

# Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning

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Résumé de l'article

Ce texte examine le réseau complexe des relations légales, sociales et écologiques introduites par les disputes contemporaines concernant l'utilisation des terres. Plus particulièrement, il prend en considération le rôle des individus qui ne sont pas propriétaires dans le processus décisionnel relatif à l'utilisation des terres privées. Il examine les conflits récents se rapportant à l'emplacement de carrières d'agrégats dans le sud-ouest de l'Ontario, en associant les perspectives critiques sur la théorie de la propriété avec les approches relationnelles aux droits. Trois décisions de la Commission des affaires municipales de l'Ontario et de la Commission mixte sont analysées pour démontrer comment les conflits à propos des carrières d'agrégat présentent des occasions d'avancement stratégique des intérêts de la non-propriété du territoire. L'approche relationnelle en quatre étapes de Jennifer Nedelsky pour la résolution des conflits, ainsi que la théorie de la relation réciproque personne-lieu de Nicole Graham sont appliquées aux cas à l'étude pour montrer comment un changement par rapport au modèle de la propriété peut mener à un meilleur résultat écologique et social dans la planification de l'utilisation des terres.

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# Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning

ESTAIR VAN WAGNER\*

## ABSTRACT

*This paper examines the complex web of legal, social and ecological relationships engaged by contemporary land use disputes. In particular, it considers the role of non-owners in decision-making processes about the use of private land. Combining critical perspectives on property theory with relational approaches to rights, it examines recent conflicts around the siting of aggregate quarries in Southwestern Ontario. Three decisions of the Ontario Municipal Board and the Joint Board are analyzed to demonstrate how aggregate disputes present opportunities for the strategic advancement of non-ownership interests in land.*

## RÉSUMÉ

*Ce texte examine le réseau complexe des relations légales, sociales et écologiques introduites par les disputes contemporaines concernant l'utilisation des terres. Plus particulièrement, il prend en considération le rôle des individus qui ne sont pas propriétaires dans le processus décisionnel relatif à l'utilisation des terres privées. Il examine les conflits récents se rapportant à l'emplacement de carrières d'agrégats dans le sud-ouest de l'Ontario, en associant les perspectives critiques sur la théorie de la propriété avec les approches relationnelles aux droits. Trois décisions de la Commission des affaires municipales de l'Ontario et de la Commission mixte sont*

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*Jennifer Nedelsky's four-step relational approach to dispute resolution and Nicole Graham's theory of reciprocal person-place relations are applied to the cases to show how a shift away from the ownership model of property can lead to better social and ecological outcomes in land use planning.*

*analysées pour démontrer comment les conflits à propos des carrières d'agrégat présentent des occasions d'avancement stratégique des intérêts de la non-propriété du territoire. L'approche relationnelle en quatre étapes de Jennifer Nedelsky pour la résolution des conflits, ainsi que la théorie de la relation réciproque personne-lieu de Nicole Graham sont appliquées aux cas à l'étude pour montrer comment un changement par rapport au modèle de la propriété peut mener à un meilleur résultat écologique et social dans la planification de l'utilisation des terres.*

**Key-words:** *Property theory, land use planning, relational theory, environmental law.*

**Mots-clés :** *Théorie de la propriété, planification de l'utilisation des terres, théorie relationnelle, droit de l'environnement.*

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## INTRODUCTION

Conflicts about how land can and should be used engage a complex web of relationships. These include relationships between people, but also relationships between people and places. Both these types of relationships are structured by formal law and by cultural constructions of property, rights, and the non-human environment. In particular, the theory and practice of “land use law,”<sup>1</sup> is informed by specific and “locatable” legal and cultural narratives about what property is and what it does.<sup>2</sup> Anglo-American property law and the land use planning regimes established in Canada, attempt to contain people-place relationships within the framework of private property ownership. While this ownership model of property is often taken for granted in decision-making processes, struggles for environmental rights in land use conflicts require us to “remember property”<sup>3</sup> and to critically examine the ways in which it shapes our relationships with the non-human environment.

1. I adopt the term “land use law” to describe an intersection of regulatory regimes governing how land can be owned, developed, used and protected in Ontario, including, land use planning law, environmental law, water law, mining law, energy law and the common law of property.

2. Libby Porter, *Unlearning the Colonial Cultures of Planning* (Burlington, VT: Ashgate, 2010) at 44.

3. Nicholas Blomley, “Remember Property” (2005) 29 *Prog Hum Geogr* 125.

According to American property theorist Carol Rose, private property regimes hold “together only on the basis of common beliefs and understandings.”<sup>4</sup> These narratives frame the way human relationships to the non-human environment are regulated through formal land use planning processes. In the case of Ontario, the ownership model is the dominant narrative in cultural and legal discourse: property is about the exclusive relationship of an individual owner with a particular “thing” and the resulting control over access to, and use of, that thing—in this case, land. However, the diversity of interests and claims engaged by contemporary land use conflicts demonstrates that these conceptual and narrative frameworks do not account for the range of human relationships with the non-human environment. Nor do they adequately provide space for the articulation and assertion of the full range of interests in how land can and should be used. In particular, such frameworks fail to adequately account for the non-ownership interests in land privately owned by others. These interests and the creative ways they are reshaping land use law are the focus of this paper.

Part I of the paper provides a brief background on the ownership model of property and property rights as it has developed in Anglo-American property law. Building on the work of Australian property law scholar Nicole Graham, this section explores how contemporary property law fails to account for people-place relationships.<sup>5</sup> Part II explores how a relational approach to property law and rights discourse has the potential to open space for a conceptual shift in human relationships with the non-human environment. The promise of relational analysis to more accurately identify “what is really at stake”<sup>6</sup> in land use conflicts is explored by bringing together Graham’s property critique and Jennifer Nedelsky’s relational analysis. In Part III, we consider these relational perspectives in the context of recent aggregate extraction

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4. Carol M Rose, *Property & Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Boulder, CO: Westview Press, 1994) at 5.

5. Nicole Graham, *Landscape: Property, Environment, Law* (New York: Routledge, 2011) [Graham, *Landscape*].

6. Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) [Nedelsky, *Law’s Relations*].

conflicts in Ontario, which have emerged as some of the most contentious environmental disputes in the Province.<sup>7</sup> Three recent decisions are considered to demonstrate how quarry disputes can serve as strategic opportunities for the assertion of person-place relationships and non-ownership interests in land. The last part offers concluding thoughts and considers some implications for further research into the role of non-ownership claims in land use planning disputes and property law.

### I. CONSTRUCTING PROPERTY: OWNERS AND NON-OWNERS, PLACES AND THINGS

A specific vision of what property is, and what it does, underpins the basic legal frameworks governing how land, water and natural resources are used in English Canada. This vision exists in the theory and practice of land use law and it fundamentally shapes the jurisprudence interpreting and applying those frameworks.<sup>8</sup> A multitude of valuable and diverse critiques of the historical development and contemporary application of property in legal theory and practice exist within legal scholarship and other disciplines.<sup>9</sup> It is beyond the scope of this paper to review them here. Rather, I am specifically concerned with how the ownership model of property

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7. Land Use Planning in Ontario: Recommendations of the Environmental Commissioner of Ontario 2000–2010. (2011): online: Eco.on.ca <<http://www.eco.on.ca/blog/2011/01/25/land-use-planning-in-ontario-ten-years-of-eco-recommendations/>> [Environmental Commissioner] (Note that all online references were accessed 9 May 2013). “Aggregate” is defined in s 1 of the *Aggregate Resources Act* as “gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock or other prescribed material.”

8. Blomley, *supra* note 3 at 126; Nicole Graham, “Owning the Earth” in Peter Burdon, ed, *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Kent Town, South Australia: Wakefield Press, 2011) 259 at 261 [Graham, “Owning”].

9. See Margaret Davies, *Property: Meanings, History, Theories* (New York: Routledge & Cavendish, 2007) for an excellent overview [Davies, *Property*]. See also, Crawford B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962); Alain Pottage, “Instituting Property” (1998) 18:2 OJLS 331; Kevin Gray, “Property in Thin Air” (1991) 50:2 CLJ 252; Nicholas Blomley, David Delaney & Richard T Ford, eds, *The Legal Geographies Reader: Law, Power and Space* (Malden, MA: Blackwell, 2001); Hilary Lim & Anne Bottomley, eds, *Feminist Perspectives on Land Law* (New York: Routledge & Cavendish, 2007).

shapes contemporary people-place relationships and the way we make decisions about the land and environment.

