

**THE PLACE OF PRIVATE PROPERTY IN LAND USE LAW:  
A RELATIONAL EXAMINATION OF ONTARIO'S QUARRY CONFLICTS**

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## ABSTRACT

Land use law structures the way we make decisions about how we live together and with the world around us. In doing so, it shapes our relationships not only with the people around us, but with the places we inhabit and encounter. This dissertation examines how land use law structures the relations between people and the ‘more-than-human world’ to uphold the ownership model of property relations and to privilege particular forms of land use. Through documentary and interview-based qualitative research, it presents an eco-relational examination of one of the most contentious land uses in Ontario – aggregate mineral extraction.

The primacy of private ownership in land use decision-making has particular spatial, temporal, social and ecological consequences for the places and communities involved in land use conflicts. As certain forms of land use are privileged through law and legal process, other relations with place fall outside the boundaries of the ownership model of property relations and are deemed less legally significant. Nevertheless, land use conflicts continue to arise because people routinely assert forms of interest in land and resources they do not own. These ‘more-than-ownership’ relations challenge the presumptive detachment of people from the places they live in, work with, and love. By examining how such relations are imagined, articulated and asserted through a place-based relational framework, this dissertation demonstrates their potential to disrupt the power of private ownership to determine whether and how land should be used.

Realizing environmentally just land use decision-making requires a transformative shift in legal property relations to de-centre private ownership and foreground a much broader range of people-place relations. This includes reconceptualizing ownership to incorporate notions of reciprocity and responsibility to the broader set of ecological, physical and material networks of relation that make up a particular place. By changing the way we think about ownership we can change the way we make decisions about land use. In doing so, we have the opportunity to reshape our relations with the places we inhabit, and with each other.

## **DEDICATION**

To all the Participants who welcomed me to their homes, kitchen tables, and backyards, and taught me about the places in this project.

To my mother who taught me about living in a good way, fighting for the world you want, and doing what you love.

To Henry and Luke who remind me to see places new and old with joy, awe, and love.

And to the lands and waters of Ontario that inspired this work and have shaped me as a person, a scholar, and a teacher.

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## Chapter One: Introduction – Defining and Mapping the Project

We need to take our traditional concepts 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. Those questions do not necessarily preclude a concept of property, but they imply a focus not on limits but on forms of interaction and responsibility for their consequences.<sup>1</sup>

### 1. Prelude

On a crisp winter afternoon in 2009, I happened upon an article about a proposal for an open pit gravel mine in Melancthon Township, Ontario.<sup>2</sup> It described growing local opposition to a proposal to site the largest quarry in Canada in the heart of Ontario's potato farmland, among the rolling highlands between Toronto and the Bruce Peninsula extending out into Georgian Bay and Lake Huron. I read the article at the kitchen table of the farm my in-laws own, realizing that the proposed site was just down the road.

Before sitting down to read the article, I had never given much thought to where the materials that build roads and subway tunnels came from. I had noticed quarries along Ontario's highways, but rarely made the connection between them and the concrete foundations of houses, the towers of Toronto's skyline, or the highways themselves. I had never heard of aggregate minerals or karst rock and knew little about the nature of water tables or the different types of soil scattered throughout the province. The article piqued my interest both as a lawyer interested in land use and environmental issues, and as someone with these local landscapes imprinted on my heart.

Our family spends a lot of time at that farm. Two years later, my partner and I were married there on a wild and stormy Labour Day weekend. But the farm was not my first experience with the highlands of Dufferin and Grey counties. This place found its way into my life much earlier. As a child I spent summer weekends just across Highway 10 at my great grandfather's goat farm, where he and his partner retired after my grandfather took over the

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<sup>1</sup> Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self" (1990) 30 *Representations* 162 at 184.

<sup>2</sup> Ben Rayner, "Limestone Quarry Threatens Prime Farm Land", *Toronto Star* (6 December 2009), online: <[https://www.thestar.com/news/ontario/2009/12/06/limestone\\_quarry\\_threatens\\_prime\\_farm\\_land.html](https://www.thestar.com/news/ontario/2009/12/06/limestone_quarry_threatens_prime_farm_land.html)>.

family auto repair shop in downtown Toronto. I learned how to feed baby goats and took chilly swims in the forest pond. I clearly remember the smell of the porch where everyone took off their barn clothes and boots, and the view from that old farmhouse kitchen, with the golden light of late summer evenings spreading across rolling hills.

It is a place I now understand to be subject to ongoing land claims by the Haudenosaunee Peoples, and connected to the territory of several other Indigenous nations through habitat and water connectivity. These intersecting and overlapping Indigenous systems of land use regulation are now overlaid with colonial law as a result of the establishment of settler farming communities and the colonial division of collective land into freehold parcels. The area has been a settler agricultural community for several generations, and small scale farm operations still characterize the Township, which has one of the lowest income levels in the province. However, growing populations of amenity-seeking exurbanites and recreational tourists like my in-laws and my family now inhabit the surrounding areas, zoned as protected Greenbelt and Niagara Escarpment lands under provincial land use plans. More recently the area has also become the site of a large number of wind turbines, itself a highly contested land use governed by a statutory regime structured around private land ownership. As I now know, it is a complex place, constantly being made and remade from messy interconnections of social and material relations.

After I read that article, I attended a packed meeting at a community hall in Shelburne in January 2011, organized by the local group opposing the quarry: The North Dufferin Agricultural and Community Taskforce. The formal application to dig the quarry would not be filed until April, but the landowner Highlands Corporation had confirmed the plan to “explore other land uses” with the local council in 2009, including extracting the aggregate limestone sitting below their fields of potatoes.<sup>3</sup> Confusion, frustration, and outrage were all on display in the crowd, but a particular narrative caught my attention as a lawyer and an aspiring academic. Over and over at that meeting, and in later conversations, I heard people say the company had lied when they purchased the land and that “the law should do something about it”. What they meant was that years earlier, when representatives of the Highlands Corporation had approached farmers in the area to purchase their land, the Corporation told them that they wanted to create the largest potato farm in Ontario. And they

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<sup>3</sup> Ibid.

did, for a time. However, the community soon learned that this was only an interim land use for Highland. Surveyors on the land, tree removal, and the clearance of old farmsteads, roused suspicion that something else was planned. There were allegations of bullying and aggressive tactics to pressure farmers to sell neighbouring parcels of land. Landowners started to decline offers to buy their land, fearful of the consequences for the community and future generations. Farmer Jim Black told the Toronto Star, "Once he started talking quarry, there was no way he was gonna get this place. I have six grandchildren – one of them's 19 now, two 15-year-olds – and we've got one here who just can't wait to get farming, so what are we going to tell them later on, our kids? We made a big hole in the ground?"<sup>4</sup> Another farmer told me about a Highlands representative who approached them to say he knew they needed to sell since they only had daughters and therefore no one to farm the land. They returned the cheque he left on the table.<sup>5</sup>

When the Highlands Corporation revealed that they planned to extract aggregate minerals from the land and create a 'mega-quarry' that would extend 200 feet below the water table on 2,400 acres of the site where they had been farming potatoes, local landowners were furious about the proposed transformation of the landscape and their communities. The proposal began to draw attention from environmentalists, First Nations, and urbanites; from foodies to weekend and recreational land users. People described the area as the "roof of Ontario" - the highest point in the Province and home to the headwaters of five major river systems flowing into two Great Lakes. They drew attention to the highly prized honeywood soil that stays wet in dry weather and dries when the weather is wet, and to the water table so close to the surface that springs pop up in many backyards. Indeed, the unique qualities of the soil are due to the presence of that valuable limestone close to the surface and the ample freshwater that runs through it. Therefore, as Black told the Toronto Star, extraction would fundamentally transform this place: "It's one thing to talk about growing potatoes ... and everything, but as soon as you start to destroy this land there's nothing left. It'll never come back again."<sup>6</sup>

I noticed an interesting tension in the narratives. People would often acknowledge that it was "their land", referring to the Highland Corporation's private ownership of the blocks that it had assembled. Highland could do much of what they had already done to transform the land

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<sup>4</sup> Ibid.

<sup>5</sup> Interview 9, August 13, 2014.

<sup>6</sup> Rayner, *supra* note 2.

simply because they owned it. There was no contention that the land was public or that it should be. This was an area dominated by private land holders and initially many were happy to see large-scale investment in the area. Yet, people wanted a say in what Highland could do on that privately-owned land. Despite the legal boundaries of property ownership, they were asserting relations with the Highland sites and felt they should be able to make claims that extended past the survey lines and beyond their own personal interest. They felt these claims should be heard and considered by decision makers, and that they should matter to the outcome:

It doesn't take much of a hiccup to cause a problem. We're talking about the generations following. It probably doesn't make much difference to me, but where's the good food going to come from if you don't have land to grow it on? What can you leave your grandchildren? Clean air to breathe, pure water to drink and good quality soil, secure, that you can grow food on. What else can you leave them that's any more important?<sup>7</sup>

They looked to the provincial land use planning system to provide a space for their claims. The law, they told me, should do something about this. Perhaps, but I was not so sure exactly what it could or should do. What exactly was the role of 'law' in all this?

Following the submission of the Highlands application, NDACT mobilized to engage people in the provincial consultation process and retained experts to respond to the over 3,000 pages of technical reports prepared by the Corporation's 17 private consultants. During the spring of 2011, I assisted with some of this work on submissions as a volunteer and gained some insight into the complexity of the regulatory and planning processes involved, as well as the highly technical expertise required to understand the implications and potential consequences of the proposal. I was lucky enough to work alongside people with this expertise, as well as rich local knowledge, and heard about many concerns and frustrations with the process. It was too long, too short, too complex, did not take enough into account, it was weighted towards development, it was hijacked by "Not In My Backyard" activists, no one was listening, there were too many meetings, the meetings were in the wrong place and with the wrong people. But what I kept coming back to was the tension between the private nature of the proposed quarry site and the range of interests and relations other people had with the place at stake – social, economic, material, and affective relations that belied the simplicity of either owning or not-owning the land. Would the planning and legal processes now underway

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<sup>7</sup> Ibid.

create space for these claims to be heard and meaningfully considered? Would the relationships that people had with privately owned land influence the outcome of decisions? Should such relationships influence the outcome of decisions?

This is where my inquiry began: an unassuming place along Highway 10 in Southern Ontario, where the complex socio-ecological networks of relation were suddenly made visible through a planning process, and where the tensions between private property and public land use planning were laid bare. I have continued to return to the ancient and subtle landscapes of this part of Southern Ontario throughout the project for guidance, knowledge, and inspiration. I hope this project is part of my giving back to that place, and so many others I have lived with and learned from, and contributing what I can to (re)shaping our people-place relations.

## **2. Description of the Research: Placing Private Property**

Land use law structures the way we make decisions about how we live together and with the world around us.<sup>8</sup> In doing so, it shapes our relationships not only with the people around us, but with the places we inhabit and encounter. How we live with these places is a central part of how we will face the challenges of contemporary environmental crises in just and sustainable ways – the floods and droughts of climate change, the rapid loss of biodiversity, as well as increasing shortages of fresh water and arable soil. This dissertation examines how law does this structural work to shape people-place relations, and how we might transform land use law to build relations of humility, reciprocity, and respect with each other and the “more-than-human” world.<sup>9</sup>

The model of property in which Anglo-Canadian land use law is embedded centres decision-making on the private ownership of land. We legally recognize forms of control over and use

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<sup>8</sup> I use “land use law” to describe the overlapping and intersection statutory and policy regimes that govern how land can be owned, used, and managed, including statutory and common law property, land use planning law, environmental law, water law, mining law and energy law.

<sup>9</sup> I adopt the term “more-than-human” from Sarah Whatmore who describes the effect of the “materialist recuperations” in geography as a “return to the livingness of the world shifts the register of materiality from the indifferent stuff of the world ‘out there’, articulated through notions of ‘land’, ‘nature’, or ‘environment’, to the intimate fabric of corporeality that includes and redistributes the ‘in here’ of human being.” See her article, “Materialist returns: practising cultural geography in and for a more-than-human world” (2006) 13 Cultural Geographies 4 600 at 602. This approach avoids defining other parts of the material world as non- or other-than human and reinscribing the enlightenment dichotomy between humans and nature.



rights to land, but we have a much more difficult time recognizing relations with the land premised on interdependence, reciprocity or responsibility. The primacy of private ownership in land use decision-making has spatial, temporal, social and ecological consequences for the places and communities involved in land use conflicts. In particular, legal property relations play a key role in upholding hierarchical relationships of environmental injustice and facilitating transformative extractive development. As certain forms of land use are privileged through law and legal process, other relations with place fall outside the boundaries of the ownership model of property relations and are deemed less legally significant or simply non-cognizable. These relationships between parties who are *not* legal interest holders and land that is owned by someone else are often rejected, ignored or invisible in traditional Anglo-Canadian accounts of property. Nevertheless, land use conflicts continue to arise because people routinely assert forms of interest in, or a relationship with, land and resources they do not own. In regulating the use of private land, the law shapes, and is shaped by, these people-place relations even where they are severed and obscured for the purpose of legal decision-making. These ‘more-than-ownership’ relations challenge the presumptive detachment of people from the places they live in, work with, and love.<sup>10</sup> Their assertion brings the socio-materiality of particular places into view, disrupting the orderly management of productive land use through law.<sup>11</sup> Such relations are complex, and even contradictory, yet in this

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<sup>10</sup> Building on Whatmore’s conception of the more-than-human world, I adopt the term ‘more-than-ownership’ to describe the relations to place that fall outside of the boundaries of ownership. As discussed in Chapter Seven, as this project developed I rejected the negative and residual category of the “non-owner” used to describe those outside of the private ownership relationship in property theory. Such parties or participants are most often defined as non-owners, third parties, or objectors, defined by their distance and exclusion from the primary legal relationship and the lack of enforceable interests at the outset of the analysis. Rather, ‘more-than-owners’ is adopted to describe individuals and groups who assert direct place-relations or those who have indirect connections but assert related experience or interest in the outcome of a land use decision. Therefore, as discussed in Chapter 7, the term is not intended to privilege such relations, but rather to foreground them as expanding the boundaries of property relations beyond private ownership.

