. As environmental science, industry and protected areas movements advanced through the previous century, it became increasingly apparent that one could not separate the constituents of the environment in an attempt to understand or protect them. A holistic view was necessary to counter the destructive effects of increasing human populations and industrialization in Muir’s day. Today we have even more compelling evidence of the profound interconnectedness of the natural world and human systems and the need to view them inclusively.

This post considers and applies the web of interests metaphor as articulated by C.A. Arnold in “The Reconstitution of Property: Property as a Web of Interests” (2002) 26 Harv. Envtl. L. Rev. 281 to *Stout & Company LLP v. Chez Outdoors Ltd.*, 2009 ABQB 444 (*Stout*). More specifically it is an attempt to ground Arnold’s web of interests metaphor in a concrete example pertaining to a legal question associated with conservation-based legislation, in this case, the [Wildlife Act](#), R.S.A. 2000, c. W-10, which regulates the allocation of hunting licenses for the purpose, arguably, of conserving a natural and public resource. This post explores problems with the “bundle of rights” approach to property, as set out in Arnold’s paper, examines how the *Stout* decision highlights a traditional “bundle of rights” approach and finally, applies the “web of interests” approach to the case.

A Web of Interests

Arnold argues that the metaphor describing property rights as a “bundle of rights” limits the recognition of a relationship between things and people and further, that it “is inconsistent with the fundamental tenets of an environmental ethic, which emphasize both context-specific interconnectedness and the value of the object itself”(at page 283). He goes on to state that there has been “no attempt to formulate a broad-based metaphor of property based on the concepts of interconnection, thingness (object-regard), and the uniqueness of the objects of property” (at page 283). He uses what he refers to as “two essential principles of environmentalism...from Aldo Leopold’s land ethic: interconnectedness of people and their physical environment and the importance of the unique characteristic of each object to begin his critical analysis of the bundle of rights metaphor as it relates to environmental ethics” (at page 281). To Arnold, the bundle of

rights metaphor is based on legal relations between people while ignoring the uniqueness and “thingness” of the object in question.

In his critique, Arnold identifies both theoretical and empirical problems with the metaphor. What follows is a summary of the theoretical problems he identifies in order to give the reader a better idea of what Arnold takes issue with.

- First is the contention that the metaphor suffers from definitional incoherency. It struggles to provide a standard set of rights that can reliably distinguish property rights from other rights, sets up a “false dichotomy between legal relations and things” thus ignoring the “interplay between the human relationships involved and the object of those relationships”: (at page 292). The inherent tension between its “malleability and adaptability, on one hand, and its functionality, on the other hand” (at page 293) may render it non-functional in practice.
- The second problem is that of “marginal definition” (at page 294) - essentially, the idea that the categorization of property often occurs at the margins rather than at the centre and that this “reveals the lack of a common core or ideal” (at page 295) in the metaphor.
- Thirdly, there is inadequate contextualization - “the very essence of the bundle of rights is to reject any significant attention to the characteristics of the object...of property or to popular understandings of property as thing-ownership” (at page 296) — and therefore the bundle of rights approach does not adequately consider the context of the thing. Arnold suggests (at page 296) fifteen factors that “shape both human relationships with respect to objects and the content and scope of property arrangements.” Absent from the bundle of rights concept is a popular understanding of property of “thing-ownership.”
- The fourth problem is that of “estrangement-alienation” (at page 297) promoted by the rejection of the importance of things and the person-thing relationship in the bundle of rights conceptualization of property. People experience alienation in many ways generally, but in this context it is the “person-thing alienation” that separates a person from their interests, be it from themselves, their work, other people or nature that is of interest. Environmentally, the important aspect is alienation from nature. The concern is that using a bundle of rights approach to define property related to nature and its reliance on legal relations destroys the relationship between the person and thing, resulting in diminished appreciation of that thing. This can lead people to “treat the natural world as a dominatable means to anthropocentric ends, not as a meaningful end in itself” (at page 300). It follows that problems may manifest from an environmental perspective because the bundle of rights analysis recognizes the outfitter-guide and client-hunter relationship to society while ignoring their relationship to the animal that is eventually hunted. The permitting process alienates the hunter from nature — from the animal being hunted — and from the relationship between the animal and the rest of nature, or the ecosystem.
 - A lucid example of the common law commodifying wildlife in Stout is presented when Madam Justice Moreau uses the three-part test from *Re Celtic Extraction Ltd.*, [2001] 1 Ch. 475 (C.A.), adopted in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 (*Saulnier*), to determine whether a license is property: the “salient features” (at para. 51) are a statutory framework, transferability and the question of whether the license has value. Justice Moreau finds all three of these criteria are met within the scheme of the *Civil Enforcement Act*, R.S.A. 2000, c. C-15 (*CEA*). What is lacking in this determination, according to a web of interests approach, is a consideration of relationships outside legal relations.
- The final problem, rights orientation, essentially holds that by defining property as rights against other people, a common understanding of a “set of shared commitments with

Bundle of Rights in *Stout*

In *Stout*, Madame Justice Moreau relies on perspectives of property from preceding decisions. Although the stated issue of the case is “whether certain allocations, permits, and entitlements...are exigible assets...” (at para. 1), the reasons for decision, rather than being strictly confined to this issue, canvass the much wider issue of the definition of property in respect to licenses and allocations meant to manage fish and wildlife utilization.