Property as the foundation of contemporary land use law is constructed as a way of organizing abstract rights of ownership, control and alienation of things as between people: "[T]he dominant view of property, in both legal and cultural discourses, is one of abstract entitlements as between persons which are alienable from, rather than proper to, a person."<sup>10</sup> Following from John Locke's property theory as it developed in England, and in Canada under British colonial expansion, formal title to land is given supremacy over other types of claims and relationships. Historically, enclosure processes facilitated the privatization of commonly owned resources in England as they were transformed into individually owned parcels of land. Indigenous legal scholar John Borrows explains how, in Canada, colonial law "imposed a conceptual grid over both space and time which divides, parcels, registers, and bounds peoples and places."<sup>11</sup> Complex Indigenous systems of government and law regulating person-person and people-place relationships were ignored and purposefully undermined as settlers undertook the work of ordering and managing space.<sup>12</sup>

Central to the ownership model of property, and its role in colonial expansion, is the presumption of a dichotomy between nature and culture, whereby people (the owners) are detached from places (the owned).<sup>13</sup> Property, under this model, is a person-person and not a people-place relationship. Commodification through transformation and cultivation of non-human nature is not only inevitable, but also, necessary for the common good.<sup>14</sup> The right to use land is so integral to this model of property that it is protected even when a particular use may harm the land in ways that fundamentally

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10. Graham, *Lawscape*, *supra*, note 5 at 27.

11. John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47:4 UTLJ 417 at 430.

12. *Ibid* at 445; Porter, *supra* note 2 at 151.

13. Graham, *Lawscape*, *supra* note 5 at 2.

14. Rose, *supra* note 4 at 5; Graham, *Lawscape*, *supra* note 5 at 24.

transform or destroy it.<sup>15</sup> As Graham argues, “[m]odern legal discourse does not countenance the possibility of reciprocity between people and place, much less obligation or responsibility of people to place.”<sup>16</sup> Further, as a person-person relation, property rights construct persons as either owners or non-owners, serving as boundaries that not only result in systemic inequality, but, require it.<sup>17</sup> Property rights are defined by acts of transformation, cultivation and development of non-human nature for use and profit, and include both the power to exclude and control in relation to other persons and the freedom to alienate or dispose of one’s property as one chooses.<sup>18</sup>

Graham emphasizes the “dephysicalisation” of property as a key development in modern western property law. It is through this “contemporary legal expression of the nature/culture paradigm” that property is defined as a person-person relationship, and place is rendered meaningless in contemporary legal disputes.<sup>19</sup> Dephysicalized property protects value rather than things.<sup>20</sup> The value of land becomes abstracted from its physicality, which is subsumed in the value created through its use and the corresponding ability to exclude all others from that use. As American scholar Kenneth Vandavelde notes, the Hohfeldian concept of dephysicalized property “banished the need for things from property.”<sup>21</sup>

Graham traces dephysicalization in property law to Locke’s “uncanny rationalisation of the physical severance of people and place.” Linking this separation of people and place

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15. Graham, “Owning,” *supra* note 8 at 266; Kate Galloway, “Landowners’ vs Miners’ Property Interests: The Unsustainability of Property as Dominion” (2012) 37:2 AltLJ 77 at 80.

16. Graham, *Landscape*, *supra* note 5 at 169.

17. Nedelsky, *Law’s Relations*, *supra* note 6 at 95.

18. Rose, *supra* note 4 at 20, 28; Graham, “Owning,” *supra* note 8 at 261.

19. Graham, *Landscape*, *supra* note 5 at 160.

20. Kenneth J Vandavelde, “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property” (1980) 29 Buff L Rev 325 at 359-60, discussing Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions As Applied in Judicial Reasoning” (1913) 23 Yale LJ 16; Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions As Applied in Judicial Reasoning” (1917) 26 Yale LJ 710.

21. Vandavelde, *supra* note 20 at 360.



with the imposition of colonial legal order, Graham argues that laws derived from this model make certain kinds of land use possible.<sup>22</sup> Places are transformed into commodities, valued only for their use for production and profit. Land is no longer understood as part of a particular place with spatial or temporal limits.<sup>23</sup> However, she argues, people-place relationships are nonetheless material: “The trouble with defining property as ‘dephysicalised’ is that it is not—property relations, by which I mean the relationships between people and place, are *material* relations—something the law finds deeply problematic.”<sup>24</sup> The result, Graham argues, is a “maladapted” and dysfunctional system of land use law.<sup>25</sup> While legal theory and practice maintain the irrelevance of the physical, property rights operate to protect these forms of use regardless of spatial or temporal location with “material consequences” for local ecosystems and peoples:

Because the places are not seen in their ecological context, but as a source of commercial profit, the paradigm of modern law does not merely prescribe a dephysicalised property relation in an abstract sense. The paradigm of modern law prescribes its materialisation through land use practices that have no necessary response to or correlation with their local ecological contexts. Dephysicalised property is, therefore, not only abstract, it is real.<sup>26</sup> Indeed, the property narrative guiding colonial settlement in Ontario “profoundly and purposefully changed” the natural environment, according to historian David Wood. He argues that the transformation of the natural world and “the drive for progress, in itself became an ideology—indeed, the prevailing, almost universal land ethic of the Province.”<sup>27</sup>

This dominant property narrative shapes whether and how interests in land and the non-human environment can be articulated and asserted in legal forums. It shapes the

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22. Graham, *Landscape*, *supra* note 5 at 160.

23. *Ibid* at 5, 7.

24. *Ibid* at 7.

25. *Ibid* at 206.

26. *Ibid* at 183-84.

27. J David Wood, *Making Ontario: Agricultural Colonization and Landscape Re-Creation Before the Railway* (Montreal & Kingston: McGill-Queens University Press, 2000).

legal and cultural recognition and treatment of such claims in decision-making processes related to land use and environmental planning.<sup>28</sup> The legal discourse of property in which Canadian planning law is embedded has traditionally been “closed” to place-based analysis. Claims asserting people-place relationships in land use decision-making forums have been understood as disruptive and subversive.<sup>29</sup> However, the limitations of the dominant framework are increasingly exposed in land use conflicts, as non-owner parties assert interests in private land and articulate rights that exceed the boundaries of the ownership model.

## II. PROPERTY AND PLACE: RELATIONAL APPROACHES

The strangeness and crises of people-place relations prescribed by modern property law are increasingly evident from disputes over property rights where what has been lost has not been the right, but the place.<sup>30</sup>

Feminist legal theorist Margaret Davies recently noted an emerging scholarly interest in alternative articulations of property—“what might be optimistically called the beginnings of a paradigm shift in the meanings and extent of property and its ties to individualism and liberalism.”<sup>31</sup> She points to feminist critiques of liberal individualism and property rights that have called for a more relational approach—consideration of the context and relationships within which property is situated.<sup>32</sup> Citing “stewardship” as an emergent concept, Davies notes a shift from property law as the realm of fixed, exclusive individual rights, to more discretionary rights, which she describes as “more fragile, contextual, and

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28. Graham, “Owning,” *supra* note 8 at 261.

29. Graham, *Landscape*, *supra* note 5 at 20; John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill LJ 629 [Borrows, “With or Without You”]; Gisday Wa & Dalgam Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet’suwet’en Hereditary Chiefs in the Supreme British Columbia 1987–1990* (Gabriola, BC: Reflections, 1992).

30. Graham, *Landscape*, *supra* note 5 at 185–86.

31. Margaret Davies, “Persons, Property, Community,” online: (2012) 2:2 *feminists@law* 1 at 13 <<http://journals.kent.ac.uk/index.php/feministsatlaw/issue/current>> [Davies, “Persons, Property, Community”].

32. *Ibid* at 14.

limited use.”<sup>33</sup> She argues that the strengthening of environmental and planning law, including the incorporation of stewardship concepts in jurisdictions like Australia, is evidence of law’s opening to these alternative visions of property.<sup>34</sup>

Canadian feminist legal theorist Jennifer Nedelsky has long advocated a rethinking of rights, and of property rights in particular, from a relational perspective.<sup>35</sup> In focusing on relationships, she is referring not only to personal relationships, but also to the “structural and institutional relationships” structured by law and rights. This structuring is the work that law and rights actually do, she argues, and therefore, it should be exposed and placed at the center of our analysis.<sup>36</sup> Like Graham’s places, relationships are central to our material existence, yet are obscured by the legal discourse of the autonomous and bounded individual. “A relational analysis,” Nedelsky argues, “provides a better framework for identifying what is really at stake in difficult cases and for making judgments about the competing interpretations of rights involved.”<sup>37</sup> Further, in Nedelsky’s opinion, a relational reorientation of rights as more than individual entitlements provides a “welcoming framework” for concepts that blur the distinction between the individual and the collective.<sup>38</sup>

While Nedelsky expressly maintains the dephysicalized construction of property as primarily about relationships between people, she points to the need for further development of her relational analysis to encompass the relationships between humans and non-humans.<sup>39</sup> Her critique of the property-inspired language of boundaries embedded in contemporary notions of “rights” points to the need to rethink what property is: “We need to take our traditional concepts

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33. *Ibid* at 15–16.

34. *Ibid* at 16, citing the Australian *Product Stewardship Act 2011*; the *Product Stewardship (Oil) Act 2000*; the *Environment Protection and Biodiversity Conservation Act 1999*, s 3A; and the Environmental Stewardship Program, online: <<http://www.nrm.gov.au/funding/stewardship/index.html>>.

35. Nedelsky, *Law’s Relations*, *supra* note 6; Jennifer Nedelsky, “Law, Boundaries, and the Bounded Self” (1990) 30 *Representations* 162.

36. Nedelsky, *Law’s Relations*, *supra* note 6 at 65.

37. *Ibid* at 4.

38. *Ibid* at 373.