<sup>11</sup> Following from feminist work on materiality, such as Karen Barad, Jane Bennett, and Stacey Alaimo, I use the term socio-materiality to emphasize the relationality and connectivity of the social and the material, neither of which I understand to exist as fixed or stable categories but rather to be constantly, and co-constitutively, made and remade. In doing so, I reject a dualistic understanding of human social meaning and experience versus an inert and objectified physical world that already exists ‘out there’ without reducing the material to purely social construction. Rather, I emphasize the need to recognize human social experience, including law, as embedded in and inseparable from the material world – both are performed and produced through the dynamic relations between people, places, and more-than-humans. In the context of property, the focus of this project, Margaret Davies argues an emphasis on property’s “emergence from relations between human and non-human spheres” allows us to see the “thingness” of property without reducing property to the thing itself. See, Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Durham: Duke University Press, 2007); Jane Bennett, *Vibrant matter: A political ecology of things* (Durham: Duke University Press, 2009); Stacey Alaimo, *Bodily Natures: Science, Environment, and the Material Self* (Bloomington: Indiana University Press, 2010); Margaret Davies, “Material Subjects and Vital Objects—Prefiguring Property and Rights for an Entangled World” (2016) 22 *Australian Journal of Human Rights*.

messiness they play an under-examined role in challenging the ownership model of property at the heart of Canadian land use planning. These more-than-ownership relations are the focus of this dissertation.

In focusing on these relations I aim to move beyond dualistic debates between “anthropocentric” perspectives in which the “nonhuman world has value only because, and insofar as, it directly or indirectly serves human interests”<sup>12</sup> and “ecocentric” perspectives in which ecological systems are presumed to have intrinsic value independent of human interests and are therefore of “direct moral importance.” While these may be radically different positions in many ways, they are both premised on the assumption that humans can and do exist outside and apart of ‘nature’. In this project, I reject this binary and instead adopt the concept of the ‘more-than-human’ in order to reintegrate humans into ecological systems and the material world. Rather than advocating for novel or parallel rights for ecological systems or entities, I seek to foreground the relatedness and interdependence of humans and the more-than-human world and consider how this might shape the way we construct property relations; and, therefore, how we make decisions about land use.

Strategic challenges to the dominant narrative of property relations can be found throughout Canadian legal history. 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, directly challenge colonial legal frameworks governing land use and people-place relations and offer place-based alternative legal orders.<sup>13</sup> Feminist litigation has also successfully challenged legal and social constructions of ownership and property relations in the context of family law.<sup>14</sup> These challenges have been put forward as part of broader legal strategies to address

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<sup>12</sup> Katie McShane, “Anthropocentrism vs. nonanthropocentrism: Why should we care?” (2007) 16 *Environmental Values* 2 169 at 170.

<sup>13</sup> See for example, John Borrows, “Living between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47 *U Toronto LJ* 417; John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Gisday Wa & Delgam Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet’suwet’en hereditary chiefs in the Supreme Court of British Columbia, 1987-1990* (Gabriola, BC: Reflections Gabriola, 1992); Kent McNeil, “Indigenous Law and Aboriginal Title” online: (2017) Osgoode Legal Studies Research Paper Series 2 182: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2825097](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825097)>; Senwung Luk, “The Law of the Land: New Jurisprudence on Aboriginal Title” (2014) 67 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 289; Karen Drake & Adam James Patrick Gaudry, “‘The Lands... Belonged to Them, Once by Indian Title, Twice for Having Defended Them..., and Thrice for Having Built and Lived on Them’: The Law and Politics of Métis Title” (2016) 54 *Osgoode Hall Law Journal* 1 1.

<sup>14</sup> Mary Jane Mossman, “Running Hard to Stand Still’: The Paradox of Family Law Reform”(1994) 17 *Dal LJ* 5; Heather Conway & Philip Girard, “No Place Like Home’: The Search for a Legal Framework for Cohabitants

historic and ongoing injustice. They are, therefore, both partial and vulnerable in the context of enduring colonization, racism and gender inequality. Nonetheless they illustrate how dissident voices can and do use legal processes to advocate for, and perform, alternative visions of property. This project considers whether and how land use conflicts are also emerging as potential strategic sites for rethinking property relations.

This dissertation examines how land use law structures the relations between people and the ‘more-than-human world’ in ways that uphold the ownership model of property relations and privilege particular forms of land use. It demonstrates the central roles that law and legal process play in structuring people-place relations by examining the regulation of aggregate mineral resource extraction in the province of Ontario. At the same time, this research demonstrates how the assertion of more-than-ownership relations challenges the dominant legal structure of people-place relations and strategically disrupts the power of private ownership to determine whether and how land should be used. In doing so, this project argues for an eco-relational reorientation to land use law, one which foregrounds a much broader range of people-place relations and creates space for reciprocity with place.

Aggregate mineral mining is hard rock mining for *gravel, sand or limestone*. These are used in a wide range of everyday products, from toothpaste to subway tunnels to condo towers. Aggregate is everywhere in the cityscape, but also in the roadways connecting rural and remote communities where extraction is often sited. It is quite literally the foundation of our built environment. As such it is intimately linked to the narratives of growth and development in a particular place: what we need, what is inevitable, and what we want. Aggregate mines are large industrial open pit mines. As such, they have significant and transformative impacts on the land and the human and more-than-human communities in which they are located. Even with the best possible rehabilitation, the site of a mine will never return to what it once was – perhaps a lake, perhaps a recreational area, but also, and more often, a large hole or even a landfill. Indeed, aggregate mineral mining, or quarrying, has become one of the most contentious land use issues in Ontario.

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and the Family Home in Canada and Britain"(2005) 30 Queen’s LJ 715. See also, *Peter v. Beblow*, [1993] 1 SCR 1980.

Like other mineral resources, aggregates are fixed resources. Therefore, although it is regulated as a land use planning issue in Ontario, aggregate extraction has distinct siting issues from other types of controversial land uses, which are dealt with through public planning and environmental assessment processes in which a number of alternative sites are considered. The rock is where it is, and that is where extraction must take place. The fixed nature of the resource means extraction is concentrated in particular areas, for example, the area around Orangeville has a high concentration of mine sites. But extraction is not only fixed by geography. Aggregate mining in Ontario largely occurs on private land, prompted by an application by an owner to the Ministry of Natural Resources and municipal governments. Site selection, therefore, is inextricably linked to land ownership as well as the fixed location of the resource. In this way, who owns the land is central to Ontario's quarry stories, and the relationship between private property and public land use planning is uniquely exposed.

Through documentary and interview-based qualitative research, this dissertation examines the way people imagine, articulate and assert non-ownership relationships with places in the context of aggregate extraction disputes. In doing so, it demonstrates that realizing environmentally just land use decision-making requires a transformative shift in legal property relations to de-centre private ownership and foreground a much broader range of people-place relations. This includes creating space for the reassertion of Indigenous legal orders as primary sources of land use law, as well as the recognition of the complex and interrelated relations within and between the more-than-human world. In this way, I argue, ownership can be re-conceptualized to incorporate notions of reciprocity and responsibility – not only with human 'more-than-owner' parties with relations to privately owned land, but with the broader set of ecological, physical and material networks of relation that make up a particular place.

### **3. Chapter Outline: Mapping the Project**

The dissertation is published as a portfolio that combines traditional chapters with published articles. It is structured into nine chapters beginning with this Introduction, which provides an overview. Chapters Two, Three and Four are traditional dissertation chapters, containing the literature review, methodology, and an overview of the relevant legal and policy framework. Chapters Two and Three set out the theoretical and methodological approaches adopted in this dissertation. Chapter Four provides a detailed analysis of the legal and policy frameworks

applicable to the extraction of aggregate resources in Ontario informed by both the theoretical framework and the documentary and interview data. Chapters Five to Eight are published papers. Chapter Nine is a substantive conclusion including final remarks on the ongoing legal and policy reforms related to aggregate extraction.

#### A. Chapter Two: Theoretical Framework

Chapter Two provides a review of scholarship relevant to the theoretical strands woven together in the later chapters: property theory and critiques; legal geography; environmental governance; planning history and theory; and, environmental justice. It presents the key debates and concepts which inform my methodological approach to data collection and analysis in later chapters, and my argument for an eco-relational approach to land use law.

Section One reviews literature on property, beginning with a brief introduction to people-place relations in Indigenous legal orders and Indigenous jurisdiction over land use decisions in Canada. It explains the link between the displacement of Indigenous laws through historical colonial settlement and contemporary property and planning law in Canada. This section then traces the dominant ownership model of property relations from its historical roots in Lockean conceptions of property through to the Hohfeldian dephysicalized model of property relations and contemporary Law and Economics approaches. Three types of critical approaches to property are then presented: social critiques such as Jennifer Nedelsky's relational framework; environmental critiques such as Nicole Graham's analysis of abstract and dephysicalized property and call for reciprocity with place; and, alternative models of property such as Elinor Ostrom's work on common pool resources.

Section Two introduces the legal geography literature and explores key debates in three areas of critical legal geography: (1) property; (2) place; and (3) nature and rurality. It begins by tracing the emergence and evolution of scholarship with an interest in the relationship between law and space. It then notes the attention legal geographers such as Nicholas Blomley have given to property and the influence of feminist and relational approaches to property including the work of Doreen Massey and Sarah Keenan. The section reviews theorization of 'place' by legal geographers, particularly those who have built on Massey's complex, negotiated and dynamic conception of space. The final strand of legal geography examined is work on 'nature' and rurality. The work of legal geography scholars examining

the social construction of nature is explored, such as David Delaney's critical understanding of nature, building on feminist and science studies scholarship. Finally, the section examines related scholarship on rurality, such as the work of Lisa Pruitt exposing the distinctive operation of law in rural space.

Section Three of the literature review brings together literature on environmental governance, planning, and environmental justice to develop an understanding of law as a key mode through which land use decisions are governed. It first introduces scholarship on governance generally, with an emphasis on critical approaches to understanding neoliberal modes of governance. It goes on to focus specifically on the environmental governance literature, which theorizes the complex intersection of state power and non-state actors in environmental decision-making. This section then examines the scholarship on land use planning, particularly the history of planning in Canada and the limited scholarly treatment of planning law. Finally this section concludes by introducing environmental justice scholarship with a particular focus on Canadian environmental justice scholars. It specifically considers calls for environmental justice scholarship to extend beyond the human world, such as Deborah McGregor's vision of environmental justice from an Anishnaabe perspective, as well as Randolph Haluza-Delay, Michael J. De Moor, and Christopher Peet's place-pluralism. It concludes by examining the need for a more attentive and complex treatment of rurality in environmental justice literature and practice.

### B. Chapter Three: Methodology

Chapter Three is a short overview of the methodological approach used in this research project. It introduces qualitative approaches to research generally and then specifically examines place-based qualitative approaches. The chapter describes the place-based qualitative approach to data collection adopted in this research, including both the documentary analysis and interviews. It provides a detailed account of the research design, including the interview process and the data analysis method. The chapter notes the techniques adopted to ensure validity and address concerns about the generalizability of qualitative research. Finally it sets out the limitations of the research.

### C. Chapter Four: The Law and Policy of Aggregate Mineral Extraction in Ontario

Chapter Four provides a detailed overview of the legal and policy frameworks applicable to aggregate licensing in Ontario. It identifies key procedural elements of aggregate extraction applications and appeals, as well as substantive legal and policy requirements, and places these in the context of the theoretical framework outlined in Chapter Two. The chapter also includes documentary analysis, in particular legislative history, case law, and non-scholarly commentary, as well as the perspectives of expert and more-than-owner interview participants. The chapter begins with a historical overview of the regulation of aggregate extraction in Ontario, from its treatment as a largely unregulated activity, to one governed by a complex proponent-driven regime engaging multiple statutes and policies at all levels of government. A detailed review of the applicable statutory and policy regimes then examines the following areas of law and policy: the constitutional rights of Indigenous communities under s 35 of the Constitution Act and the duty to consult those communities about activities that may affect those rights; the *Aggregate Resources Act*; the Provincial Policy Statement that guides all planning decisions in the province; and, the other provincial, federal, and international regimes that intersect with these primary frameworks.

The chapter then provides an overview of the participation and consultation requirements and opportunities available in the municipal and provincial planning processes. Key decision-making powers of municipal, provincial, and adjudicative actors are then described. Finally, Chapter Four concludes with a brief overview of two key amendment and review processes: the 2017 amendment of the *Aggregate Resources Act*; and, the ongoing coordinated review of the provincial land use plans, including the Niagara Escarpment Plan.

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

Chapter Five consists of the paper *Putting Property in its Place*, which was published in a special edition of the *Revue générale de droit* on human rights and the environment.<sup>15</sup> The paper links the legal and policy framework with key theoretical strands from Chapter Two. In

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<sup>15</sup> Estair Van Wagner, “Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning” (2013) 43 *Revue générale de droit* 275.

particular, it weaves together relational theory with critical property theory and legal geography to foreground the work that law does in structuring human relations with land and the more-than-human world.

The paper introduces the legal framework for aggregate licensing decisions, and then examines three high profile aggregate mine siting decisions in Southwestern Ontario. 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. By centering the structural work that law does to manage people-places relations in the context of these decisions, the paper demonstrates specific ways in which Ontario's land use law attempts to contain people-place relations within the boundaries of private property ownership. In particular, the article points to the under-examined role that parties who do not own the land at stake play in land use disputes. It exposes law and legal actors as central to determinations about what is at stake, which claims are included or excluded from decision-making processes, and which relations influence outcomes about the use of private land. At the same time, this chapter argues that attempts to bound property relations are incomplete and partial, and points to strategic openings for the assertion of transformative relations with the more-than-human world in aggregate mine siting decisions.