A discussion of property that focuses on identification of legal relations indicates an application of the “bundle of rights” metaphor, according to Arnold (at page 285). As summarized by Justice Moreau, the plaintiff, arguing that the outfitter-guide permit is property, identified these attributes (at paras. 30 and 32): transferability, value associated with the holding of an allocation, entitlement to a fee and a beneficial interest in the earnings derived. These are not only legal relations but also, one might argue, commodified attributes for which a market may be created, another of Arnold’s defining features of the bundle of rights approach (at page 289). Attributes ascribed by the plaintiff to the interests held by the defendant in the outfitter-guide permit may be identified as legal relations between people and reflect rights to possess and use, to income, capital, security, prohibition of harmful use and liability to execution — rights identified by A.M. Honoré in his classic essay on “Ownership,” in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (1961) 107, as defining property.

The Crown’s position was that the defendant “does not obtain a propriety interest akin to the *profit à prendre* in the animal harvested from the hunt” (at para. 33), essentially stating that the outfitter-guide permit is simply a license that allows for the outfitter-guide to engage in an activity that they would not otherwise be legally permitted to engage in. In order to be elevated to the status of property in the common law, there must be, in the words of the Crown “something more than a mere permission to do something which is otherwise illegal” (at para. 46). Justice Moreau found that there is. The “bundle of rights” approach appears to color this argument by minimizing or down-playing the rights held by the person to whom a Class T outfitter-guide permit is issued. It seems to suggest that, until adequate rights flow to the holder of the permit, it will not be deemed property and remains a license.

The decision of Supreme Court of Canada Justice Ian Binnie in *Saulnier*, when he agrees with the “evolution” towards a “broader concept of intangible property if the purposes of that legislation are to be achieved” (as quoted in *Stout* at para. 40) and his focus on regulatory purpose in defining property, also appears to be an application of the bundle of rights approach. The focus is on legal relations. Justice Binnie is also effectively demonstrating Arnold’s points about the “malleable and adaptable” nature of property and the ability for the law to recognize new objects of property that “can change with changing social needs and values,” arguments Arnold identifies with the conceptualization of property from the bundle of rights approach. Both Justice Binnie and Justice Moreau put significant weight on the purpose of legislation in their determinations of the matter of particular licenses being property.

This question of “what is property?” arises from the lack of clarity in the legislation as to when or how a “mere license” transforms into a property interest, which is essentially the question Justice Binnie is answering in *Saulnier*. He considered both the regulatory and commercial reality approaches used in the case appealed from and pointed out the limits of both before determining that “the fishing license is analogous to rights considered at common-law to be proprietary in nature and that the fish harvest falls within the s. 2 *BIA* definition of property that includes a “profit, present or future, vested or contingent, in, arising out of or incident to property”” (as quoted in *Stout* at para. 43). The bundle of rights approach can be distilled from Justice Binnie’s decision because he appears to be stating that the rights flowing to the holder of the license — or the legal relations created — are determinative of property and become the “something more” that is deemed necessary for elevation to this characterization. Although Justice Moreau analyses both the “commercial reality” and “regulatory” approaches discussed in *Saulnier*, her findings utilize bundle of rights language: “entitle it,” “permit them,” “acquire a property interest,” and “fruits of the hunt” (all at para. 45) and “entitlement acquired” and “harvest the product” (at para. 46). These are suggestive of legal relations and the language reflects Honoré-Hohfeldian rights and duties.

Thus, although the bundle of rights approach is specifically mentioned only in reference to the position of the plaintiff in paragraph 31 of the *Stout* decision, it permeates the decision in this case. That the bundle of rights metaphor for property would be so prevalent in a recent “what is property” decision should not be surprising as this theory is long standing, digestible and easily applied.

Applying a Web of Interests Approach

With an understanding of the problems identified in a bundle of rights approach and its application in *Stout*, I now consider the manifestation of these problems in *Stout* and formulate a response “giving attention to the objects of property, their nature and their relationships to interest-holders,” commonalities identified by Arnold (at page 317) in concepts of property that do not place legal relations as the central tenet of the concept. Two fundamentals of the web of interests, uniqueness and thingness, will be applied to the object in this case, with the thing being the Class T outfitter-guide permit, a statutory construction under section 59(1) of the *Wildlife Regulation*.