39. *Ibid* at 196.

like property, and ask what patterns of relationship among people and the material world we want, what patterns seem true to both integrity and integration.”<sup>40</sup> Nedelsky’s reconceptualization of autonomy—from requiring independence from the collective to being enabled by constructive relationships—opens up conceptual space for place as more than commodity.<sup>41</sup> Graham’s concept of the reciprocal people-place relationship in property relations is a starting point for the future project of using the relational approach to articulate the responsibility of humans to the non-human world.<sup>42</sup>

Graham also aims to (re)centre the notion of relationship—in her case, the people-place relationship that property law has erased and excluded. In doing so, Graham rejects the dualism of either anthropocentric or ecocentric analyses of environmental crises:

The concepts of network and interconnection open a space for the notion of inalienable relationships between people and place. The idea that relationships are interdependent and multilinear works against the idea that relationships are oppositional within the dichotomous nature/culture paradigm of anthropocentrism.<sup>43</sup>

In fact, she notes, the etymological origins of the word “property” invoke a “mutually formative” relationship between property and identity.<sup>44</sup> In the original sense, property was all about the interconnections between people and things, with land in particular being central to the formation of identity for individuals and communities.<sup>45</sup> Graham and others have noted echoes of this in the way that lay persons and communities assert interests based on generational or other forms of connection with a particular place.<sup>46</sup>

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40. *Ibid* at 117.

41. *Ibid* at 152.

42. *Ibid* at 199.

43. Graham, *Landscape*, *supra* note 5 at 18.

44. *Ibid* at 26.

45. *Ibid*; David Seipp, “The Concept of Property in the Early Common Law” (1994) 12:1 LHR 29 at 49.

46. *Ibid* at 27; Davies, *Property*, *supra* note 9 at 27; David Lametti, “The Concept of Property: Relations Through Objects of Social Wealth” (2003) 53 UTLR 325 at 354.

Both Nedelsky and Graham seek to “open space” to reorient legal discourse towards already existing relationships and the work they do. Both point to the failure of property law to recognize relationships fundamental to the material conditions of life as the source of dysfunction in the law, resulting in its failure to adequately respond to ongoing and emergent social and environmental crises and conflicts. And, while both engage at length with the theoretical aspects of this potential reorientation, they are also deeply concerned with the practical outcomes of this present dysfunction. In particular, abstract rights limit the ability of interested parties to meaningful express their claims and connect their experience to the formal decision-making process. As Graham observes in the context of land use conflicts, “courts swiftly transform disputes about physical land use practices into disputes over abstract property rights.” Parties that speak of property as place and the loss associated with transformation of the non-human environment become “dissident voices.”<sup>47</sup>

Nedelsky proposes a four-step approach to resolving a particular dispute.<sup>48</sup> Her approach is based on the distinction she makes between values and rights. Values, she argues, are the big abstract articulations of what a society sees as essential to humanity. Rights are specific “institutional and rhetorical means of expressing contesting, and implementing such values.”<sup>49</sup> In Nedelsky’s model, rights are not rigid and universal or timeless, they are contextual, negotiated and evolve around the kinds of relationships we need to pursue our values. Presented with a specific dispute, the inquiry begins by examining how the legal structuring of the relevant relations is related to the conflict. Having identified the underlying context, the question becomes, “What values are at stake?” Once the values are articulated, the inquiry shifts to the kinds of relationships that would foster those values. Finally, with these relationships in mind, the question becomes how different types of rights would structure relations differently in the relevant context?<sup>50</sup>

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47. *Ibid* at 162-63.

48. Nedelsky, *Law’s Relations*, *supra* note 6 at 236.

49. *Ibid* at 241.

50. *Ibid* at 236.

Creating space for articulations and assertions of people-place relationships in Ontario's land use law framework requires the kind of creative reorientation suggested by Graham and Nedelsky. Contemporary land use and property law are fundamentally structured to maintain and enforce the ownership property narrative and abstract property rights. However, Canadian law does provide some examples of strategic challenges to this vision of property relations. Constitutional rights and title claims by First Nations, Inuit and Métis peoples, as well as the (re)assertion of Indigenous law in many parts of Canada, fundamentally challenge colonial legal frameworks governing land use and people-place relations.<sup>51</sup> Feminist family property litigation has also successfully challenged law's construction of ownership and property relationships.<sup>52</sup> While these are the result of legal strategies as part of broader political projects that found strategic ways to push legal boundaries, and should be understood as partial and vulnerable in the context of ongoing colonization, racism and gender inequality, they demonstrate that dissident voices can use legal processes to advocate for alternative visions of property. As we will outline below, recent land use conflicts about aggregate extraction in Ontario demonstrate potential strategic cracks in the land use planning framework. Rethinking rights through the assertion of place and the expression of our relation with places has the potential to help us find these cracks and use them to reorient property and rights towards environmental justice.

### III. IN CONTEXT: AGGREGATE EXTRACTION, PLACE AND PROPERTY

Except at the front where the Great Lake pounds and the beach stones form ever-changing terraces—solid waves of their

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51. See e.g. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Constitution*]; Borrows, "With or Without You," *supra* note 29; Wa & Uukw, *supra* note 29.

52. See e.g. *Peter v Beblow*, [1993] 1 SCR 980; Mary Jane Mossman, "Running to Stand Still: The Paradox of Family Law Reform" (1994) 17 Dal LJ 5 at 6; Heather Conway & Philip Girard, "No Place Like Home: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 9 Queen's LJ 715.

own in response—Loughbreeze Beach Farm spreads in ruin around Esther. The parts of it that are not being claimed by that which is unclaimable are being excavated by industry: the growing quarry, the impossible earth-wound made by the cement company. Meadows she played in as a child, woodlots, cornfields, and pastures have disappeared into this gaping absence. Past midnight, when the lake is calm, Esther has, for the last ten years, been able to hear huge machines grinding closer and closer to the finish of her world.<sup>53</sup>

Ontario's Environmental Commissioner recently noted that aggregate extraction, more often referred to as quarrying, has become one of the most contentious land use issues in the Province.<sup>54</sup> Since 2005, conflicts over large-scale quarry developments in the urban-rural fringe of Southwestern Ontario have resulted in major community mobilizations,<sup>55</sup> complex multi-year litigation,<sup>56</sup> a foreign investment protection claim against the federal and provincial governments,<sup>57</sup> and an election promise of legislative review.<sup>58</sup> Non-owner parties to quarry disputes have raised issues ranging from Indigenous sovereignty to food security and public health; and, from regional economic development and water rights to international trade.<sup>59</sup> The range and diversity of claims raised by these parties through formal objection processes, political campaigns, the media and litigation, make it clear that current legal and policy frameworks are unable to account for the complexity of property relations engaged by these land use conflicts.

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53. Jane Urquhart, *Away* (Toronto: McClelland & Stewart, 1993) at 9–10.

54. Environmental Commissioner, *supra*, note 7.

55. "Mega quarry defeat is a lesson in activism," *Toronto Star* (25 November 2012) online: <[http://www.thestar.com/opinion/editorialopinion/2012/11/25/mega\\_quarry\\_defeat\\_is\\_a\\_lesson\\_in\\_activism.html](http://www.thestar.com/opinion/editorialopinion/2012/11/25/mega_quarry_defeat_is_a_lesson_in_activism.html)>.

56. See e.g. "Nelson Aggregate Hearing Explained," *Lake Ontario Waterkeeper* (17 November 2010) online: <<http://www.waterkeeper.ca/2010/11/17/nelson-aggregates-hearing-explained/>>.

57. "St Mary's Cement Group – Update January 2013," online: Halton Region <<http://www.halton.ca/cms/one.aspx?portalId=8310&pageId=10296>>.

58. Ontario, Legislative Assembly, *Orders and Notice Paper*, 40th Leg, 1st Sess, No 27 (22 March 2012).

59. A representative range of objections from non-owner parties are available on the North Dufferin Agricultural and Community Task Force ("NDACT") online: <<http://ndact.com/index.php/letters-a-reports/letters-general>>.

Ontario's quarry conflicts offer an opportunity to examine the complexity of contemporary property relations as non-owner actors—First Nations, local ratepayer and community groups, farmers, environmentalists, and municipal governments—attempt to assert a variety of claims to privately-owned property. These claims do engage the person-person relationships between owners and non-owners at the center of traditional property law.<sup>60</sup> However, this paper is concerned with these conflicts because they also engage the much less visible, and much less examined, people-place relationship between non-owners and the land itself.

Because quarry disputes in Ontario are regulated through land use planning law, they serve as a possible strategic entry point from which to shift the legal discourse about our relationships to land and the environment. As administrative processes, land use decisions present unique opportunities for non-owner persons and groups to assert claims within a legal process. Otherwise legally obscured people-place relationships can emerge as troublesome and subversive actors in these conflicts. As well, despite the abstract model of property rights informing the land use planning system, the physical reality of the land in question is uniquely exposed in these disputes, as principles of property law and environmental law are simultaneously invoked. In this context, quarry conflicts offer a strategic opportunity to reinsert the people-place relationship into both legal theory and practice.