Applying a relational rights analysis informed by environmental critiques of dominant property relations, the paper concludes by arguing for a relational reorientation of property ownership in land use and environmental decision-making. In doing so, it sets the foundation for an eco-relational approach informed by Indigenous legal orders and critical property scholarship. This approach, I argue, has the potential to shift people-place relations away from the bounded and exclusionary nature of private ownership, towards relations of responsibility and reciprocity between humans and the more-than-human world. By weaving these foundational theoretical strands together, this paper sets the stage for the analysis of the interview data in the following three papers.



E. Chapter Six: The Work of Ownership: Shaping contestation in Ontario's aggregate extraction disputes

Chapter Six consists of the book chapter, "The Work of Ownership: Shaping contestation in Ontario's aggregate extraction disputes" forthcoming in the edited volume *Contested Property Claims*.<sup>16</sup> This paper builds on the approach developed in Chapter Five by identifying specific ways ownership operates to both order actors and events, and to control the flows of knowledge and information that are included or excluded in the aggregate extraction licensing process. Ownership, I argue, works through law to assert both the chronological power to control the sequencing of events, as well as the substantive power to manage and control the relations engaged by decisions about how land can, and should, be used.

This paper engages with key legal geography concepts and critical planning theory, particularly Blomley's concept of "bracketing"<sup>17</sup> and Valverde's work on "spatiotemporalities".<sup>18</sup> By examining both the legal and policy framework and the interview data, the paper traces the spatiotemporal power of ownership from site selection through to the control of knowledge and expertise at the adjudication stage. It demonstrates the specific ways in which the law and policy of aggregate licensing attempt to "bracket" human relationships with land in order to produce and reinforce extractive forms of land use. By structuring the sequence of events to privilege and enrol private owners in extractive development, law creates a hierarchy of interests in relation to land with procedural and substantive consequences for human and more-than-human relations. Not only are other actors provided with limited opportunities to engage in and intervene in the process of decision-making, they are bound by the spatial power of owners to transform their land and to produce the conceptual boundaries about what is at stake in a particular decision.

By exposing the specific ways this chronological power and hierarchical ordering of actors and interests is produced, this paper reveals specific strategic opportunities for intervention and transformation. I conclude that decoupling aggregate planning from private ownership

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<sup>16</sup> Estair Van Wagner, "The Work of Ownership: Shaping contestation in Ontario's aggregate extraction disputes" Mikkel Thorup, Maja Hojer Bruun, Bjarke Skærlund Risager & Patrick Cockburn eds. *Contested Property Claims: What disagreement tells us about ownership* (London: Routledge, forthcoming).

<sup>17</sup> Nicholas Blomley, "Disentangling Law: The Practice of Bracketing" (2014) 10 *Ann Rev of L and Soc Sci* 133.

<sup>18</sup> Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (New York: Routledge, 2015).

could be a first step in rebalancing the values and relationships engaged by aggregate licensing decisions. Through reframing the key issue from how we manage the extraction of the resource to a broader planning inquiry into whether we should extract this resource in this place, and in whose interest, this reorientation has the potential not only to influence case-specific outcomes, but to create space for relational frameworks for land use and environmental decision-making.

#### F. Chapter Seven: Law's Ecological Relations: The Legal Structure of People-Place Relations in Ontario's Aggregate Extraction Conflicts

Chapter Seven consists of the paper "Law's Ecological Relations: The Legal Structure of People-Place Relations in Ontario's Aggregate Extraction Conflicts", published in a special edition of the MIT Planning Journal *Projections* on the relationship between law and planning.<sup>19</sup> This paper builds on the theoretical approach outlined in Chapter Two to develop my eco-relational framework for understanding the complex and interconnected socio-materiality of land use disputes. The paper uses the interview data with more-than-owner parties involved in aggregate mineral siting disputes to foreground people-place relations falling outside the boundaries of the ownership model of property. In doing so, it accounts for the spectrum of contested relations with, and within, the places at stake in aggregate extraction conflicts. In this paper, I conclude that the transformative and democratizing potential of planning is limited by the day-to-day operation of participation in land use decisions, in which ownership is upheld as the primary legal relationship to land, and the public interest is defined narrowly in terms of economic growth and development.

The paper first presents a quantitative overview of the outcomes in aggregate siting decisions between 2001 and 2014, which demonstrates the overwhelming rate of success for proponent applications despite substantial contestation from local and other interested parties. This disproportionate rate of approval, I argue, indicates a structural problem, and the need for further inquiry into how the decision-making process produces these outcomes. The paper considers this finding from an eco-relational perspective.

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<sup>19</sup> Estair Van Wagner, "Law's Ecological Relations: The legal structure of people-place relations in Ontario's aggregate extraction conflicts." (2016)12 *Projections: The MIT Journal of Planning* 35.

Through analysis of the interview data, I critically assess theoretical claims that participatory elements of planning and environmental law have redefined property relations and democratized environmental decision-making. I then use the interview data to demonstrate the complex, and often contradictory, range of ecological relations asserted by more-than-owner parties in land use conflicts about aggregate mineral siting decisions. Through the experiences and reflections of the interview participants, I specifically examine the space in the aggregate licensing process for the assertion of environmentally focused people-place relations. The paper identifies the reductive characterization of participation as ‘objection’ as a key limitation on the ability of more-than-owner parties to influence outcomes. It points to the narrow opportunities to disrupt either the proponent’s narrative about what was at stake and the state’s development-focused view of the public interest. The paper also examines the limitations of increasing reliance on proponent-led mitigation and adaptive management of impacts, as opposed to avoidance and prevention. At the same time, it demonstrates how more-than-owner parties are filling the knowledge and advocacy gaps left by the increasingly proponent-driven regulatory framework and the ongoing lack of due diligence and enforcement by governments.

#### G. Chapter Eight: Law’s Rurality: Land Use and the Shaping of People-Place Relations in Rural Ontario

Chapter Eight consists of the paper “Law’s Rurality: Land Use and the Shaping of People-Place Relations in Rural Ontario,” which was published as part of a special edition on rurality as a dimension of environmental justice in the journal *Rural Studies*.<sup>20</sup> In this paper I bring an environmental justice lens to the eco-relational framework developed and applied in the previous chapters. By incorporating environmental justice perspectives, this paper exposes the role of law in constructing rurality as residual space, and examines the social and ecological consequences for particular places. In particular, it presents the case of the Niagara Escarpment Plan Area through an examination of two aggregate siting decisions and the interview data.

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<sup>20</sup> Estair Van Wagner, “Law’s rurality: Land use law and the shaping of people-place relations in rural Ontario” (2016) 47(Part A) *Journal of Rural Studies* 311.

The paper specifically scrutinizes the use of the category ‘rural’ in Ontario’s land use law and policy, and concludes that rurality serves as a legal category which enables extractive development within one of the most protected and ‘environmentally-focused’ planning areas in the province. The experiences and observations of interview participants are analyzed to examine the consequences of this legal construction of rurality for people-place relations. In particular, it explores the emphasis on compensation rather than avoidance of transformative loss or harm, the treatment of experiential knowledge in the licensing process, and the failure to recognize cumulative impacts. The paper demonstrates that the current legal structure of relations results in a reductionist account of the embodied and complex relations of rural places, and reinforces simplistic accounts of rural land use politics. At the same time, the paper draws attention to the potential for rural land use politics to uphold dominant property relations and colonial land use patterns. It concludes that applying an environmental justice lens to rural land use movements is a necessary part of confronting and countering the parochial, exclusionary, colonial, and racist potential of rural politics of place.

This paper argues that realizing the transformative potential of land use conflicts to change people-place relations in settler-colonial states requires more than creating space for environmentally focused relations between people and places. Environmentally just rural politics and legal strategies must strive to be inclusive and transformative by foregrounding Indigenous law and land rights alongside acknowledging the range of ecological relations between people and places which lie beyond private ownership and presumptive development. It argues that glimpses of this emerge in struggles over aggregate siting; however, relations of solidarity between rural and indigenous communities must be developed on the ground in particular places, as challenging and difficult conversations take place between Indigenous people and settlers involved in land use conflicts.

#### **4. Conclusion: Towards Ecologically Just Relations in Ontario’s Land Use Law**

The conclusion in Chapter Nine briefly synthesizes the main research findings and provides both theoretical conclusions about an eco-relational approach to land use conflicts and practical recommendations for legal reform of Ontario’s mineral aggregate regime. Returning to the ecological adaptation of Nedelsky’s relational rights analysis set out in Chapter Five, I conclude the existing legal structure of relations hierarchically privileges private land owners and remains closed to the broader range of more-than-owner relations engaged by aggregate

mineral disputes. Not only does this facilitate transformative extractive development in particular cases, I argue, it upholds and reinforces the dominant ownership model of property in Ontario's land use law framework. I then provide a final summary discussion of the values and relationships uncovered through the place-based qualitative research undertaken for this project. Informed by these values and relationships, the conclusion then recommends both immediate practical reforms to Ontario's land use law, as well as future transformative change to the way we make decisions about how we live together and with the world around us.

In the chapters that follow, this dissertation critically examines how land use law centres private ownership and upholds the dominant model of property relations. By uncovering the complex and messy more-than-owner relations engaged by aggregate mineral extraction conflicts, I generate an eco-relational approach to land use decision-making through which we work towards ecologically just people-place relations.

## CHAPTER TWO

Land use and environmental decision-making are the subject of a diverse range of literature across many disciplines. This chapter specifically reviews the literature in three broad areas of scholarship: 1) Property theory; 2) legal geography; and, 3) governance, including planning and environmental justice scholarship. The chapter begins by reviewing property theory, first situating Anglo-Canadian property law as contextual and constructed by acknowledging the enduring role of Indigenous laws and legal orders governing land use throughout Canada. It then reviews the dominant ownership model of property relations as well as social and environmental critiques, and, finally, alternative constructions of property. The chapter then reviews the legal geography literature on three themes: 1) property and property law; 2) conceptions of place and space; and, 3) constructions of nature and rurality. Finally the chapter concludes with a review of literature on governance in three distinct areas of scholarship: 1) environmental governance; 2) planning theory, history, and law; and, 4) environmental justice. This project weaves these strands together to develop the original methodological approach described in Chapter Three; and, to inform the eco-relational approach generated in Chapters Three through Eight.

### PROPERTY THEORY

#### A. Indigenous Legal Orders and Land Law

A lifeworld doesn't reflect the spontaneous ideas of those standing within it. Our creation stories are *of* something common: the earth beneath and all around us. What varies is how we understand it.

That's what's at stake. That's what I need you to understand.

The trouble isn't simply that we tell different stories which ultimately generate widely different bodies of law. That's a wonderful thing. We can learn from one another to the benefit of us all. The trouble is that some of us don't *just* differ but differ in the *kind* of stories we tell of creation.<sup>1</sup>

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<sup>1</sup> Aaron Mills, "The Lifeworlds of Law : On Revitalizing Indigenous Legal Orders Today" (2016) 61 McGill LJ 847 at 863.

Anishinaabe legal scholar Aaron Mills draws our attention to the foundational narratives that inform different systems of law in order to point to the “earth-alienation” at the heart of liberal constitutionalism. This “rootless” foundation for law, he argues, is a very different *kind* of story than an Anishinaabe legal order “rooted in interdependent conceptions of self-community”:<sup>2</sup>

Under a rooted vision of freedom, order isn’t secured through rule of law; law isn’t the formal obligation to respect rules (i.e., rights and correlative duties). Rather, law consists in the informal responsibility to coordinate mutual aid (i.e., gifts and needs) within particular forms of relationship: law is a framework for proper judgment.<sup>3</sup>

Understanding particular conceptions of property as specific “narratives” or “artefacts,” producing and produced by specific historical, spatial and cultural contexts, opens up avenues to re-imagine, articulate, and recognize the range of existing and possible people-place relations.<sup>4</sup> In other words, despite its dominance in Canada and other settler-colonial states, the Anglo-Canadian ownership model of property described below in Section B should be understood as specific and contextually situated – just one way of understanding human relations with and in relation to the world around us, particularly land and the environment. In examining the context of contemporary land use disputes in Ontario, my research points to the link between this model of property and the emergence of land use planning law. I acknowledge “the colonial genealogy of planning,”<sup>5</sup> noted by Australian planning scholar Libby Porter and consider its ongoing influence on the people-place relations at issue. In this context, while Indigenous law is not the focus of this research, it is critical to recognize the enduring presence and jurisdiction of Indigenous legal and governance systems and the influence of the relationships between these legal orders and colonial property and planning regimes in shaping contemporary people-place relations.<sup>6</sup> Further, both Indigenous legal theory and practice as well as Indigenous planning point to existing models of people-place relations that challenge “maladapted”<sup>7</sup> superimposed Anglo-Canadian property practices and

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<sup>2</sup> *Ibid* at 865.

<sup>3</sup> *Ibid*.

<sup>4</sup> See Margaret Davies, *Property: Meanings, Histories, Theories* (New York: Routledge, 2007); Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, CO, Westview Press, 1994).

<sup>5</sup> Libby Porter, *Unlearning the Colonial Cultures of Planning* (Farnham and Burlington: Ashgate Publishing, Ltd., 2012) at 151.

<sup>6</sup> Shiri Pasternak, “Jurisdiction and settler colonialism: where do laws meet?” (2014) 29 *Canadian Journal of Law and Society/Revue Canadienne Droit et Société* 2 145.