Uniqueness

Arnold gives examples of uniqueness being considered in cases respecting land, summarizing the considerations as “an analysis of the claimant’s entire relationship with the particular land under regulation and the impact...on the entire relationship, regardless of the specific rights...in the bundle” (at page 313).

Had Justice Moreau analyzed the entire relationship between the outfitter-guide and the permit, she may have uncovered the uniqueness of the allocations: it was issued to a particular person, having the particular attributes mandated by regulation with a result that this particular person is able to enter into contracts (relationships) with other individuals. Pursuant to section 52 of the *Wildlife Act*, a person must be issued a big game guide’s designation to be authorized to participate in activities associated with guiding hunters in Alberta. In this statutory context, the permit is “unique” because it fits the definition from the [Oxford English Dictionary](#): “of which there is only one; one and no other; single, sole, solitary.”

Thingness

Inadequate contextualization - what Arnold calls the failure to consider “factors that shape both

human relationships with respect to objects and the content and scope of property arrangements” — arises from lack of attention to the nature of the thing (at page 296). Arnold lists 15 different factors:

1. whether the object can be occupied (e.g., land), extracted or withdrawn (e.g., natural resources), held (e.g., tangible personal property), or none of the above (e.g., intangibles);
2. whether the object is natural or human-made;
3. whether the object is renewable or non-renewable;
4. the destructibility or durability of the object;
5. the scarcity of the object;
6. the volume or size of the object;
7. whether the object has a standard form, expression, or shape;
8. the mobility of the object;
9. accessibility to the object;
10. the relationships and proximity of the object to other objects in which other persons hold property interests (i.e., shared “borders” and nearby “neighbors”);
11. the duplicability of the object;
12. the mutability of the object and its place on the continuum between static and dynamic;
13. the personal and cultural meanings of the particular object;
14. the object’s contribution to shaping the interest holders’ identities; and
15. the object’s natural features, if any, and importance to the natural environment.

In the case of the permit, Justice Moreau pays great attention to the context of the CEA in her decision, but not to the nature of the permit itself, although there is considerable regard for the intangibility of licenses and permits generally. The portion of the *Saulnier* decision in which Justice Binnie discusses expanding the definition of property to accommodate intangibles such as the license that was the subject matter of the case is referred to by Justice Moreau on multiple accounts (at paras. 13, 14, 15, 17, 20, 25, 29, 40, 41).

Three of the contextualization factors suggested by Arnold are of particular relevance to this discussion: (13) personal and cultural meanings of the particular object, (14) the object’s contribution to shaping the interest holders’ identity and (15) the object’s importance to the natural environment.

A consideration of the personal and cultural meanings of an outfitter-guide permit would take into account the holder’s relationship to the profession, to the lifestyle, to their clients and their relationship to the land on which they hunt. Client relationships and the intimate knowledge of the land contribute to the personal meaning of the permit. It is submitted that a successful outfitter-guide is not created through the transfer of permits in a civil enforcement ruling but through participating in the culture and the practice of the profession. In this way, although a market may exist or transferability be permitted, it seems inappropriate for a court to order such a transfer.

It may be mere speculation, but I would think that the typical outfitter-guide is employed in this trade for reasons beyond necessity. The profession is one that is lifestyle-oriented, highly seasonal and dependant on nature. Applying for and receiving a permit to allow a person to enter into a relationship with another person goes beyond the legal relations (i.e., contracts) that are formed. It allows the outfitter-guide to participate in their profession and to exercise their freedom in choosing their livelihood, typically a fundamental aspect of personal identity.

The permit's importance to the natural environment is that it allows the formation of relationships between humans and nature that Arnold argues the bundle of rights alienates us from. Connections between the outfitter, the client and the animal hunted are facilitated through the issuance of the permit which may serve to create a stewardship ethic. Focusing on the transferability, statutory framework and value of the permit as Justice Moreau does (at paras. 50 and 51) commodifies the intrinsic value of the experience to the outfitter-guide.

Conclusion

Stout applies the bundle of rights conceptualization to the question of “what is property?”. It demonstrates the problems of inadequate contextualization and over-emphasis on legal relations to the detriment of the relationships between people, the object and nature. It does a disservice to conservation by commodifying something that a web of interests approach, while perhaps conceiving of the outfitter-guide permit in the end as property, would recognize as personal, unique and non-transferable. That is, the permit stands in for the interconnected relationships between outfitter-guide, animal, land and in the context of conservation-focused regulation should not be excised in a civil proceeding. Finding the permit to be exigible fosters the commodification and marketability of it to the detriment of the relationships associated.