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60. While these complex networks of relationships related to land use are beyond the scope of this paper, it is notable that quarry disputes such as the recent Melancthon mega quarry dispute, have emerged as a site of potential coalition building for broader environmental justice goals, bringing together First Nations, farmers, environmentalists, and local community groups, see e.g. online: <<http://www.theglobeandmail.com/news/national/coalition-of-farmers-and-urban-foodies-halts-ontario-mega-quarry/article5546334/>>. At the same time, it is important to note that these disputes raise important equity questions as the gentrification of the rural-urban fringe in Southwestern Ontario changes the socio-economic make-up of rural areas, and therefore, the kind of interests raised in land use conflicts.



### A. LEGISLATION AND POLICY— THE AGGREGATE LICENSING PROCESS

A detailed overview of the complex regulatory regime applicable to aggregate extraction in Ontario is beyond the scope of this paper. A brief overview is provided below, with particular attention to the way the applicable law and policy constructs the boundaries of the legal process and the relevance of the places in question. Aggregate licensing applications also incorporate aspects of other regimes, in many cases the environmental regulation of water and air, but potentially also regulatory regimes at different scales of governance, such as the constitutional and treaty rights of Indigenous peoples, as well as Indigenous legal orders, and increasingly, investor protection mechanisms in international trade agreements such as the *North American Free Trade Agreement*.<sup>61</sup>

*The Aggregate Resources Act*<sup>62</sup> provides for several categories of aggregate mine.<sup>63</sup> This paper, like the majority of high profile aggregate conflicts, is concerned with large scale, below the water table aggregate quarries, requiring a Class “A” Quarry Below Water license under the Act.<sup>64</sup> For this type of licence, a landowner must make an application to the Ministry of Natural Resources (the “Ministry”). A site plan and technical reports prepared by a “qualified” professional must be included in the application.<sup>65</sup> While the Act contemplates statutory guidance for application requirements, no such regulations have been enacted. Guidance is contained only in two Ministry policy documents, the *Aggregate Resources Provincial Standards* and the *Aggregate Resources*

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61. 32 ILM 289, 605 (1993), c 11.

62. RSO 1990, c A. 8 [“Act”].

63. *Ibid* at ss 7, 23, 34.

64. *Ibid* at s 7(2)(a).

65. *Ibid* at s 8. Section 8(4) stipulates: “Every site plan accompanying an application for a Class A licence must be prepared under the direction of and certified by a professional engineer who is a member of the Association of Professional Engineers of Ontario, a land surveyor who is a member of the Association of Ontario Land Surveyors, a landscape architect who is a member of the Ontario Association of Landscape Architects, or any other qualified person approved in writing by the Minister.”

*Policies and Internal Procedures Manual*.<sup>66</sup> Together these documents specify the technical information and reports required, including expert hydrogeologic report(s), natural environment report(s) and cultural heritage report(s). Based on this information and the objections received from members of the public and other government agencies through the processes outlined below, the Minister of Natural Resources can issue the licence, refuse to issue the licence, or refer the matter to the Ontario Municipal Board (the “Board”) for a hearing.<sup>67</sup>

While these policy requirements flow from the Act, most hearings in quarry conflicts are focused on the local municipality’s Official Plan. If the land is not currently designated as a “mineral aggregate extraction area” under the applicable municipal Official Plan, the proponent will need to apply to local authorities for appropriate amendments under the *Planning Act*.<sup>68</sup> Under the Act no license can be issued if extraction is prohibited by an applicable zoning by-law.<sup>69</sup> Therefore, most aggregate disputes turn on whether the decision of a local authority to amend, or not to amend, the Official Plan conforms to the *Provincial Policy Statement* (the “Policy Statement”).<sup>70</sup> Under the *Planning Act*, the Policy Statement serves as the guiding document for all land use decisions in the Province. It stipulates that “all policy and decisions of municipal governments and land use tribunals, including the Ontario Municipal Board and the

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66. *Aggregate Resources Provincial Standards*, 1997, Natural Resources Management Division [“Standards”], online: <[http://www.mnr.gov.on.ca/en/Business/Aggregates/Publication/STEL02\\_173877.html](http://www.mnr.gov.on.ca/en/Business/Aggregates/Publication/STEL02_173877.html)>; *Aggregate Resources Policies and Internal Procedures Manual*, 1996, Ministry of Natural Resources, Land and Water Branch, Aggregate and Petroleum Resources Section, online: <[http://www.mnr.gov.on.ca/en/Business/Aggregates/2ColumnSubPage/266561.html#2\\_0\\_Licences](http://www.mnr.gov.on.ca/en/Business/Aggregates/2ColumnSubPage/266561.html#2_0_Licences)>.

67. “Act,” *supra* note 62, s 11(5), (9). In some cases where a particular provincial development plan requires it, including two of those discussed below under the *Niagara Escarpment Planning and Development Act*, RSO 1990, c N.2, the matter is referred to a Joint Board of the Ontario Municipal Board and the Environmental Review Tribunal.

68. RSO 1990, c P-13, s 22 [*Planning Act*].

69. “Act,” *supra* note 62, s 12.1(1).

70. Ministry of Municipal Affairs and Housing 2005, online: <<http://www.mah.gov.on.ca/Page215.aspx>> [“Policy Statement”].

Environmental Review Tribunal, *shall* be consistent with the Policy Statement.”<sup>71</sup>

Since the first version was approved in the 1990s, the Policy Statement has consistently prioritized aggregate resource “preservation” and development. Prior to the first Policy Statement, aggregate resources were declared a “matter of provincial interest” in 1986, effectively requiring municipalities to prioritize the protection of aggregate resources above other land uses.<sup>72</sup> This prioritization has been maintained through to the present. In 2005, the Policy Statement was revised to eliminate any consideration of provincial mineral resource needs in licensing decisions. The current version states:

Demonstration of need for *mineral aggregate resources*, including any type of supply/demand analysis, shall not be required, notwithstanding the availability, designation or licensing for extraction of *mineral aggregate resources* locally or elsewhere.<sup>73</sup>

The Policy Statement imposes mandatory protection of aggregate resources for long-term use, including the protection of areas with known deposits, areas adjacent to known deposits, and/or current operations, from development or activities that would “preclude or hinder” extraction.<sup>74</sup> In fact, this protection continues even where an operation or a license “ceases to exist,”<sup>75</sup> resulting in the strange phenomenon of a licensing regime with no possibility of expiration regardless of the length of time an area has remained undeveloped and the changes to surrounding land and land uses.

The Policy Statement also implicitly places the burden of aggregate resource protection and development on a specific geographic area within the Province by requiring that “as much of the *mineral aggregate resources* as is realistically

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71. *Planning Act*, *supra* note 68, s 3.

72. Matt Binstock & Maureen Carter-Whitney, *Aggregate Extraction in Ontario: A Strategy for the Future* (Toronto: Canadian Institute for Environmental Law and Policy, 2011), online: <[http://www.cielap.org/pub/pub\\_aggregatestrategy.php](http://www.cielap.org/pub/pub_aggregatestrategy.php)>.

73. “Policy Statement,” *supra* note 70, s 2.5.2.1 [emphasis in original].

74. *Ibid* at ss 2.5.2.4, 2.5.2.5.

75. *Ibid*.

possible shall be made available as close to markets as possible.”<sup>76</sup> The majority of aggregate is used within the Greater Toronto Area and the surrounding Greater Golden Horseshoe region.

While the Policy Statement provides for absolute protection of aggregate resource supplies and existing operations, social and environmental impacts are to be “minimized” rather than avoided.<sup>77</sup> This despite s 2.1.1, which states, “[n]atural features and areas shall be protected for the long term,” and s 2.2.1, which states, “[p]lanning authorities shall protect, improve or restore the *quality and quantity of water*.” The Policy Statement sets up a clear conflict between these requirements and its prioritization of mineral aggregate extraction. At first glance social and cultural features are given greater protection as they “shall be conserved.”<sup>78</sup> However, a close examination of the Policy Statement reveals that protection of natural and social-cultural features is largely limited to features formally deemed “significant” by provincial policy.<sup>79</sup>

The Policy Statement attempts to resolve this apparent conflict by classifying aggregate extraction as an “interim” activity.<sup>80</sup> “Rehabilitation” to “accommodate subsequent land use” is explicitly required.<sup>81</sup> However, the lack of any standards for rehabilitation beyond the promotion of “land use compatibility” demonstrates the failure to understand the site of extraction as a place with value beyond commodification or acknowledge its relationships to the adjacent environment and communities. Land identified as containing valuable aggregate deposits is treated, in Heidegger’s words, as “‘one vast gasoline station’ for human exploitation.”<sup>82</sup> Beyond the absurdity of a potentially infinite licence for an “interim” activity, and concerns about the nature and quality

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76. *Ibid* at s 2.5.2.1 [emphasis in original].

77. *Ibid* at s 2.5.2.2.

78. *Ibid* at s 2.6.1.

79. *Ibid* at s 6.0.

80. *Ibid* at s 2.5.3.1.

81. *Ibid*.