<sup>7</sup> Nicole Graham, *Landscape: Property, Environment, Law* (New York: Taylor & Francis, 2011) at 206.

offer specific examples of place-based knowledge and land use governance in Ontario and throughout Canada.<sup>8</sup>

In demonstrating the relevance of Indigenous laws to contemporary land use disputes, Anishinaabe legal scholar John Borrows points to the “ancient and contemporary stability and flexibility of First Nations laws.”<sup>9</sup> North American Indigenous peoples, he notes, “developed spiritual, political, and social conventions to guide their relationships with each other, and with the natural environment. These customs and conventions became the foundation for many complex systems of government and law.”<sup>10</sup> In “Living between Water and Rocks: First Nations, Environmental Planning and Democracy,” Borrows describes how Anishinabek law of environmental planning in Ontario derived from specific knowledge and practices relating to plants, animals, water, fish and history. For example, he reviews laws that trace the link between the appropriate scale of development and capacity of the land, as well as the importance of restoring and monitoring after land is used.<sup>11</sup> This Anishinabek law and knowledge, he argues, would have contributed to contemporary disputes about proposed development on Hay Island, Ontario, not only by bringing ecological considerations into focus, but because of its potential to “destabilize the boundaries between humans and their surroundings and deconstruct the seemingly neutral and natural facade of contemporary geo-legal ideas.”<sup>12</sup> Similarly, in *Canada’s Indigenous Constitution*, Borrows describes Anishinabek people-place relations as involving a trustee-like relationship of interdependence and reciprocity in which the Earth has legal personality and agency.<sup>13</sup> Rocks, he notes, have agency that requires consent and appropriate process before they can be used.<sup>14</sup> In the Hay Island case, Borrows provides concrete examples of the procedural and substantive barriers to Anishinabek assertions of people-place relations and their legal recognition within Ontario’s current land use framework. At the same time, he provides evidence that more ecologically and socially sustainable decisions about land use and environmental planning would result

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<sup>8</sup> For an introduction to Indigenous planning across several jurisdictions see, Ryan Walker, David Natcher & Ted Jojola, *Reclaiming Indigenous Planning* (Montreal: McGill-Queen’s Press-MQUP, 2013).

<sup>9</sup> John Borrows, “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47 *UTLJ* 417 at 465.

<sup>10</sup> *Ibid* at 453-454.

<sup>11</sup> *Ibid* at 463-465; John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 244-248.

<sup>12</sup> Borrows, *supra* note 9 at 443.

<sup>13</sup> Borrows, *supra* note 11 at 246.

<sup>14</sup> *Ibid* at 245.



from the inclusion of a broader range of perspectives and knowledge about place. In particular, he argues legal recognition of the Earth as a living being and the interconnectedness of human life flow from knowledge and recognition of place.<sup>15</sup> This points to the importance of including a range of perspectives and people-place relations in decision-making process from both an equity and justice perspective and an instrumental perspective about reaching the best possible decision and outcome.

Kahnawake Mohawk scholar Taiaiake Alfred's description of the sharp contrast between human-nature relationships in Indigenous and Western liberal traditions provides some insight into the philosophical origins of the destabilizing potential of Indigenous laws.<sup>16</sup> He describes Indigenous philosophies as based on a stewardship relationship with the earth, with power derived from respect for, and responsibility to, nature. In contrast, he argues that in Western liberal traditions power is derived from "alienation from nature."<sup>17</sup> The connection between social and political power and land is evident in the Gitksan legal order and governance system in Northwest British Columbia, described by Gisday Wa and Delgam Uukw<sup>18</sup> and by Richard Overstall<sup>19</sup> and considered in the landmark Supreme Court of Canada ruling in *Delgamuukw v. British Columbia*.<sup>20</sup> According to Borrows, imposed colonial land use law "inadvertently ignored and purposely undermined" Indigenous laws based on this conflicting worldview.<sup>21</sup> In Canada, he argues, colonial law "imposed a conceptual grid over both space and time which divides, parcels, registers, and bounds peoples and places."<sup>22</sup> Complex Indigenous systems of government and law regulating both person-person and people-place relationships were ignored and purposefully undermined as settlers undertook the work of ordering and managing space.<sup>23</sup> The resulting legal discourse of property in which Canadian planning law is embedded has been closed to place-based analysis. Claims

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<sup>15</sup> *Ibid* at 248.

<sup>16</sup> Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, ON: Oxford University Press, 2009).

<sup>17</sup> *Ibid* at 84.

<sup>18</sup> Gisday Wa & Delgam Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet'suwet'en hereditary chiefs in the Supreme Court of British Columbia, 1987-1990* (Gabriola BC: Reflection, 1992).

<sup>19</sup> John McLaren, AR Buck & Nancy E Wright, "Property Rights in the Colonial Imagination and Experience" in *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 1997) at 5.

<sup>20</sup> *Delgamuukw v. British Columbia* [1997] 3 SCR 1010.

<sup>21</sup> Borrows, *supra* note 9 at 429.

<sup>22</sup> *Ibid* at 427.

<sup>23</sup> *Ibid* at 445; Porter, *supra* note 5 at 151.

asserting people-place relationships, such as Alfred's stewardship, have been understood as disruptive and subversive.<sup>24</sup>

Borrows points to the need for more than procedural changes aimed at participatory inclusivity in planning decisions. In his view, better environmental planning requires the participation of Indigenous people, but also requires ideological change through "an infusion of substantive ideas" including Indigenous laws suitable to evaluate and interpret Indigenous knowledge relevant to specific land use proposals.<sup>25</sup> Alfred also argues that Indigenous traditions offer a way of breaking from destructive patterns of thought.<sup>26</sup> This is particularly relevant to land use practices associated with Anglo-Canadian property law developed in very different ecological and social conditions. In the land use context, Alfred argues, Indigenous perspectives provide a model for balancing engagement in broader economic development with responsibility to respect the "long-term health and stability of people and the land."<sup>27</sup> This underlying principle of balance, Alfred notes, makes ecological and community health the goals of economic decision-making which the scale or intensity of a specific land use must uphold.<sup>28</sup> The potential for a range of non-ownership relationships to be articulated and recognized in land use disputes depends on the potential to open up conceptual space for alternatives to the ownership model of property. This requires the inclusion of Indigenous peoples in decision-making, but as Borrows and Alfred argue, it must also go further. It requires substantive recognition of and respect for Indigenous legal knowledge and the jurisdiction of Indigenous legal orders that apply place-based knowledge about specific ecosystems. Rather than treating assertions of Indigenous law over land use decisions as Aboriginal rights claims to be adjudicated within the state-based Aboriginal law frameworks, this includes space for the assertion and application of Indigenous laws that challenge dominant conceptions of the relationship between humans and our environment even when,

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<sup>24</sup> Wa & Uukw, *supra* note 18; John Borrows, "With or Without You: First Nations Law (in Canada)" (1995) 41 McGill Law J 629; Tyler A McCreary & Richard A Milligan, "Pipelines, Permits, And Protests: Carrier Sekani Encounters With The Enbridge Northern Gateway Project" (2014) 21 Cultural Geography 1 115; Gordon Christie, "Discourse and Negotiations Across the Indigenous/Non-Indigenous Divide: Obligations', Decolonization and Indigenous Rights to Governance" (2014) 27 Can JL Juris 259; Angela V Carter, Gail S Fraser & Anna Zalik, "Environmental Policy Convergence in Canada's Fossil Fuel Provinces? Regulatory Streamlining, Impediments, and Drift" (2017) 43 Can Public Policy 1 61.

<sup>25</sup> Borrows, *supra* note 9 at 451.

<sup>26</sup> Alfred, *supra* note 16 at 84.

<sup>27</sup> *Ibid* at 85.

<sup>28</sup> *Ibid* at 86.

perhaps especially when, they may not be compatible with Canadian law and institutions.<sup>29</sup> As Gordon Christie argues, meaningful engagement with Indigenous laws requires us to critically consider the “the ability of the state (and Canadian society) to accommodate itself to the emergence of Indigenous legal traditions” and the reassertion of Indigenous control and jurisdiction as decentring state law rather than the reverse.<sup>30</sup> In the context of this research, Indigenous jurisdiction over land use planning and natural resources poses particular challenges for Anglo-Canadian planning and property law. According to Canadian legal scholar Kirsten Anker, this stems from the disjuncture between colonial conceptions of “land-as-space” and Indigenous relational conceptions of “land-as-place”, the former excluding “the possibility of alternative modes of imagining the relationship between people and the land.”<sup>31</sup>

### B. The Ownership Model of Property Relations

This project examines the impact of dominant property relations in the context of a set of land use disputes about aggregate mineral extraction in Ontario. Therefore, this section sets out a brief description and background to this dominant model of property in Canadian law and Anglo-colonial legal theory and culture more broadly. Australian property scholar Margaret Davies argues that the dominant Anglo-colonial “ownership model” of property is “just the here-and-now of a cultural and political history which is still in process.”<sup>32</sup> In doing so, she points to the importance of understanding why and how particular models of property achieve and sustain dominance, as well as recognizing the possibility of other different models. Similarly, American property theorist Carol Rose argues that private property regimes “hold together only on the basis of common beliefs and understandings.”<sup>33</sup> This project examines contemporary English Canadian land use planning and natural resource management frameworks, which rely on a private property narrative rooted in Anglo-colonial law and

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<sup>29</sup> Gordon Christie, “Culture, self-determination and colonialism: Issues around the revitalization of Indigenous legal traditions” (2007) 6 *Indig Law J* 13; Glen S Coulthard, “Subjects of empire: Indigenous peoples and the ‘politics of recognition’ in Canada” (2007) 6:4 *Contemp Polit Theory* 437; Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (Vancouver: UBC Press, 2016).

<sup>30</sup> Christie, *supra* note 29 at 26–27.

<sup>31</sup> Kirsten Anker, “Land” in Alexandra Popovici & Lionel Smith, eds, *McGill Companion Law* (Montreal: McGill University, 2012).

<sup>32</sup> Davies, *supra* note 4 at 50.

<sup>33</sup> Rose, *supra* note 4 at 5.

culture.<sup>34</sup> Therefore, it examines how the liberal “ownership model”<sup>35</sup> is built on common beliefs and understandings in cultural and legal discourse about land use: 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. This idea of property is foundational to the construction of contemporary land use law as a way of organizing the ‘bundle’ of 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>36</sup>

While the theoretical examination of the roots of this model of property draws on English, American and Australian scholarship in addition to the work of Canadian scholars, this research also adopts the need to “locate property law” contextually and in place.<sup>37</sup> This project does so in the specific social, but also material, context of the province of Ontario and its predecessor, Upper Canada. Canadian legal scholar Bruce Ziff argues that English property law was largely adopted in Upper Canada. Noting few exceptions, he links this adherence to English law to both practical reasons of certainty and convenience, but also to imperial discourse – the “resolute confidence in the superiority of English political institutions” and the related “belief in the right-headedness of English justice” which manifested in the common law.<sup>38</sup> This normative justification exposes the deeply held commitments to foundational elements of property law despite departures and adaptations in new colonial settlements. As legal historian John McLaren observes: “Land settlement, as a process within the dominant culture, was closely related to that blend of order, individualism, and deference that has marked the history of colonialism in Canada”.<sup>39</sup> Land, in his view, was viewed through the lens of “nation building and the progressive development of a

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<sup>34</sup> John George Chipman, *A Law Unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002); Eran Kaplinsky, “The Zoroastrian Temple in Toronto: A Case Study in Land Use Regulation, Canadian-Style” in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: The Osgoode Society for Legal History, 2012) 223.

<sup>35</sup> Joseph William Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2001) at 3.

<sup>36</sup> Graham, *supra* note 7 at 27.

<sup>37</sup> McLaren, Buck & Wright, *supra* note 19 at 2.

<sup>38</sup> Bruce Ziff, “Warm Reception In A Cold Climate: English Property Law And The Suppression Of The Canadian Legal Identity” in John McLaren, A R Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 1997) 106 at 113.

<sup>39</sup> John McLaren, “The Canadian Doukhobors and the Land Question: Religious Communalists in a Fee Simple World” in A R Buck, John McLaren & Nancy E Wright, eds, *Land and Freedom: Law and Property Rights in the British Diaspora* (2001) 135 at 242.

commercial and industrial economy.”<sup>40</sup> The departures Ziff does note draw on American and Australasian reforms to property law – including free-entry mining regimes – pointing to the influence of other Anglo-settler colonial legal regimes on the ways property law was adapted to local conditions in English Canada.<sup>41</sup> Therefore, while “a variety of local conditions in Canada, including those related to geography, climate, and culture, required the fine-tuning of English property laws for the Canadian context,” Valiante and Smit characterize the common law of property in Canada as remaining “grounded in the English system of property ownership but has its own peculiarities.”<sup>42</sup> This review of property scholarship reflects this enduring influence, as well as the links with other settler-colonial property law.

This section contends that the dominant Anglo-colonial ownership model shapes the ways that people imagine, articulate and assert their relationships with place in contemporary Ontario. This influence is related to three central features of property relations that are of particular relevance to this project: 1) the dualistic and hierarchical view of nature-culture relations; 2) the presumption of exclusivity and alienability of private property; and 3) the construction of dephysicalized property as an abstract person-person relationship.

### ***I. Nature-Culture Dualism***

The ownership model of property can be traced to the liberalism of English philosopher John Locke and his *Two Treatises of Government* (1689).<sup>43</sup> His influential theory of property emerged in the context of the 17<sup>th</sup> century scientific revolution and the emergence of ‘modernist’ thinking. Central to ‘modern’ thinking was the dualistic understanding of the culture-nature relationship associated with Francis Bacon<sup>44</sup> and Rene Descartes.<sup>45</sup> Cartesian dualism separated mind from body and culture from nature. For Descartes, men were not only separate from nature, but superior ‘masters and possessors’ as cultural creatures with agency

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<sup>40</sup> John McLaren, “The Failed Experiments: The Demise of Doukhobor Systems of Communal Property Landholding in Saskatchewan and British Columbia, 1899-1999” in John McLaren, A R Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 1997) 222 at 242.

<sup>41</sup> Ziff, *supra* note 38 at 110.

<sup>42</sup> Anneke Smit & Marcia Valiante, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2015) at 9–10.

<sup>43</sup> John Locke, *Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1988).

<sup>44</sup> Francis Bacon, Lisa Jardine & Michael Silverthorne, *Francis Bacon: The New Organon* (Cambridge University Press, 2000).