82. Martin Heidegger, *The Question Concerning Technology, and Other Essays* (New York: Garland, 1977), cited by David Harvey, *Justice, Nature and the Geography of Difference* (Malden, Mass: Blackwell, 1996) at 134.

of rehabilitation, the Environmental Commissioner has expressed serious concerns about the current number of abandoned aggregate pits and quarries and the slow rate of achieving basic levels of rehabilitation.<sup>83</sup> At the current rate, the Canadian Environmental Law Association recently estimated it would take between 234 and 335 years to rehabilitate the 6,900 abandoned pit and quarry sites in Ontario.<sup>84</sup>

The disconnect between the purported protection of natural, social and cultural features and the prioritization of aggregate extraction in the Policy Statement is most evident in relation to the treatment of agricultural lands.<sup>85</sup> Despite mandatory protection of “prime agricultural land,” aggregate extraction is permitted as an interim use on farmland. Requirements for rehabilitation to “substantially the same areas and same average soil quality” explicitly exempt the most potentially harmful class of below the water table quarry. The exemption applies where the applicant can show that much of the resource is below the water table or where extraction is so deep as to render rehabilitation “unfeasible.” The current Policy Statement requires that the applicant also demonstrate that alternative locations have been considered and that agricultural rehabilitation is maximized in remaining areas.<sup>86</sup> While the land may be recognized as having natural, social and cultural features, and potentially as having an ongoing relationship with non-owner persons and communities for food production, its value as a commodity is ultimately what matters. The Policy Statement is constructed in such a way that other claims are trumped by the protection of the resource value.

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83. Environmental Commissioner of Ontario, “Our Cratered Landscape: Can Pits and Quarries be Rehabilitated?” in *Reconciling Our Priorities, ECO Annual Report, 2006–2007* (Toronto: ECO, 2007) 139.

84. Joseph Castrilli & Ramani Nadarajah, “Submissions to the Standing Committee on General Government on the *Aggregate Resources Act*” (14 May 2012), online: <<http://s.cela.ca/files/839Aggregates.pdf>>.

85. *Ibid* at s 2.3.1.

86. *Ibid* at s 2.5.4.1.

## B. LEGISLATION AND POLICY—NOTICE AND PARTICIPATION

While there are no statutory public consultation standards in the Act, Ministry policy requires the proponent to provide public notice. This triggers a 45-day “notification” period during which members of the public, local governments, and provincial ministries and agencies can file objections to the proposal.<sup>87</sup> Within two years, the proponent must “attempt to resolve” objections and must submit a list of unresolved objections and documentation of attempts at resolution as well as recommendations for resolutions to the Ministry and to remaining objectors.<sup>88</sup> A 20-day notice period is then triggered during which remaining objectors, including government agencies, must submit further “recommendations” or they are deemed to no longer object.<sup>89</sup>

Non-owner third parties in Ontario cannot appeal land use planning decisions as-of-right. While the provincial *Environmental Bill of Rights* provides for parties with a demonstrable interest to seek leave to appeal certain kinds of provincial decisions,<sup>90</sup> the test for leave is “stringent” and the majority of applications have been turned down.<sup>91</sup> In practice, the Board hears aggregate disputes as a result of a Ministerial referral, or an owner-applicant’s as-of-right appeal from a Ministerial decision. Non-owner parties who object to proposals during the initial 45-day notice process do have a presumptive right to be parties to hearings ordered under the Act.<sup>92</sup> As a result, quarry litigation often formally includes non-owner parties either as individuals or as groups with

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87. Standards, *supra* note 66 at ss 4.1.1., 4.2.

88. *Ibid* at ss 4.3.6, 4.3.3.1.

89. *Ibid* at s 4.3.3.3.

90. SO 1993, c 28.

91. Richard D Lindgren, “Third Party Appeals Under the *Environmental Bill of Rights* in the Post-Lafarge Era: The Public Interest Perspective” (Toronto: Canadian Environmental Law Association, 2009).

92. “Act,” *supra* note 62, ss 11(5), (6). The Act provides that the Minister may refer the application and any objections to the Board for a hearing and that the persons who made the objections are parties. However, s 11(5) provides that the Minister can direct the Board to consider only specific issues; and, s 11(8) that the Board may refuse to consider objections that have not been made in good faith, to be frivolous or vexatious, or to be made only for the purpose of delay. There is also a rarely invoked third party appeal provision in Ontario’s *Environmental Bill of Rights* that allows a non-owner party to seek leave to appeal.

similar interests in the proceedings. While opportunities to participate are limited by the ability to retain legal representation and fund independent technical research, objector participation does present a procedural opportunity for non-owners. Unlike property disputes in other forums, these land use conflicts are at least theoretically open to claims from third parties without ownership interests.

In addition to public notice, the proponent is required to host one public presentation in the local area during the notice period. Neither the technical experts retained by the proponent nor Ministry representatives are required to be at the presentation to assist the public in interpreting the reports. Most aggregate licence applications are also posted to the provincial Environmental Registry, a public online database for environmental decisions, for a minimum of 30 days under the *Environmental Bill of Rights*. However, these comments are not considered to be objections under the Act and therefore do not afford the objector the same procedural rights outlined above. The proponent is also not required to respond.

### C. QUARRY PLACES: CURRENT AND RECENT CASES

While the legal and policy framework outlined above demonstrates how the ownership model of property fundamentally shapes Ontario's land use regime, recent quarry decisions demonstrate that land use conflicts provide a strategic opportunity to reorient law towards people-place relationships and relational analysis. In particular, several themes emerge from three recent and highly contested quarry cases: *James Dick Construction Ltd. v Caledon (Town)*,<sup>93</sup> *Nelson Aggregate Co., Re*<sup>94</sup> and *Walker Aggregates Inc. (Re)*.<sup>95</sup> The first part of the analysis is organized around four themes

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93. (2011) 66 OMBR 263 [Rockfort].

94. 2012 CLB 29642 [Nelson].

95. 2012 CLB 16274 [Walker]. *Niagara Escarpment Commission v The Joint Board*, 2013 ONSC 2497, leave to appeal denied.

identified in the decisions: 1) onus, 2) precaution, 3) reinserting need, and 4) place and ecological context.<sup>96</sup> The decisions are then considered through Nedelsky's four-step relational approach. While none of the parties advanced a relational analysis, nor did the Board in any of these cases adopt one, the reasons in these decisions demonstrate openness to the centrality of relationships and the significance of place in decisions about land use. Applying Nedelsky's approach to these decisions demonstrates how a relational perspective could help to clarify what is at stake and identify a path to resolution in future land use disputes.

## 1. Onus

The issue of onus is significant in land use decisions because in many ways, the hearing process operates on the terms of the applicant landowner. The licensing process is set in motion by the owner's proposal to use private land for extractive purposes. As a result of the applicant-driven nature of the process, the vast majority of the evidence that comes before the Board is prepared and presented by experts employed by the applicant for the purpose of having the licence approved.

In practice, objectors are often burdened with proving that extraction *will* cause negative impacts and expert evidence to demonstrate this is expensive and logistically difficult to obtain. The majority decision in *Walker* is an excellent example:

There is no compelling evidence before the Joint Board that the proposed application would offend the first Purpose of the NEP, as in this area the Niagara Escarpment and lands in its vicinity will be maintained as a substantially natural

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96. *Walker* and *Nelson* were both heard by a Joint Board of the Ontario Municipal Board and the Environmental Review Tribunal. *Rockfort* was heard by a single member of the Ontario Municipal Board. In *Walker* the majority of the Board, the two Municipal Board members, granted the Application for the required amendments. However, the third member from the Tribunal disagreed so strongly that he was compelled to write a detailed 95-page dissent. The Niagara Escarpment Commission, which opposed the application before the Board and whose submissions were largely adopted by the dissent, sought leave to appeal the decision to the divisional court. Leave was denied in July 2013. The dissent is the focus of the analysis below.



environment and there will be no break in the continuous natural environment resulting from this application. This is clearly shown on Exhibits 314 and 315. *Nor is there any compelling evidence that a quarry use cannot be compatible with the natural environment.*<sup>97</sup>

In weighing the evidence before the Board, the majority largely accepts the evidence put forward by applicant. A close reading of their decision reveals an implicit link between the owner-applicant's economically-oriented relationship to the land and the majority's preference for their evidence. At the outset, the majority characterizes evidence about the benefits of the proposed quarry as definitive: "it is clear that the proposed quarry is a highly significant project for the local community which will create jobs and contribute millions of dollars to the local economy."<sup>98</sup> In contrast, the majority appears to treat the non-owner objections as suspect, requiring them to provide "compelling evidence" to overcome the presumption that the applicant has the right to determine what is best for his property. They characterize the issues raised by non-owners as "legitimate concerns," subtly contrasting their indeterminate nature to the definite economic benefits established by the applicant.<sup>99</sup>

As noted by the dissenting member, the majority overwhelmingly "prefers" the evidence and the witnesses put forward by the applicant, or concludes that the opposing parties "have not put forward any compelling evidence."<sup>100</sup> He notes that the majority does not provide reasons or make findings of credibility to explain these preferences or conclusions.<sup>101</sup> The majority explicitly acknowledges being "significantly influenced" by the applicant's status as the owner-operator of an existing quarry on adjacent lands. On this basis they describe aggregate extraction as a "long-established land use"

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97. *Walker, supra* note 95 at 1 [emphasis added].

98. *Ibid* at 1.

99. *Ibid* at 2.

100. *Ibid* at 182. The majority uses the language "no compelling evidence" with regard to the opposing parties argument thirteen times in their decision at pages 18, 31, 35, 46, 54, 55, 61, 62, 78, 79, 81, 83 and 90. They explicitly state that they "prefer" the evidence of applicant eight times at pages 25, 50, 53, 55, 68, 81, 96 and 161.

101. *Ibid.*

and note the “positive history” and “lack of negative impact” of the applicant’s existing quarry.<sup>102</sup>

The majority notes that they considered the applicant’s “many years of data.”<sup>103</sup> However, they fail to acknowledge the argument put forward by one of the non-owner parties that the existing quarry is a poor case study as it was established in 1964, long before the existing approvals process and regulatory monitoring regimes were established.<sup>104</sup> As there is no pre-extraction baseline for the existing quarry lands, any conclusions about its impact are of limited use at best, and potentially misleading at worst. In contrast, the dissenting member notes that monitoring data has only been collected from 1996 on the existing quarry lands and concludes that it is of limited use without baseline data about the hydrological or natural systems prior to extraction.<sup>105</sup>

The dissenting member in *Walker* emphasizes the onus on the proponent, finding that the majority had in fact reversed it.<sup>106</sup> He goes on to note that under the majority’s test few proposals could fail.<sup>107</sup> The dissenting member also took care to note that amendments and development permits “are not granted as of right.”<sup>108</sup> While aggregate development may be a contemplated use within the applicable land use framework, in that case the *Niagara Escarpment Planning and Development Act*, it is “only such development . . . as is compatible with that natural environment.”<sup>109</sup> While the majority concluded that their role was to “determine the appropriate balance” between the environmental, social and economic benefits,<sup>110</sup> the dissenting member explicitly rejected this “rebalancing” approach.<sup>111</sup> He found that the *Niagara Escarpment Plan* was an “environmentally focused

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102. *Ibid* at 5.

103. *Ibid* at 4.

104. *Ibid* at 251.

105. *Ibid* at 251–52.

106. *Ibid* at 188.

107. *Ibid*.

108. *Ibid* at 168.

109. *Ibid*.

110. *Ibid* at 18.

111. *Ibid* at 178.

plan” and other contemplated activities, regardless of their purported social and economic benefits are secondary, and in the case of aggregate mining, restricted.<sup>112</sup>

In *Rockfort*, the Board found that the Policy Statement clearly placed the onus on the proponent, and not on the objectors, despite the lack of a statutory burden in the *Aggregate Resources Act*: “The Board finds that this means that a proponent of development has the onus of demonstrating no negative impact. Objectors to a development need not demonstrate that there will be negative impact.”<sup>113</sup> While technically this burden under the Policy Statement applies to the Board’s determination regarding the *Planning Act* approvals, the Board found this to be highly relevant to the ultimate *Aggregate Resources Act* determination.<sup>114</sup> Further, while the Board in *Rockfort* noted that the Policy Statement “acknowledges the importance” of aggregate extraction, it found that mineral aggregate policies do not take priority over any other policy.<sup>115</sup>

In *Rockfort* and the *Walker* dissent, the presumption of the hierarchy of ownership is limited by the requirement that owners acknowledge other ecological and people-place relationships with land. While the *Aggregate Resources Act* framework and the process are structured around the ownership relationship of the applicant to the land, these decision-makers emphasize the onus on the proponent to draw attention to a broader range of relations involved in land use and its consequences. In doing so they expose opportunities for the structural relations imposed by law to be reoriented.

## 2. Precaution

In his review of judicial treatment of the precautionary principle, Chris Tollefson points to the approach adopted in recent Australian decisions that put it to work where it can

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112. *Ibid.*

113. *Supra* note 93 at 271.

114. *Ibid* at 271.

115. *Ibid* at 276.

“add analytic value.”<sup>116</sup> In *Telstra Corporation Ltd. v Hornsby Shire Council*,<sup>117</sup> the Land and Environment Court of New South Wales found that the principle can be applied where two conditions can be established: (1) a threat of serious irreversible environmental damage, and (2) scientific uncertainty as to the environmental damage.<sup>118</sup> While the *Rockfort* and *Nelson* decisions do not explicitly reference the precautionary principle, their analysis appears to put variations of the principle to work in circumstances fitting the *Telstra* conditions. Moreover, the dissenting member in *Walker* expressly adopts the precautionary principle.

In *Rockfort*, the Board based the analysis of potential negative impacts on an unmitigated or inadequately mitigated quarry, effectively a worst case scenario approach, despite the detailed and expert-prepared mitigation plan put forward by the applicant:

The Board finds that an unmitigated or an inadequately mitigated quarry could have a disastrous effect on the natural features and functions on the lands surrounding the subject property. Therefore a high degree of certainty, which would be attendant upon demonstration by JDCL [the applicant], is required before the Board approves the applications. Such demonstration has not taken place.<sup>119</sup>

They did not accept the applicant’s argument that the analysis should proceed on the basis of the impact of the mitigation plan working as proposed. Therefore, even while accepting the conclusions of the applicant’s experts as “supportable,” the Board found that the applicable Policy Statement and the Official Plan tests required more: “. . . demonstration of no unacceptable impact on the natural environment is the test established by the PPS and OP, and that test

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116. Chris Toffelson, “A Precautionary Tale: Trials and Tribulations of the Precautionary Principle” (Paper delivered at the *Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage*, University of Calgary, 23-24 March 2012) at 13, online: <[http://www.cirl.ca/system/files/Chris\\_Toffelson-EN.pdf](http://www.cirl.ca/system/files/Chris_Toffelson-EN.pdf)>.

117. [2006] NSWLEC 133 [*Telstra*].

118. *Ibid* at para 128.

119. *Supra* note 93 at 333.

goes beyond supportable conclusions.”<sup>120</sup> The Board explicitly rejected the proponent’s argument that they could meet the standard because the mitigation plan demonstrated a “strongly diminished risk of undesirable outcomes.”<sup>121</sup> This analysis is consistent with a precautionary approach, which Alan Randall describes as “driven by big risks” and the prospective prevention of “plausible but uncertain threats of harm.”<sup>122</sup> Rather than weighing outcomes, the precautionary approach looks to the worst-case and if the harm is “horrifying, even if unlikely,” prohibition may be the best result.<sup>123</sup>

In *Walker*, the dissenting member cautioned, “[e]ven if a proposed development may be technically feasible, that does not mean it should proceed.”<sup>124</sup> He noted that the applicable Plan’s language, requiring that the amendment would ensure only compatible development, sets a very high standard: “In other words, ‘possibly,’ or ‘likely,’ is not good enough.”<sup>125</sup> He adopts the precautionary principle as a minimum standard and finds the applicable regulatory regime, the *Niagara Escarpment Planning and Development Act*, sets an even higher standard of ensuring only compatible development.<sup>126</sup>

In *Nelson*, the Board’s rejection of the application was largely based on concerns about the impact on one endangered species, the Jefferson Salamander. The Board took note of the “knowledge gaps” about the species and its habitat, including the effectiveness of mitigation efforts to address threats.<sup>127</sup> Concluding that there is “still a great deal unknown,” the Board found that “particular care must be taken when assessing impacts” on the species *and* its habitat.<sup>128</sup> The standard applicable in that case was to establish with “a substantial degree of certainty that implementation

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120. *Ibid* at 328.

121. *Ibid* at 329.

122. Alan Randall, “Coal Seam Gas—Toward a Risk Management Framework for a Novel Intervention” (2012) 29:2 EPLJ 152 at 159.

123. *Ibid*.

124. *Supra* note 95 at 176.

125. *Ibid* at 188.

126. *Ibid* at 257.

127. *Supra* note 94 at 19.

128. *Ibid*.

of the proposed development will ensure that the Jefferson Salamander and its habitat will be protected.”<sup>129</sup>

In all three cases, the decision-makers are indicating a shift from an adaptive management approach, as proposed by the applicant and accepted by the Ministry, to a precautionary approach. As Randall argues, “adaptive management is essentially reactive. It is all about waiting until problems reveal themselves and seeking to resolve them by trial and error—basically, standing aside when the lights go out and then feeling our way in the dark.”<sup>130</sup> Applicant proposals to mitigate rather than prevent potentially catastrophic harm to land and non-human species exemplify the type of maladapted land use practices and material consequences that Graham’s argument result from law’s dephysicalized model of property.<sup>131</sup>

### 3. Reinserting Need

Despite the explicit rejection of need-based analysis in the Policy Statement, the Board in *Rockfort* found the issue of need to be relevant and explicitly re-inserted it into the analysis:

The language of the policy documents speaking to making as much of the mineral aggregate as realistically possible, to the market as possible, implies a Provincial, Regional and Town recognition of the need for the resource. However that does not make the issue of need irrelevant to these proceedings. James Parkin, qualified by the Board to provide expert land use planning evidence on behalf of JDCL [the applicant] opined that need is a relevant planning consideration, as it goes to balance. The Board finds that this is the case. It cannot engage properly in the mandated balancing exercise without understanding whether there is a need for the aggregate resource. If there were no demonstrable need for the resource in this Province the Board would be unlikely to countenance the changes and impact that a stone quarry would have on the Town and the Region.<sup>132</sup>

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129. *Ibid* at 21.