<sup>45</sup> John Cottingham, Robert Stoothoff & Dugald Murdoch, *The Philosophical Works of Descartes* (Cambridge University Press, 1985).

and the capacity for rational thinking.<sup>46</sup> Modernist thinking emphasized reason and scientific knowledge, moving away from a view of authority as vested in religion and kings. While Locke clearly applied the subject-object binary in the human-nature relations he constructed, he rooted his theory of property in natural law. For Locke, Australian property scholar Nicole Graham argues, God's nature was both the origin of law and the powerless object of cultural appropriation.<sup>47</sup>

For Locke, land as nature was given to Man in common. Appropriation and improvement of nature by humans for their beneficial use was not only inevitable, it was necessary for the formation of society.<sup>48</sup> According to Locke, appropriation of nature established dominion over the land and thus created property. In this transformative act, worthless nature was given value through human use: “[H]ow much *labour makes the far greatest part of the value* of things, we enjoy in this World: And the ground which produces the materials, is scarce to be reckon'd in, as any, or at most, but a very small, part of it.”<sup>49</sup> Neither consent nor justification were necessary for Locke because the commons were of no use until they were transformed into property: “Nature and the Earth furnished only the almost worthless Materials, as in themselves.”<sup>50</sup> Almost a century later William Blackstone defined property in the *Commentaries on the Laws of England Books 1 & 2* (1765-1766) as, “that sole and despotic dominion which one man claims and exercises over the external things of the world.”<sup>51</sup> While Jeremy Bentham's “A Theory of Legislation”<sup>52</sup> breaks with Locke and Blackstone in conceiving law as originating in culture rather than in God, Graham notes that he maintains the anthropocentric and dualistic view of human-nature relations.<sup>53</sup> For Bentham, property emerges in the shift from the ‘savage’ circumstances of physical reality in nature where only “miserable and precarious” possession is possible to civilization and the creation of law.<sup>54</sup> Therefore, for my purposes, whether Western liberal theory accepts that private property is a God-given natural right according to Locke or functionally necessary according to Bentham,

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<sup>46</sup> Ibid.

<sup>47</sup> Graham, *supra* note 7 at 50.

<sup>48</sup> Locke, *supra* note 43, para 32.

<sup>49</sup> *Ibid*, para. 42.

<sup>50</sup> Ibid.

<sup>51</sup> William Blackstone, *Commentaries on the Laws of England Applicable to Real Property* (Toronto: Rowsell & Hutchison, 1880) at 2.

<sup>52</sup> Jeremy Bentham, “A Theory of Legislation” in CB MacPherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978).

<sup>53</sup> Graham, *supra* note 7 at 138.

<sup>54</sup> Bentham, *supra* note 52 at 52.

the ability to hold property rights in the natural world is the basis for legal and political order. This remains true within the influential contemporary law-and-economics strain of property theory with economic necessity and transactional efficiency having taken the place of earlier justifications.<sup>55</sup> Even where there are deep divisions within law-and-economics scholarship,<sup>56</sup> the disputes about the nature of property relations never question the severability of humans from the natural world or the ability of humans to own it. Indeed, these remain the fundamental premises of private property as a social and legal tool.

The centrality of human-nature dualism in conceptions of property can be linked directly to the historical role of English property law in the politics of both domestic enclosure in Britain and the dispossession of Indigenous land throughout the British Empire.<sup>57</sup> In his history of early Ontario, David Wood describes the “mindless assault on nature” by early settlers and the resulting “profound unbalancing of ecological relationships by the Europeanization of the New World” that was justified by a vision of “progress” entirely defined by “gainful human activities that would increase materialistic productivity.”<sup>58</sup> As this project argues, the severability of humans from the more-than-human world remains profoundly influential in Ontario property relations. Here I examine this both in terms of the way people imagine and articulate their relationship to land and how such legal and political claims are asserted and treated in land use disputes. British feminist legal scholar Davina Cooper points out the subject-object orientation of the ownership model continues to produce and perform hierarchical relations of control in contemporary property relations.<sup>59</sup> She notes the legal, physical and emotional “severability” of the owner from the owned in instrumental property relationships where both are replaceable.<sup>60</sup> In this way the “propertied subject” is produced<sup>61</sup> in relation to the “object” of property and other ways of constructing human relations with place are obscured or invisible. In this project, I examine how this arises in the context of

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<sup>55</sup> Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 2013); Richard Posner, *Economic Analysis of Law*, 7th ed (Austin: Wolters Kluwer, 2007); Richard Coase, “The Problem of Social Cost” 3 J Law Econ 1; Thomas W Merrill, “Property and the Right to Exclude Essay” (1998) 77 Neb Law Rev 730.

<sup>56</sup> Thomas W Merrill & Henry E Smith, “What Happened to Property in Law and Economics?” (2001) 111 Yale Law J 2 357.

<sup>57</sup> Graham, *supra* note 7 at 38; Peter Fitzpatrick, *The Mythology of Modern Law* (New York: Routledge, 1992) at 82.

<sup>58</sup> David Wood, *Making Ontario* (Montreal: McGill-Queen’s Press-MQUP, 2000) at 20.

<sup>59</sup> Davina Cooper, “Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property” (2007) 32 Law Soc Inq 3 625 at 639.

<sup>60</sup> *Ibid* at 629.

<sup>61</sup> Sarah Keenan, “Subversive Property: Reshaping Malleable Spaces of Belonging” (2010) 19 Soc Leg Stud 4 423 at 423; Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge, 2014) at 71.

conflicts about how private land can and should be used and explore how the dominant ownership model of property continues to presume and enforce the separation of nature and culture into two separate and severable spheres. This presumption of a dichotomy between nature and culture, whereby people (the owners and users) are detached from places (the owned and used) shapes how people understand their relationship with place and the way that their relationships with place are interpreted by legal actors. Here, I demonstrate ways in which this profoundly shapes not only who participates in land use conflicts, but also how they participate, and how they do not.

## ***II. Land Use, Exclusivity and Alienability***

The ability to appropriate nature as property in the ownership model is linked to specific notions of legitimate use, productivity and progress. As historians such as J.M. Neeson and E.P. Thompson have demonstrated, land use was defined as “improvement” towards the realization and justification of specific political and economic ends, particularly the English enclosure of the commons, capitalist industrialization of English society and settlement for colonial expansion of the British Empire.<sup>62</sup> Wood notes the integral link between conceptions of progress and the rhetoric of settlers “confronting and defeating” wilderness in creating the new property relations of early Ontario.<sup>63</sup> Indeed, he argues, “the image of progress as armed opposition to nature” was not only “deeply embedded” in those early settlers, it “still exerts considerable influence, despite different conditions and much greater knowledge, in the current jobs versus environment debate.”<sup>64</sup> Lockean property theory provided a key theoretical foundation for the transformation of a wide range of property relations within England and then into new settler colonies. Davies argues that Locke’s theory of property is “first and foremost a theory of and justification for enclosure.”<sup>65</sup> In the context of this project, legal historian John McLaren’s observations about the idea of property in Canada demonstrates the power of Lockean property in settler colonial contexts: “In the Canadian mind, the dominant although not exclusive view has been that land is a commodity designed for the succour of and exploitation by individuals or corporations exercising *dominium* over

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<sup>62</sup> J M Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820* (Cambridge: Cambridge University Press, 1996); Edward Palmer Thompson, *Customs in Common* (London: Merlin Press Limited, 2009); Wood, *supra* note 58.

<sup>63</sup> Wood, *supra* note 58 at 10.

<sup>64</sup> *Ibid.*

<sup>65</sup> Davies, *supra* note 4 at 88; Barbara Arneil, *John Locke and America: The Defense of English Colonialism* (Oxford: Oxford University Press, 1996).



it.”<sup>66</sup> He notes the “selective historical amnesia” demonstrated by those arriving from jurisdictions with long histories of common land rights and of resistance by those excluded from privatization of common lands.<sup>67</sup>

For Locke, the appropriation of nature as property was only achieved through such acts of transformation, cultivation and industrial use of nonhuman nature for benefit and profit.

Locke constructs property’s acquisitive potential in a particular and deliberate way.

According to Davies, “In Locke’s state of nature the world was, to be blunt, up for grabs – as long as it was grabbed in the right way.”<sup>68</sup> Graham notes that Locke’s labour was explicitly distinguished from the types of labour engaged in by commoners prior to enclosure.<sup>69</sup>

Labour, as envisioned by Locke, was cultivation, not mobile or seasonal land uses such as grazing or harvesting associated with commoners and with Indigenous peoples. In the context of Ontario, the “laying of lines on the land” through the survey grid was “a prime example of the attempt to impose human control on the little understood non-human matrix.”<sup>70</sup> As noted above in Section 1, it was also a deliberate effort to impose a new colonial jurisdiction over land use and natural resources and erase existing Indigenous laws.<sup>71</sup> This “super imposed geometry,”<sup>72</sup> facilitated by colonial authorities, upheld and reinscribed the efforts of individual settlers to transform their land into usable and productive *private* property once they had successfully transformed and recreated it.<sup>73</sup> There is significant continuity in this emphasis on encouraging productive economic development through the stability and security of private property from Locke to Blackstone to Bentham and forward to law-and-economics theorists such as Richard Posner.<sup>74</sup> As will be discussed in Section 3 and demonstrated in this project, the link between private property rights and economic growth is maintained in contemporary land use law in Ontario.

For Locke, the ability to appropriate property results from the ownership of one’s labour:

“every man has a *Property* in his own Person,” and in the “*Labour* of the body, and the *Work*

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<sup>66</sup> McLaren, *supra* note 40 at 237.

<sup>67</sup> McLaren, *supra* note 39.

<sup>68</sup> Davies, *supra* note 4 at 66.

<sup>69</sup> Graham, *supra* note 7 at 47.

<sup>70</sup> Wood, *supra* note 58 at 20–21.

<sup>71</sup> Borrows, *supra* note 9.

<sup>72</sup> Wood, *supra* note 58 at 20.

<sup>73</sup> *Ibid* at 50.

<sup>74</sup> Posner, *supra* note 55.

of his Hands.”<sup>75</sup> As a result of this original ownership, Locke’s man is able to remove something from the common and create property to the exclusion of all others.<sup>76</sup> Locke, Rose observes, “is undoubtedly the most influential of the classical property theorists.”<sup>77</sup> However, this exclusivity was echoed in that oft-quoted Blackstone passage noted above, where he went on to note dominium meant that an owner had a right of “total exclusion of the right of any other individual in the universe.”<sup>78</sup> While Rose points out that this “trope” fails to reflect Blackstone’s in critical ways, in particular the “anxieties” he expresses about existing distributional arrangements,<sup>79</sup> Blackstone’s dominium and Lockean exclusivity have informed the development of an idea of property that remains both legally and culturally powerful. In particular, the American discourse on “takings” and an absolutist position on property rights associated with the Chicago School and law-and-economics theorists. Thomas Merrill goes so far as to argue that the right to exclude is the *sine quo non* of property – a necessary and sufficient condition for the existence of property.<sup>80</sup> In addition to the narrow view of the state in relation to private property that results from an emphasis on exclusion, the Lockean view also relies on a particularly bounded vision of the individual as a “self-interested rational utility maximizer” severable from broader networks of social relation.<sup>81</sup> As Rose observes, neoclassical economics adopts this presumption of a self-interested and utility-maximizing individual in order to make predictions about society.<sup>82</sup> The law-and-economics movement incorporates this presumption in turning to neoclassic economics to explain and predict how laws work, as well as assessing laws against measures of efficiency.<sup>83</sup> Indeed Merrill and Smith’s critique of the Coasean contractarian bundle of rights model and their (re)assertion of the absolutist exclusionary model of *in rem* property rights is expressly linked to the need for minimal state intervention: “If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list

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<sup>75</sup> Locke, *supra* note 43, para. 27.

<sup>76</sup> *Ibid.*

<sup>77</sup> Carol M Rose, “Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory” (1990) 2 Yale JL Hum 37 at 38.

<sup>78</sup> Blackstone, *supra* note 51 at 2.

<sup>79</sup> Carol M Rose, “Canons of Property Talk, or Blackstones Anxiety” (1998) 108, 603.

<sup>80</sup> Merrill, *supra* note 55 at 730–731.

<sup>81</sup> Rose, *supra* note 77 at 42; Jennifer Nedelsky, “Law, Boundaries, and the Bounded Self” (1990) 30 Representations 162.

<sup>82</sup> Rose, *supra* note 77 at 42.

<sup>83</sup> Robert Cooter, “Unity in Tort, Contract, and Property: The Model of Precaution” (1985) 73 Calif Law Rev 1 1; Guido Calabresi & A Douglas Melamed, “Property rules, liability rules, and inalienability: one view of the cathedral” (1972) Harv Law Rev 85 1089.

of interests in the name of general welfare.”<sup>84</sup> As explored in this project, this ideal of the individual autonomous property holder severed from social relations and place by the pre-social and absolute right to exclude has important implications for the kinds of claims that can be made, and can be heard, in land use disputes.

Once property is legitimately acquired, Lockean theory continues, it can and should be freely transferable. Indeed, the law-and-economics strain of property theory builds on basic Lockean property to argue for a minimal state with narrow scope for regulation that restricts property rights.<sup>85</sup> As Singer points out, this poses particular problems for property in the North American context since if the initial transaction is unlikely to have created a “legitimate root of title, then the whole system is placed in doubt.”<sup>86</sup> Thus, as Singer goes on to argue, the neo-Lockean appeal to a chain of rightful historical transfers appeals to a “fictitious state of nature” rather than the history of land acquisition in the context of British colonial settlement and dispossession of Indigenous lands.<sup>87</sup> Not only is the Lockean account ahistorical, legal geographer and feminist legal scholar Sarah Keenan argues Lockean property is “pre-social,” originating in the labour of the subject rather than culture and law.<sup>88</sup> Those who take up Lockean property today base their opposition to state regulation of private property on this argument that private property rights pre-exist the state as natural rights. For Richard Epstein, “the end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state.”<sup>89</sup> State-based law, in Epstein’s view, protects these natural rights rather than creates them. For this strand of property theory, it follows that when law limits property rights, it constitutes a “taking” of that property and must be compensated. While the concept of “takings” has specific and particular resonance in the United States as a result of the constitutional protection of property rights, there is a “healthy (if somewhat less vocal) property rights lobby” in Canada.<sup>90</sup> As discussed in Chapter Four, the lack of constitutional protection for property rights in Canada results in a distinctive legal landscape in relation to regulatory

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<sup>84</sup> Merrill & Smith, *supra* note 56 at 366.