130. *Supra* note 122 at 161.

131. Graham, *Lawscape*, *supra* note 5 at 183–84.

132. *Supra* note 93 at 281.

In that case, the applicant had adduced evidence to establish the need and the objectors did not dispute it. Therefore, the Board accepted that need was established. However, the decision clearly indicates a willingness to consider such evidence should it be put forward.

The *Walker* dissent goes further to conclude that justification of the amendment *required* consideration of need and alternate sites in the context of that case.<sup>133</sup> As in *Rockfort*, it was the proponent in *Walker* who adduced evidence regarding need, which the dissenting member interpreted as a waiver of the Policy Statement “need shield” and therefore accepted the objectors’ evidence regarding need and alternate sites.<sup>134</sup>

#### 4. Place and Ecological Context

While all three decisions are largely expressed in terms of the technical evidence presented by the parties, in some of the Boards’ conclusions other voices are heard. In *Rockfort* and *Walker*, the physical reality of the land in question emerges as a significant factor in the decision, as do the material relationships asserted by objectors, both ecological and cultural.

The dissent in *Walker* expressly acknowledges the profound difference between land uses that have the potential to be sustainable, such as farming or forestry, and the “radical and complete” transformation of aggregate extraction: “In my view, a quarry operation is not in the same category of features as farming and forestry. While they are all ‘human-made,’ the latter are sustainable uses of the land. A quarry is not sustainable—it removes land and changes the landscape forever.”<sup>135</sup> This recognition of the threat of the loss of place not only acknowledges the physicality of the land, it recognizes the human relationships with that specific place as relevant to the decision. In Graham’s terms, the legal decision is “grounded” in the material reality of the land.<sup>136</sup> Citing *Nelson*, the dissent rejects the proposal to “protect” significant

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133. *Supra* note 95 at 222.

134. *Ibid* at 223.

135. *Ibid* at 211.

136. Graham, *Landscape*, *supra* note 5 at 20.

natural features, including endangered species, by fragmenting the landscape and leaving isolated islands of habitat in the midst of a large-scale aggregate mining operation. The member goes on to reject the majority's conclusion that rehabilitation to a large human-made lake, fragmenting the existing natural features, would "maintain the natural environment" based on the site-specific natural and cultural features of the landscape:

The footprint of the proposed quarry and the unnatural end-lake at the site will drastically, and permanently, alter this unique ecologic area. It will result in the destruction of most of the significant woodland that is its core. This will diminish the remaining natural features, functions, and systems in the area, including linkages, and surface and groundwater flow and recharge, and leave isolated and oddly shaped landforms of uncertain long-term ecological value.<sup>137</sup>

The dissenting member further rejected a series of findings by the majority that would allow destruction of significant natural features, concluding that it is impossible to maintain and enhance the natural environment by removing features and functions.<sup>138</sup> He rejected what he called the "more elsewhere" approach, finding that a significant woodland on the site cannot be destroyed because it is part of a larger woodland beyond the site.<sup>139</sup> He also roundly rejected the proponent's "Net Gain" proposal whereby woodland and wildlife habitat permanently destroyed by the quarry would be replaced by "recreating them" in another location:

If a feature is removed, or otherwise destroyed, in one area, and a similar feature created in another location within the NEP Area, then an existing feature will be destroyed within the NEP Area in the new location as well. The end result is that there will be two areas where features have been destroyed.<sup>140</sup>

Finally, the member explicitly rejects the characterization of the quarry as an "interim use" of the subject land,

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137. *Walker, supra* note 95 at 194.

138. *Ibid* at 245.

139. *Ibid* at 200.

140. *Ibid* at 204.



finding that the total time period of activity until complete rehabilitation was between 58 and 80 years.<sup>141</sup>

This analysis applies knowledge about the particular ecological and social systems of the place in question to conclude that there are material physical limits to how the land should be used. The member concludes that these limits should be determinative of the appropriate use for that place and explicitly distinguishes between forms of use that harm and destroy the land and those that have the potential to be sustainable. In doing so, the member shifts away from a fixed concept of ownership towards a contextualized understanding of property rights.

In *Rockfort*, the Board rejected the proponent's arguments about the inevitability or progressive nature of "change" and situates the subject lands as a place with a particular environmental and social context with relationships to the land and people around it:

The PPS [Provincial Policy Statement] directs conservation of significant cultural heritage landscapes. The subject property is part of such a landscape and the eradication of the agricultural context does not constitute conservation; it constitutes destruction. Such destruction is an unacceptable impact.<sup>142</sup>

The Board's conclusions point to the relationship between the land as a specific "natural" place and the human community connected to it:

In addition, the fundamental change to the character of the area attendant upon the proposed quarry would not be acceptable. The loss of views of rural lands, the loss of a cultural heritage landscape and cultural heritage resources and the conversion of a rural area into an urban area centred on a heavy industrial operation cannot be permitted in the interest of the production of more aggregate for infrastructure development. It is time for alternatives to aggregate for infrastructure construction to be found. Too much of what is essential to the character of this Province would be lost if aggregate extraction were to be permitted on lands like the subject

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141. *Ibid* at 252–53.

142. *Supra* note 93 at 318.

property. Lands situated in a significant cultural landscape, surrounded by significant natural heritage features and functions, are not lands on which extraction should be permitted in the absence of demonstration of no negative impacts.<sup>143</sup>

All the parties agreed that there were “no significant natural heritage features” on the property to be excavated or subject to activities associated with excavation. Nonetheless, the Board found that the impact on groundwater systems and therefore on the surrounding area dependent on the groundwater features would be negative.<sup>144</sup> In *Rockfort* the Board is shifting away from a presumptive use model to contingent ownership rights limited by the character and integrity of a place. Based on an acknowledgment of the land as situated within social and natural systems, the features and functions that make up a particular place are valued above the abstracted resource.

#### D. APPLYING A RELATIONAL APPROACH

The themes emerging from these cases reveal a potential shift in the responsiveness of land use decision-makers to assertions of non-ownership interests in private land. These cracks in the property narrative at the foundation of land use law should be exploited both theoretically and in practice. Creative thinking about relationships and rights has the potential to reorient debates about land use and the structure of environmental decision-making. Nedelsky’s four-step relational approach offers one way to begin this work. A full relational analysis of the cases discussed above would require further research into the complex relations and the diverse perspectives of the many parties involved in each case. What follows is a brief theoretical application of the four-step approach to Ontario’s quarry conflicts based on the information available in the quarry decisions and the themes discussed above.

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143. *Ibid* at 76.

144. *Ibid* at 323.

## 1. How Does Law Structure the Relevant Relations?

The first step of Nedelsky's approach is to consider the way that law structures the relevant relations. At the outset of the *Aggregate Resources Act* process, the owner as applicant is the primary actor and his ownership of the land as private property is the core relation. While the establishment of a regulatory regime like the *Aggregate Resources Act* does provide for public interest limitations on the ownership relationship, the relations it establishes are centered on the presumptive ability of an owner to use the land as a "source of commercial profit."<sup>145</sup> The exclusive legal relationship to the land and the resulting right to use it, even in ways that will fundamentally transform or destroy it, ultimately shapes the relationship of the owner to all other parties, human and non-human.

Non-owner parties are recognized within the legal framework of the *Aggregate Resources Act* and the Policy Statement. However, the *Aggregate Resources Act* positions non-owners as third-party objectors to a quarry decision with limited standing and contingent relations. Third party relations are with the decision-maker and the decision-making process—they are set apart from the primary ownership relationship. They are neither rights to the land nor a formal acknowledgement of a relationship with the land owned by the applicant.<sup>146</sup>

## 2. What Values Are at Stake?

A number of values may be at stake for the parties involved in quarry conflicts and each of these could take various forms for each party. For the applicant, one of these values might be expressed as the freedom to use property for private benefit and profit. For a non-owner party, one value might be expressed as the need to understand and respect the capacities and limits of land and ecological systems.

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145. Graham, *Lawscape*, *supra* note 5 at 183–84.

146. Graham, "Owning," *supra* note 8 at 261.

The process outlined in the Act shapes the space for these conflicting values to be heard and accounted for by the decision-makers in each case. In the cases discussed above, the precautionary principle provided non-owners with an analytical tool to encourage the decision-makers to consider specific and place-based knowledge about the land and environment in question. In this way, the reality of “physical limits to the status quo” became a legitimate factor for consideration.<sup>147</sup> Further, the precautionary principle opened up space for the decision-makers to prefer a prospective approach to managing risk, based on knowledge of the relevant ecological systems, including the temporal and spatial connectivity of particular places.<sup>148</sup> The insertion of a needs-based analysis also provided an opportunity for the decision-makers to raise questions about whether a specific place can, or should, be used in the manner and for the purpose proposed. Continued assertion of the need analysis in quarry cases could be used to raise critical questions about commodification of land and the interests served by a particular proposal: Is this specific aggregate needed? By whom? Where is it needed? For what purpose is it needed?