<sup>85</sup> Nozick, *supra* note 55.

<sup>86</sup> Joseph William Singer, “Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity” (2011) 86 *Ind LJ* 763 at 772.

<sup>87</sup> *Ibid* at 776.

<sup>88</sup> Keenan, *supra* note 61 at 424.

<sup>89</sup> Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge MA: Harvard University Press, 1985).

<sup>90</sup> Smit & Valiante, *supra* note 42 at 15.

expropriation.<sup>91</sup> However, a study of attitudes to private property by Canadian law professor Cherie Metcalf demonstrates that the difference in the public law frameworks in Canada and the United States is not reflected in a more favourable attitude to government interference with private property in Canada amongst the members of the public. Indeed, the takings debate is alive and well in Canadian property scholarship despite relatively little case law.<sup>92</sup> As this project demonstrates, naturalization of property rights also manifests in a presumption of the right to develop privately owned land on the part of both proponents and decision makers in Ontario's land use planning framework.

The right to use land for the benefit of the owner despite locally developed property relations and physical capacity is so integral to Locke's model of property that it is protected even when a particular use may harm the land in ways that fundamentally transform or destroy it. While Locke does recognize "limits" on appropriation, his concern is for uncultivated land, which he characterizes as wasted or spoiled. He allows for accumulation and surplus value by conceiving of the alienation of property as productive and legitimate "use." This, in turn, leads to his justification of the money economy, through which people can exchange for the "truly useful, but perishable Supports of Life,"<sup>93</sup> and which provides the incentive for growth and development beyond provision for one's personal needs. This system of accumulation, characterized by Locke as consent-based, allows for the unequal distribution of property without offending his sense of limitation on individual use of property. Canadian feminist legal scholar Jennifer Nedelsky argues that this model of property constructs persons as either owners or non-owners not only resulting in systemic inequality, but also in fact requiring it.<sup>94</sup> Indeed, the reliance of contemporary Lockean theorists on the free-market to deal with any distributional issues maintains and deepens this acceptance of inequality.<sup>95</sup>

Further, the Lockean idea of waste is not extended to land whose limits are exceeded by overuse through industrial agriculture or mining, as these are understood as productive forms

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<sup>91</sup> Douglas C Harris, "A Railway, a City, and the Public Regulation of Private Property: *CPR v. City of Vancouver*" in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law, 2012) 455; Smit & Valiante, *supra* note 42.

<sup>92</sup> Eran S Kaplinsky, "Private Tree Protection Bylaws in Canadian Cities: Some Observations and a Property-Rights Analysis" in Marcia Valiante & Anneke Smit, eds, *Public Interest Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 195 at 216.

<sup>93</sup> Locke, *supra* note 43, para. 47.

<sup>94</sup> Nedelsky, *supra* note 81.

<sup>95</sup> Nozick, *supra* note 55; Epstein, *Takings*, *supra* note 89; Singer, *supra* note 86 at 775.

of use, producing collective benefits, regardless of the material consequences. In early Ontario, Wood argues the “ecological imperialism” of colonial settlement not only tolerated, but celebrated the re-recreation of the land from a complex forested landscape to one in which over 90% of the mature woodland was lost and replaced by “a more controlled, regimented scene of superimposed geometry that reached its zenith in the gridironed towns and cities.”<sup>96</sup> John Stuart Mill’s 19<sup>th</sup> century utilitarian theory of property similarly relies on cultivation as the source of land’s value: “In many cases, even when cleared, its productiveness is wholly the effect of labour and art.”<sup>97</sup> The value of nature is conceived of in purely instrumental terms, albeit utility not individual profit.<sup>98</sup> Obligations to cultivate and improve land are framed as moral duties to act in accordance with the public good and state priorities for Mill, not to understand and develop land use in accordance with the capacities and limits of the land itself.<sup>99</sup> This project examines how this emphasis on use value and a conception of waste that requires development rather than sustainability endures as a core element of Ontario’s land use planning framework.

In light of distributional and environmental concerns, property scholars from a variety of perspectives have drawn attention to and debate the meaning of Locke’s provisos, particularly that the acquisition of private property is justified only where there is “enough and as good” left for others in the commons.<sup>100</sup> While a complete survey of the extensive literature is beyond the scope of this project, examples include Singer who has argued that the proviso requires a democratization of property rights to provide for equal opportunity,<sup>101</sup> and, Canadian environmental philosopher Peter Brown who finds the basis for sustainability and transformative ecological economics in the provisos.<sup>102</sup> These are important debates with genuine potential to reorient the way Locke’s property upholds particular arrangements and distributions of property rights. However, in the context of this project, it is the dominant interpretation rather than debates about potential to repurpose Lockean property for

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<sup>96</sup> Wood, *supra* note 58 at 158.

<sup>97</sup> John Stuart Mill, “Principles of Political Economy with Some of Their Applications to Social Philosophy”, CB Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) at 94.

<sup>98</sup> Graham, *supra* note 7 at 141.

<sup>99</sup> Mill, *supra* note 97 at 98.

<sup>100</sup> Locke, *supra* note 43 at 27.

<sup>101</sup> Singer, *supra* note 86 at 775.

<sup>102</sup> Peter G Brown, *The Commonwealth of Life: New Environmental Economics: a Treatise on Stewardship* (Montreal, Black Rose Books, 2008).

transformative purposes that inform the decisions being made in Ontario's land use law framework. In particular, law-and-economics scholars have dismissed the proviso<sup>103</sup> or limited it to the avoidance of harm, thus avoiding any more radical implications.<sup>104</sup>

The result of the emphasis on relations of use, alienation and exclusivity in the theory underpinning property law, legal scholar Craig Arnold argues, is the promotion of "alienation of people from the object of their rights and the environments in which those rights arise, including alienation from self, others, work, faith, and nature."<sup>105</sup> In the contemporary context of Ontario's planning and resource management regime, particular forms of land use linked with economic development continue to be prioritized in land use decision-making.<sup>106</sup> As discussed below in Section C, the emphasis on use as development for economic gain and the justification for private property were central to the ideology of Canadian planning in the early 20<sup>th</sup> century. This project demonstrates that it persists in provincial land use policy and informs the hierarchical ordering of uses. The notion that certain types of use-based relationships to land are productive or progressive, particularly those linked to contemporary industrial capitalist development, continues to maintain and enforce the hierarchical ordering of person-place relations in Ontario; and, therefore, remains relevant to the kinds of claims about place parties articulate in land use disputes and to the way such claims are treated by decision makers.

As explored in this research, the overlapping claims in land use disputes are complex and sometimes contradictory. Nonetheless, legal tools and process shape the way parties frame their claims, for example emphasizing instrumental relationships and economically productive activity rather than ancestral connections to, or stewardship responsibilities for, the land. In this way people-place relations are transformed from complex eco-social relationships into abstract entitlements recognizable by law.

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<sup>103</sup> Epstein, *supra* note 95 at 11.

<sup>104</sup> Nozick, *supra* note 55.

<sup>105</sup> Craig Anthony Arnold, "Sustainable Webs of Interests: Property in an Interconnected Environment" in D Grinlinton & P Taylor, eds, *Property Rights and Sustainability* (Leiden: Martinus Nijhoff Publishers, 2011) 167 at 40.

<sup>106</sup> Environmental Commissioner of Ontario, *Land Use Planning in Ontario: Recommendations of the Environmental Commissioner of Ontario from 2000-2010*, Report to the Legislature (Toronto: Environmental Commissioner of Ontario, 2011).

### **III. Dephysicalisation**

Graham points to “dephysicalisation” as a critical conceptual development in Anglo-American property law and a fundamental part of the paradigm of people-place relations in Anglocentric culture.<sup>107</sup> Dephysicalisation, according to Graham, is “the removal of the physical ‘thing’ from the property relation and its replacement with an abstract ‘right.’<sup>108</sup> While it is generally associated with Wesley Hohfeld’s 1913 and 1917 writings on property,<sup>109</sup> Graham traces the conceptual roots of dephysicalized property to Locke’s connection between the right to property and the improvement of land.<sup>110</sup> Laws derived from this model of severable relations between people and places make certain kinds of land use possible, she argues, as places are valued only for their productive capacity. Land is no longer understood as part of a particular place with spatial or temporal limits and embedded in specific networks of connection and relation between humans and the nonhuman environment.<sup>111</sup>

Jeremy Bentham’s idea of property goes beyond the Lockean subordination of nature outlined above by removing the physicality of place from view entirely and assuming the instrumental value of nature. Law, Bentham argued, not nature, has the capacity to create “a fixed and durable possession which merits the name property.”<sup>112</sup> This, Graham argues, marks the emergence of dephysicalized property in the Anglo-American legal tradition. Property was now a person-person relationship and not a people-place relationship.<sup>113</sup> This is a critical development, Graham argues, as it results in a transformation of “the locus of social wealth from land, to law or legal right.”<sup>114</sup> Bentham begins his discussion of property with the pronouncement that “there is no such thing as natural property, and ... it is entirely the work of law”<sup>115</sup> and famously continues, “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property

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<sup>107</sup> Graham, *supra* note 7 at 134.

<sup>108</sup> *Ibid.*

<sup>109</sup> Kenneth J Vandavelde, “New Property of the Nineteenth Century: The Development of the Modern Concept of Property, The” (1980) 29 *Buff Rev* 325 at 357; Wesley Newcomb Hohfeld, “Some fundamental legal conceptions as applied in judicial reasoning” (1913) 23 *Yale Law J* 1 16; Wesley Newcomb Hohfeld, “Fundamental legal conceptions as applied in judicial reasoning” (1917) 26 *Yale Law J* 8 710.

<sup>110</sup> Graham, *supra* note 7 at 134.

<sup>111</sup> *Ibid* at 184.

<sup>112</sup> Bentham, *supra* note 52 at 50.

<sup>113</sup> Graham, *supra* note 7 at 46.

<sup>114</sup> *Ibid* at 138.

<sup>115</sup> Bentham, *supra* note 52 at 51.

ceases.”<sup>116</sup> As Graham notes, Bentham’s theory assumes the instrumental value of nature, “removing place from the equation altogether.”<sup>117</sup> In his words, property “is not material, it is metaphysical; it is a mere conception of the mind.”<sup>118</sup> The positivist conception of property reduces property to interpersonal relations mediated by positive law – in other words, neither places nor people-place relations are relevant to legal property any longer.

American legal scholar, Kenneth J. Vandeveld uses the term “dephysicalized” to describe the conceptual shift in the idea and practice of property from Blackstone to Wesley Hohfeld in the late 19<sup>th</sup> century.<sup>119</sup> Hohfeld proposed a “conceptual scheme” that became the dominant view of property in the 20<sup>th</sup> century. Conceiving of property as purely a set of legal relations between persons Hohfeld, according to Vandeveld, “banished the need for things from property law.”<sup>120</sup> His property relations were a complex arrangement of rights, privileges, powers and immunities that were neither fixed nor absolute and could be disassembled into “constituent parts.”<sup>121</sup> Through this dephysicalisation, Vandeveld argues, property became “the right to value rather than some thing.”<sup>122</sup>

For Vandeveld, Hohfeld’s conceptual scheme meant that property lost its’ meaning as a legal category. As definitional boundaries about whether something was or was not property were no longer fixed and absolute protections were no longer tenable, the content of property as a legal category became purely political.<sup>123</sup> In Vandeveld’s view, Hohfeld’s model resulted in judicial determinations of what counts as property purely based on public policy interests and opinions – there was no longer any logic or inevitability to what made property property. Therefore, since “property was what the law said it was,” for Vandeveld the resulting relations in a particular case were entirely determined by politics rather than a fixed legal category.<sup>124</sup> This, he argues, fundamentally undermines the rule of law.<sup>125</sup> Merrill and Smith similarly argue that the move from conceiving of property as fixed *in rem* to a bundle

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<sup>116</sup> *Ibid* at 52.

<sup>117</sup> Graham, *supra* note 7 at 139.

<sup>118</sup> Bentham, *supra* note 52 at 51.

<sup>119</sup> Vandeveld, *supra* note 109 at 357; Hohfeld, *supra* note 109; Hohfeld, *supra* note 109.

<sup>120</sup> Vandeveld, *supra* note 109 at 360.

<sup>121</sup> *Ibid* at 361.

<sup>122</sup> *Ibid* at 333; Merrill & Smith, *supra* note 56.

<sup>123</sup> Vandeveld, *supra* note 109 at 364.

<sup>124</sup> *Ibid* at 361.

<sup>125</sup> *Ibid* at 367.



of *in personam* rights has led to an orthodox “conception of property as an infinitely variable collection of rights, powers, and duties” in contemporary property theory.<sup>126</sup> The consequence, in their view, is a shift from the “tried and true method of handling potential conflicts over resources” through the clarity and “limiting effect” of the absolute right to exclude towards the discretionary and variable contractual “list of uses” model that inevitably requires public regulation to resolve conflicts.<sup>127</sup> However, modern property law did not suddenly become political, nor was there a pre-existing logical legal category of property that upheld the rule of law.<sup>128</sup> Rather, property law has developed as a particular way of conceiving of, and producing, human relations with land, places and the more-than-human world, which is, and was, always a political project. Following from Graham’s argument outlined above, decisions about what property is, and whose relations are recognized by law, can be traced much further than Vandavelde suggests, justifying the political and legal arguments for both domestic enclosures in England and colonial dispossession of Indigenous lands. Indeed, the “tried and true” method of resolving conflicts was a method of upholding dominant property relations not a natural or pre-political distributional arrangement.

Graham points to the importance of an absence of materiality in dephysicalized property, however, Vandavelde is entirely concerned with the loss of the conceptual fixity and predictability of the category of property in the law. For him, Graham argues, it is a metaphysical loss connected to an ideal of government, society and the role of law.<sup>129</sup> Accepting Graham’s argument about the conceptual development of dephysicalisation and the anthropocentrism of his critique, Vandavelde’s insights about the political nature of legal determinations of contemporary property relations, and the role of economic interests, remain important to my project. What counts as property in a particular dispute, and the reasons particular relationships are deemed legitimate as a result, are often taken for granted in land use law.

Vandavelde illustrates his concern by pointing to a series of American cases regarding trademarks, trade secrets, and oil and gas rights in which courts created limited property rights. In the oil and gas cases, the courts struggled to match the abstract property interests of

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<sup>126</sup> Merrill & Smith, *supra* note 56 at 365.

<sup>127</sup> *Ibid* at 374.

<sup>128</sup> Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012) at 19.

<sup>129</sup> Graham, *supra* note 7 at 145.

competing claimants to the nature of the owned thing, which defied ownership boundaries by its very nature, resulting in increasingly illogical legal outcomes.<sup>130</sup> The struggle to apply property concepts to oil and gas resulted in a strange relationship between landowners whereby one owner could gain an absolute form of ownership over the minerals in their possession, but “[a]ny superadjacent landowner was legally entitled to take as much oil and gas as he could get by any available means.”<sup>131</sup> As this initially led to a race between potential owners to extract and exhaust the resource, courts introduced a circumstantial reasonableness test to be applied on a case-by-case basis. In Vandeveldel’s view this represents a key shift away from legal categories that facilitate the logical deduction of rights as between parties and towards policy-based decision-making.<sup>132</sup>

In the context of land use disputes it is important to examine the embedded assumptions, and the complex connections and relations that are left out, both in the way parties frame legal claims and in the treatment of those claims. The social and environmental critiques discussed in the next section provide a number of useful ways to undertake this work. For example, Davina Cooper exposes work performed by property practices that attempt to transform complex sets of relationships into simplified or bounded representations, with clear and fixed boundaries of relation that entitle particular relations while obscuring or rejecting others.<sup>133</sup> However, she also exposes the potential to code, define and recognize different and overlapping property relations – to attend to an expanded and complex understanding of property as constitutive relations of “belonging” beyond formal law and rights.<sup>134</sup> Whereas Cooper brings the social relationship of the individual and the collective into view in the production of property, Graham’s critique adds the possibility of seeing and exposing the material, and more-than-human, dimensions of arranging property relations in disputes about particular places.<sup>135</sup> From this view, Vandeveldel’s oil and gas disputes are not only about the economic interests and the maintenance of social order through arranging extraction rights. Nor can they be fully understood by conceiving of interests as contingent on or responsible to those of others or the community.<sup>136</sup> They are also about seeing the physical, geologically and

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<sup>130</sup> Vandeveldel, *supra* note 109 at 364.

<sup>131</sup> *Ibid* at 357.

<sup>132</sup> *Ibid*.

<sup>133</sup> Cooper, *supra* note 59 at 630–631.

<sup>134</sup> *Ibid*.

<sup>135</sup> See also discussion below in Section 3 of Sarah Keenan’s work with Cooper’s concept of property as belonging, Keenan, *supra* note 61.

<sup>136</sup> Cooper, *supra* note 59.

hydrologically embedded, ecological phenomenon (here oil and gas) as not only at stake, but as having a stake in the transformation from relating in-place to use as severable and differentiated resources in zones of extractive use.

### C. Property Critiques

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<sup>137</sup> and other disciplines.<sup>138</sup> For the purposes of my project, I am specifically concerned with three types of property critiques that are relevant to understanding people-place relationships in Ontario and the way decisions about land and the environment are made: i) Social critiques that point to the social context of the ownership model and challenge the assumptions and political implications of dominant property narratives; ii) Environmental critiques that point to the physical and material consequences of the ownership model; and, iii) Critiques based on alternative articulations and practices of property that demonstrate both the possibility and the continued existence of alternative relationships with places and the environment. In my view, there has been insufficient scholarly effort to bring these three together to develop a hybrid eco-social critique of property that attends to both the theoretical concerns raised by property theorists and the existing practices of alternative properties highlighted in the commons literature. One of my aims is to contribute to this ambitious project by considering people-place relations and land use disputes in the context of all three.

#### *I. Social Critiques*

The ownership property model has been critiqued by a number of scholars concerned with its cultural and political consequences. While these critiques often point to conceptual problems or inconsistencies in dominant property narratives, their focus is on the way property influences, and is influenced by, social relations.

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<sup>137</sup> Davies, *supra* note 4; Kevin Gray, “Property in thin air” (1991) 50:02 Camb Law J 252; Alain Pottage, “Instituting Property” (1998) 18 Oxf J Leg Stud 331.

<sup>138</sup> See for example, Nicholas Blomley, David Delaney & Richard T Ford, *The Legal Geographies Reader: Law, Power and Space* (New York: Wiley, 2001); Hilary Lim & Anne Bottomley, *Feminist perspectives on land law* (New York: Routledge, 2007); John McLaren, Andrew Richard Buck & Nancy E Wright, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005).

Jennifer Nedelsky has long advocated a rethinking of rights, and of property rights in particular, from a relational perspective.<sup>139</sup> Cooper and fellow feminist legal theorist Sarah Keenan have built on Nedelsky's relational reorientation of property. Cooper reconceptualises property as belonging, replacing the centrality of control with a constitutive relationship of part and whole.<sup>140</sup> Keenan adopts Cooper's notion of belonging, but spatializes property by defining it as a "relationship of belonging held up by the surrounding space."<sup>141</sup> Legal theorist Joseph Singer's *Entitlement: The Paradoxes of Property* also builds on Nedelsky's relational critique to develop a model of property premised on the importance of obligations and human relationships rather than presumptive exclusion.<sup>142</sup> Gregory Alexander, one of the American 'progressive property' scholars, argues that attention to the communitarian social obligations of private property can in fact foster human flourishing.<sup>143</sup> Alexander, Singer and fellow American scholars Eduardo Penalver and Laura Underkuffler's "Statement of Progressive Property" rejects the dominant model and argues for a new model of property that serves a diverse range of values and social relations.<sup>144</sup> Like Nedelsky, the Progressive Property scholars also reject the atomism and individualistic model of the self carried forward from Locke to Bentham and the Chicago School property model. These broadly communitarian approaches inform my work by situating property as enmeshed in a much more complex, dynamic, and contested set of people-place relations. Radin breaks property into that which is essential to personhood, and therefore protected and inalienable, and that which is commodifiable and exchangeable.<sup>145</sup> Critical race theorist and legal scholar Cheryl Harris has interrogated constructions of the self-possessed person as property holder, pointing to whiteness as a form of property both historically and in contemporary United States politics.<sup>146</sup> Legal scholar James Penner's *The Idea of Property in Law* attempts to reconstitute property as "the right to a thing" focusing on the interest in use protected by the right to exclusion as the essence of the property relation.<sup>147</sup>

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<sup>139</sup> Nedelsky, *supra* note 81; Jennifer Nedelsky, *Law's relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2012).

<sup>140</sup> Cooper, *supra* note 59.

<sup>141</sup> Keenan, *supra* note 61 at 426. See discussion of spatialization in Keenan's work in Section 3 below.

<sup>142</sup> Singer, *supra* note 35.

<sup>143</sup> Gregory S Alexander, Ownership and Obligations: The Human Flourishing Theory of Property, *Hong Kong L J* 43 (2013).

<sup>144</sup> Gregory S Alexander et al, "A statement of progressive property" (2008) 94 *Cornell Rev* 743.

<sup>145</sup> M J Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Cambridge MA: Harvard University Press, 1996); Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993).

<sup>146</sup> Cheryl I Harris, "Whiteness As Property" (1992) 106 *Harv Law Rev* 1707.

<sup>147</sup> James E Penner, *The Idea of Property in Law* (New York: Oxford University Press, 1997).

In general these “socially grounded criticisms”<sup>148</sup> maintain and enforce a dephysicalized conception of property. The nature-culture divide is presumed, as is the objectification of ‘things’ and the severability of people and place.<sup>149</sup> The material consequences of using land as property are rarely directly considered. Therefore, while they point to the critical need to rethink the complexity of person-person relations involved in land use disputes, these authors offer limited insight into place-based claims and human-more-than-human relations. As Penner suggests, “[F]or most philosophers the actual objects of property are uninteresting, and the real meat of the question about property is how we can justify unequal holdings.”<sup>150</sup> While Penner contends that his model returns the ‘thing’ to property, it is only to serve as the foundation for a better understanding of relations between persons. He explicitly rejects the notion of reciprocity with or duties towards the things that are properly deemed property: “The individual is not on par with the thing... control is absolute in the sense that a person’s influence over the thing is unbounded in principle. He may destroy, modify, or leave the thing, to the extent that this is actually possible.”<sup>151</sup> Things, including land, have no agency or rights in property relations: “A thing has nothing to say about the relationships it has.”<sup>152</sup> Perhaps the most revealing of Penner’s anthropocentrism is his incredulity at the idea of an “unbreakable relation to a thing [that] would condemn the owner to having to deal with it.”<sup>153</sup> This limits the potential for non-ownership relationships to land to be articulated and recognized. In particular, there is no conceptual space in Penner’s model for non-instrumental relations linked to ancestral or cultural relationships or concerns about the capacity and limits of the land itself. Indeed, Penner explicitly excludes the possibility for a range of such potential interests and relations to be considered. As David Lametti notes, Penner “does not take the idea of thingness far enough.”<sup>154</sup> Thus while Penner attends to the “thingness” of property, he does so primarily to argue for the importance of exclusion and the maintenance of the autonomous bounded self through this exclusion of others from one’s property. For the purposes of this research, this failure to provide for a much broader range of relations, and to

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<sup>148</sup> Davies, *supra* note 4 at 43.

<sup>149</sup> Keenan, *supra* note 61.

<sup>150</sup> Penner, *supra* note 147 at 106.

<sup>151</sup> *Ibid* at 78.

<sup>152</sup> *Ibid* at 81, 82.

<sup>153</sup> *Ibid* at 79.

<sup>154</sup> David Lametti, “The Concept of Property: Relations Through Objects of Social Wealth” (2003) 53 *Univ Tor Law J* 325 at 345.

explicitly exclude relations with place, limits the potential of Penner's attention to materiality and things in property relations.

Canadian scholar David Lametti aims to bring objects "back into the property picture."<sup>155</sup> He proposes the metaphor of "a relationship between or among individuals *through* objects of social wealth" to better reflect the dual relationality of property – to persons and through things.<sup>156</sup> He points to property as involving both control and exclusion and obligation and responsibility, including duties to the object itself.<sup>157</sup> In this sense, Lametti allows for the thing itself to influence, or "condition" the property relation.<sup>158</sup> Lametti points to the importance of focusing on non-ownership or lesser entitlements, as well as correlative duties of property holding, in order to develop a more socially accurate and functional idea of property and including stewardship or conservation relationships.<sup>159</sup> Indeed, he notes the conceptual baggage that the term ownership carries, which, he argues, obscures the complexity of property relations as "contextual, flexible, fragmented and non-hierarchical."<sup>160</sup>

As relational approaches, Lametti's critique and Nedelsky's relational rights model both have particular potential to bridge the divide between environmental and social critiques of property in the context of land use disputes. Nedelsky's 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 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>161</sup> In focusing on relationships, she is referring not only to personal relationships, but also to the interconnected "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>162</sup> Like Graham's places, relationships are central to our material existence, yet are

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<sup>155</sup> *Ibid* at 326.

<sup>156</sup> *Ibid* at 325.

<sup>157</sup> *Ibid* at 326.

<sup>158</sup> *Ibid* at 354.

<sup>159</sup> *Ibid* at 333, 336.

<sup>160</sup> *Ibid* at 363.

<sup>161</sup> Nedelsky, *supra* note 139 at 117.

<sup>162</sup> *Ibid* at 65.

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>163</sup> This project adopts this reorientation to attend to relationships and relational claims in order to understand what is at stake for those involved in land use disputes. 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 nonhumans.<sup>164</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>165</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 more-than-human world.<sup>166</sup> This research builds on both to argue for a reorientation of property from exclusion and severability towards relational reciprocity in people-place relations.

Nedelsky proposes a four-step approach to resolving a particular dispute.<sup>167</sup> Her approach is based on her distinction 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>168</sup> Rights, in Nedelsky’s model, are not rigid and universal or timeless. Rather, 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 would different types of rights structure relations differently in the relevant context?”<sup>169</sup> This approach to dealing with conflicts has the potential to radically alter the way that a particular land use dispute may play out,

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<sup>163</sup> *Ibid* at 4.

<sup>164</sup> *Ibid* at 196.

<sup>165</sup> *Ibid* at 152.

<sup>166</sup> *Ibid* at 199.

<sup>167</sup> *Ibid* at 236.

<sup>168</sup> *Ibid* at 241.

<sup>169</sup> *Ibid* at 236.

particularly when relations between humans and the more-than-human world are explicitly recognized as part of both the problem and the resolution.