### 3. What Relationships Might Foster These Values?

Nedelsky’s framework now turns our attention to the types of relationships that might foster the values at stake. For the owner-applicant, the status quo *Aggregate Resources Act* framework recognizes ownership as the primary relationship in the approvals process. While the regulatory approvals process ostensibly limits ownership rights, its applicant-driven nature privileges the ownership relationship vis-à-vis non-owner parties. The applicant is free to propose a fundamentally transformative use by virtue of owning the land, a relationship that is understood to include both the freedom to commodify the owned land and to exclude non-owner parties from using it. The discussion of onus above demonstrates how

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147. *Ibid* at 266.

148. *Ibid*.

the applicant-driven process results in the owner's information setting the terms of the debate. It becomes the knowledge base for the decision-making process and all other actors articulate their objections based on the information contained in the application as prepared by and for the owner.

The cases reveal that the precautionary principle assists in conceptualizing relationships that foster respect for the capacities and limits of land and ecological systems. Reorienting people-place relations away from ownership as exclusion and commodification, and towards responsibility, requires an acknowledgement of the human dependence on, and role in, ecological systems.<sup>149</sup> As Graham argues, it is not a matter of replacing anthropocentric relations with ecocentric relations that maintain the nature/culture dualism at the heart of modern property law.<sup>150</sup> Taking a precautionary, "slow-down and learn"<sup>151</sup> approach to land use decisions provides the necessary opportunity to understand complex ecological systems, consider cumulative effects, and build responsibility for consequences into property relations. Such an approach would necessarily include a contextualized needs-based analysis that would consider the human need for extracted aggregate alongside other social and ecological needs in the context of specific person-place relations. For example, a decision-maker might consider whether the aggregate to be extracted is part of a natural system that fulfills social and ecological needs for the surrounding species and human communities. In this way, the resource is understood to have functions and relationships as it exists in an ecological system and not only as an abstract extracted commodity. Similarly, owners and non-owners are understood as part of an interconnected ecological system that constitutes a specific place. An owner's relationships of dependence and responsibility to other people, other species, and the land itself are acknowledged and made visible through a shift away from fixed exclusive rights to the more limited and contextual forms of property relations noted by Davies.<sup>152</sup>

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149. *Ibid* at 267; Graham, *Lawscape*, *supra* note 5 at 18.

150. *Ibid*.

151. Randall, *supra* note 122 at 161.

152. Davies, "Persons, Property, Community," *supra* note 31.

These types of relationships with land might be described as “stewardship”<sup>153</sup> or “custodianship.”<sup>154</sup> As Graham argues, they should be characterized by reciprocity with the land and acknowledgment of interdependence and responsibility.<sup>155</sup> In Ontario, as in many other places, examples can be found in the systems of law or jurisprudence of Indigenous peoples, such as the Anishinabek form of ownership described by Borrows in which “land is provisionally held for (con)temporary sustenance and for those unborn.”<sup>156</sup> As Graham notes, the point of looking to Indigenous legal practices and property relations is not to “essentialise and racialise law but to identify and respect the intellectual integrity and practical success of laws that have been and remain locally viable and authoritative.”<sup>157</sup> The key is that the land is brought back into property relations and the material consequences of destructive and harmful uses are exposed and considered in the decision-making process.

In the cases discussed above, the conflict is not about the use versus non-use of the land. Nor is it about changing ownership from private to public. Rather, quarry disputes are often about conflicting forms of land use, such as extraction versus agriculture. The cases discussed above demonstrate that use-based relationships articulated by non-owners can be understood as potentially compatible or sustainable in a specific place, and therefore, preferable to the transformative extraction proposed by the owner.<sup>158</sup> At the same time, the cases reveal openness to the less instrumental relationships articulated by non-owners, such as the importance of maintaining the integrity of a landscape or the character of place for both human and non-human needs. The point is not to erase human activity from the landscape, but to expose our

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153. *Ibid.*

154. Graham, “Owning,” *supra* note 8 at 268.

155. *Ibid.* at 262.

156. Borrows, *Constitution*, *supra* note 51 at 246.

157. Graham, “Owning,” *supra* note 8 at 267.

158. It is important to note that non-extractive forms of land use are not necessarily sustainable or rooted in person-place relationships of reciprocity or responsibility, the point is their potential to be when contrasted to other transformative and destructive forms of use that physically remove place.

connections to land and consider the material consequences of a range of human activities, including but not limited to those proposed by the owner.

#### 4. What Kinds of Rights Can Foster These Relationships?

Nedelsky's final step brings us to the practical question of the rights that can foster these relationships. In her words, what are the "institutional and rhetorical means of expressing, contesting and implementing such values?" As this analysis has considered the role of non-owners in quarry conflicts, one possibility would be to consider new or improved rights for third parties in the current decision-making process. Examples of such rights are discussed elsewhere, such as proposals for a "right to a healthy environment."<sup>159</sup> Proposals for rights or standing for the land or non-human species have also been proposed and might be appropriately considered.<sup>160</sup> However, by clarifying what is at stake, a relational analysis of Ontario's quarry disputes points to third possible approach—redefining what ownership and its associated rights mean in land and property law.

Starting with a redefined ownership relationship has the potential to reorient the land use planning process away from a contest of rights and interests. If ownership were understood as affording limited and contextual rights of private use and benefit but to exclude rights to fundamentally transform ecological systems and/or cause substantial harm or destruction of the land, decisions about such uses would need to be made very differently.<sup>161</sup> There may still be resources that we decide we need to use despite the potential to destroy or transform places. However, such decisions would no longer be driven by an owner's private decision to profit from doing so. The material consequences could be exposed and examined

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159. David R. Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012).

160. See e.g. Peter Burdon, ed., *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Kent Town, South Australia: Wakefield Press, 2011).

161. Galloway, *supra* note 15 at 80.

through independently obtained knowledge about the social and ecological systems of the specific place. Reorienting land use law away from the ownership model of property could make proposals for new forms of environmental rights for a range of parties, including non-human species, less difficult to conceptualize and implement in practice. Rather than adding more rights to the already complex existing conflict of claims and interests, these types of novel rights would have the space to reshape law's relations.

What would this look like in practice? In the context of Ontario's quarry disputes this might mean replacing the current licensing process with a publically-driven aggregate development strategy informed by independent and specific place-based knowledge about the land and social and ecological systems that aggregate minerals are a part of. In the short term, changes could build on the opportunities revealed in the cases discussed above. For example, a statutory onus on the proponent to demonstrate that no negative impact will result from the proposed quarry could be added to the Act. Requirements for both a needs-based analysis and a precautionary approach could be included in the Act and the Policy Statement. Support for non-owner parties to bring forward a range of concerns at all stages of the decision-making process, including expensive expert scientific and technical evidence, could also significantly improve the quality of the knowledge base for decision-makers. But the focus of creative legal interventions and law reform efforts should be clear—to transform the way law structures our people-place relations from ownership to responsibility.

## CONCLUSION

Examining land use law through a relational analysis opens up space for the creative articulation and assertion of people-place relations in land use decision-making. As Nedelsky's work makes clear, law structures the relationships in quarry disputes—both those between people and those between people and places. And as Graham argues, land use law structures property relationships to obscure both the physical nature of property and the relationships between



people and places. In Ontario, the law and policy of land use transforms places identified as sources of aggregate minerals into commodities—all other natural, social and cultural features of the land are superseded by the use-value of the aggregate. Claims based on non-ownership relations with other aspects of the land are transformed into Graham's dissident voices. The resulting legal "maladaptation" has material consequences as land use practices that disregard the ecological capacities and limits of particular places continue to be not only permitted, but deemed appropriate and desirable.<sup>162</sup> Land use conflicts like Ontario's quarry disputes arise as a result of law's failure to account for relationships with places outside of the ownership model, based on connections with the social, cultural and ecological features of a specific place.

Future research is necessary to identify the range of values at stake in these disputes, as diverse parties will experience and articulate the central concerns differently, perhaps emphasizing ecological sustainability, environmental health, food security, or Indigenous rights. Similarly, future research is needed to explore the diversity of relationships these parties envision to protect these values—perhaps stewardship, custodianship, perhaps local self-government or Indigenous sovereignty. The recent quarry cases outlined above reveal a strategic opening for people-place relationships to be asserted by the non-owner parties with an interest in how privately-owned land can and should be used. By articulating connectedness with, and responsibility to, specific places in these forums, we can do at least some of the work to move land use law beyond a model of property as a contest of abstract rights to exclude and control. Creative re-thinking of what ownership means, what property is, and the potential for reciprocal relationships between people and places, will be required if we are to create rights that realize and institutionalize these relationships and protect these values. Perhaps we can start, as Graham suggests, by looking outside of ourselves and take direction from the very places at the heart of these debates:

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162. Graham, *Landscape*, *supra* note 5 at 175, 206.

If we want to know how to reshape our property law, we have to look no further than the landscape because it is the landscape that reveals our place in the world and the opportunities and limits of our connection with it.<sup>163</sup>

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163. *Ibid* at 206.