In my view, Nedelsky's work offers particular conceptual openness to ecological critiques of property. The eco-relational methodological approach outlined in Chapter Three and applied in Chapters Five through Eight adapts her relational rights framework in light of ecological property critiques. Nedelsky's concrete framework for dispute resolution is adapted and strengthened by the insights from Graham and others who emphasize human-nonhuman relationality and mutual dependence and responsibility. Both Nedelsky's relational approach and Graham's environmental critique seek to "open space" to reorient legal discourse towards already existing relationships and the work they do. Both point to the current inadequacy 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 effectively 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 meaningfully express their claims and connect their experiences 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 nonhuman environment become "dissident voices."<sup>170</sup>

## ***II. Environmental Critiques***

Graham argues, "[P]roperty law is an ideology and practice of a relationship between people and place."<sup>171</sup> In the Hohfeldian concept of property discussed above, property relations are categorized through ownership and non-ownership. Ownership, he argued, comes with a set of rights, privileges, powers and immunities. As Arnold notes, duties, responsibilities, and obligations are largely absent from this concept of ownership.<sup>172</sup> Non-ownership, in the Hohfeldian sense, comes with a set of relations that do not include rights, but do include duties, disabilities, and liabilities with respect to an owner.<sup>173</sup> As Vandavelde and Graham

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<sup>170</sup> Graham, *supra* note 7 at 163.

<sup>171</sup> *Ibid.*

<sup>172</sup> Arnold, *supra* note 105 at 40.

<sup>173</sup> Vandavelde, *supra* note 109 at 360.



both point out, Hohfeld's property relations are conceived of as entirely between persons. The consequence of a dominant person-person model, according to Graham, is that people-place relationships are deemed insignificant in both law and culture.<sup>174</sup> This decontextualization of property, Arnold argues, results in the failure to give "meaningful consideration to the ecological characteristics of particular lands or waters in which rights are claimed."<sup>175</sup> This project examines the effects of this conception of ownership on land use law and people-place relations in Ontario.

In the US context, environmental law scholar Jeffery Sax argues in *Environmental Law Forty Years Later: Looking Back and Looking Ahead* that Anglo-American property's function as a structural legal category is to create an "incentive system" for environmental degradation through the promotion of transformative uses of physical earth systems and resources.<sup>176</sup> In his view, fundamental change to our relationship with the environment requires attention to this structural element of the legal system and integration of environmental values into basic legal structures rather than layering-on increasingly complex environmental regulatory regimes to existing legal categories. Without such structural change, he argues, environmental law has little effect against the "unrelenting autonomic momentum of the property system and the rewards it promotes and encourages."<sup>177</sup> In the context of Ontario, Wood concludes, "[T]he battle mentality of the early days has become deeply ingrained, a cultural construct expressed in the values of our society; indeed, the natural environment remains something to be overcome in favour of development".<sup>178</sup>

Sax points to several specific concerns with the current dominant model of property. Individualistic concepts of ownership, he argues, equate the market-driven interests of property holders with the public interest leading to an "absolutist" conception of rights to use and exclusion.<sup>179</sup> Indeed the "jus abutendi" right of abuse, he argues, means that an owner can destroy land and resources without consideration of the consequences for society. While

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<sup>174</sup> Graham, *supra* note 7 at 143.

<sup>175</sup> Arnold, *supra* note 105 at 40.

<sup>176</sup> Joseph L Sax, "Environmental Law Forty Years Later: Looking Back and Looking Ahead" in M Jeffery and Bubna Litic, ed, *Biodiversity Conservation Law + Livelihoods: Bridging the North-South Divide* (New York: IUCN Academy of Environmental Law Research Studies and Cambridge University Press, 2008) at 9–10.

<sup>177</sup> *Ibid* at 11-12.

<sup>178</sup> Wood, *supra* note 58 at 166.

<sup>179</sup> Sax, *supra* note 176 at 12–13.

specific regulatory tools may be layered onto the basic ownership relationship to prohibit specific activities, there is a presumptive right to use one's land as one wishes.<sup>180</sup> Indeed, as Sax argues and as will be discussed below in Section iii, such regulatory limitations on ownership are increasingly interpreted as expropriation, takings in the US context, and subject to compensatory orders for the *potential* profit value of private property regardless of the public legislative purpose, the demonstrated social or ecological values protected, or even the actual private use of the land.<sup>181</sup> As noted above, the lack of constitutional protection for private property rights in Canada has resulted in limited judicial uptake of American case law on regulatory takings and high standard for constructive takings in Canadian law<sup>182</sup> as set out by the Supreme Court in *CPR v City of Vancouver*.<sup>183</sup> Nonetheless, Canadian legal historian Douglas Harris points out that property rights are protected by statutory regimes at the provincial level that require market value compensation for expropriation.<sup>184</sup> Further, as noted by Valiante and Smit, Canada has a “healthy” property rights movement<sup>185</sup> supported by Metcalf's study that demonstrates strong cultural resistance to state interference with private land.<sup>186</sup> Sax also laments the lack of judicial imagination to conceive of “legally recognizable interests” in nature beyond its instrumental use value or the potential for “concrete injury.”<sup>187</sup> Without the conceptual space to conceive of and protect broader relational interests in, for example, biodiversity conservation, Sax argues that the legal system functions to deny “the very possibility of environmental law.”<sup>188</sup> As argued in this project, Ontario's land use law similarly lacks conceptual space for more-than-human interests and people-place relations, which has important implications for the transformative potential of land use planning and environmental law.

Also in the US context, environmental law scholar Eric Freyfogle points to a place-based reinterpretation of private property as both a legal and cultural institution. He highlights the particular potency of the dominant construction of property in relation to the power to

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<sup>180</sup> *Ibid* at 13.

<sup>181</sup> *Ibid* at 14.

<sup>182</sup> Harris, *supra* note 90 at 474.

<sup>183</sup> [2006] 1 SCR 227, 2006 SCC 5.

<sup>184</sup> Harris, *supra* note 90 at 475.

<sup>185</sup> Smit & Valiante, *supra* note 42 at 15.

<sup>186</sup> Cherie Metcalf, “Property Law Culture: Public Law, Private Preferences and the Psychology of Expropriation” (2014) 39 *Queen's LJ* 685.

<sup>187</sup> Sax, *supra* note 176 at 20.

<sup>188</sup> *Ibid* at 21.

control, transform and even destroy nature.<sup>189</sup> Linking its dominance to both the Lockean pre-social view of property's origins and to the individualistic construction of rights, Freyfogle problematizes the pervasive role of private property in American environmental governance.<sup>190</sup> Based on the history of land use in Illinois, he presents a counter-narrative of common use of rural land combined with strong prohibitions on harmful land use to balance out presumptions about the centrality of exclusivity and private property to American identity.<sup>191</sup> Freyfogle notes the particular strength of this property paradigm in rural areas,<sup>192</sup> pointing to both the historically urban focus of movements for land-use control and to the failure of environmental movements to "put forth an alternative vision of private ownership" characterized by responsibility and grounded in ecological place.<sup>193</sup> Wood's exploration of "ecological imperialism" in the colonial settlement of Upper Canada situates similar dynamics in Ontario,<sup>194</sup> as do McLaren's observations about the primacy of private property in the Canadian colonial settlement mentality.<sup>195</sup>

Sax and Freyfogle develop alternative approaches to property rights by reorienting existing American legal concepts. Sax aims to demonstrate the possible elements of an "environmentally functional" property regime.<sup>196</sup> Property ownership relations, he argues, must include inducements for the maintenance and restoration of land and water, in particular the "natural services" provided for human and nonhuman communities.<sup>197</sup> Sax points to the decision in a 1972 riparian zoning case, *Just v. Marinette County*,<sup>198</sup> to demonstrate that it is possible to define private property rights in relation to "the land in its natural condition" and to view ecological benefits as meaningful public rights.<sup>199</sup>

Freyfogle proposes a practical approach to revising ownership based on familiar legal concepts in the US legal system, the "do-no-harm-principle" already embedded in the

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<sup>189</sup> Eric T Freyfogle, "Private Rights in Nature: Two Paradigms" in Peter Burdon, ed, *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Adelaide: Wakefield Press, 2011) 270 at 272.

<sup>190</sup> *Ibid* at 273.

<sup>191</sup> *Ibid*.

<sup>192</sup> *Ibid* at 272.

<sup>193</sup> *Ibid* at 274.

<sup>194</sup> Wood, *supra* note 58 at 13.

<sup>195</sup> McLaren, *supra* note 39.

<sup>196</sup> Sax, *supra* note 176 at 15.

<sup>197</sup> *Ibid* at 12.

<sup>198</sup> *Just v Marinette County*, 201 NW 2d 761 (Wisc. 1972).

<sup>199</sup> Sax, *supra* note 176 at 16.

common law of nuisance and the public ownership and trusteeship in water and wild animals.<sup>200</sup> Extending the notion of harm to the land itself, as well as future generations, he argues, would limit the power of owners to transform and degrade land, as well as call attention to issues of capacity and scale in determining appropriate land use.<sup>201</sup> This notion of “carrying-capacity-harms,” in his view, “could provide a strong counterpoint to the prevailing tendency to define private rights abstractly, as if land parcels were identical.”<sup>202</sup> Similarly, he argues that focusing on the public interest in, and responsibility for, common resources such as water and wildlife shifts scale of appropriate decision-making from the individual owner to “collective governance at the landscape scale.”<sup>203</sup> This project explores the potential to reorient ownership and property in the Canadian context, specifically in Ontario’s land use planning framework. Sax and Freyfogle demonstrate the existing concepts can be a source of transformative potential and this project argues we should expose and engage with such strategic openings in land use law.

Canadian Peter Brown adopts a “commonwealth of life” perspective to shift from the ‘natural resources’ framework in which ecosystems, and their constituent parts, are understood to exist for the use and benefit of humans towards a worldview that understands the mutual dependency of nonhuman species on natural systems.<sup>204</sup> From this perspective, human use, such as extraction, “must be supported by reasons” that attend to both human and nonhuman well-being.<sup>205</sup> This perspective, he argues, shifts the basis on which decisions about how land can and should be used from economic return to the realization and maintenance of “resilient flourishing of life and the maintenance of capacity for self-renewal.”<sup>206</sup>

Graham’s concept of the reciprocal people-place relationship in property relations offers another starting point for the future project of using the relational approach to articulate the responsibility of humans to the nonhuman world.<sup>207</sup> Graham aims to (re)centre the notion of relationship - in her case, the people-place relationship that property law has erased and

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<sup>200</sup> Freyfogle, *supra* note 189 at 275–276.

<sup>201</sup> *Ibid* at 275.

<sup>202</sup> *Ibid* at 276.

<sup>203</sup> *Ibid* at 277.

<sup>204</sup> Peter G Brown, “Are there any natural resources?” (2004) 23 *Polit Life Sci* 1 12; Brown, *supra* note 102.

<sup>205</sup> *Ibid* at 17.

<sup>206</sup> *Ibid* at 19.

<sup>207</sup> Graham, *supra* note 7 at 199.

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>208</sup>

In fact, she notes, the etymological origins of the word “property” invoke a “mutually formative” relationship between property and identity.<sup>209</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>210</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>211</sup> This research examines such assertions in the context of aggregate mineral extraction disputes and considers whether and how such articulations are made, but also how they are received and considered by decision makers. The more-than-owners people-place relations examined here demonstrate the complex and even conflicting relations that exist between people and particular places, neither purely ecocentric or simply anthropocentric.

Arnold’s conception of property as a “web of interests,” which he defines as, “a set of interconnections among persons, groups and entities each with some stake in an identifiable (whether tangible or intangible) object at the centre of the web,” brings together a number of elements of the critiques describe above in this section.”<sup>212</sup> This approach compliments Graham’s re-centering of relationship and emphasis on the centrality of people-place relations. By simultaneously attending to the particular object of the interest in property, he argues, and to the multiple relationships between the property-holder and the object and the property-holder and other interest-holders, the web of interests serves as an integrative model of property. In his view, by opening up space for consideration of the characteristics of the object of property and its connectedness with a broader ecological, social, and geographic and temporal context, this model is preferable to the “legally centrist isolated abstraction” of

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<sup>208</sup> *Ibid* at 18.

<sup>209</sup> *Ibid* at 26.

<sup>210</sup> *Ibid*.

<sup>211</sup> *Ibid* at 27; Davies, *supra* note 4 at 27; Lametti, *supra* note 154 at 354.

<sup>212</sup> Arnold, *supra* note 105 at 41.

traditional models of property.<sup>213</sup> Further, Arnold includes duties, responsibilities and relationships alongside rights, building in the space for relations such as Graham's reciprocity with place.<sup>214</sup> In my view, Arnold's model provides conceptual space for articulation, assertion and consideration of the multiple, overlapping and diverse forms of people-place relation that emerge in the context of land use disputes.

### ***III. Alternative Models***

Citing "stewardship" as an emergent concept, Davies notes a shift from property law as the realm of fixed, presumptively exclusive individual rights, to more discretionary rights, which she describes as "more fragile, contextual, and limited use."<sup>215</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>216</sup> Cooper suggests five intersecting property dimensions of property practices that can help us uncover the production and performance of property; "belonging", "codification," "definition," "recognition," and "power."<sup>217</sup> Belonging, for Cooper, extends beyond the hierarchical and instrumental subject-object relation normally associated with property to include "constitutive" relations of connection between a part and whole.<sup>218</sup> Codification is the coding of a particular thing that "locates relations to a thing within wider regulatory and epistemic structures" such that it represents "a far more complex set of relationships."<sup>219</sup> While Cooper notes this includes instrumental coding of a thing as a severable commodity, a more relational coding of a thing as representative of the whole to which others belong is possible, or both may coexist and overlap. Definition, Cooper argues, includes attempts to fix boundaries around things and relationships to them but also a process of "familiarization" in which the thing is brought into focus.<sup>220</sup> Recognition is the process of bestowing authoritative "recognition and entitlement upon particular relations of belonging

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<sup>213</sup> *Ibid* at 42.

<sup>214</sup> *Ibid*.

<sup>215</sup> Margaret Davies, "Persons and Property" (2012) 2 *Feminist @ Law*, 1 online:

<<https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/49>> at 15–16.

<sup>216</sup> *Ibid* at 16. See the Australian Product Stewardship Act 2011 (Cth); The Product Stewardship (Oil) Act 2000 (Cth); the Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 3A; and the Environmental Stewardship Program (<http://www.nrm.gov.au/national/continuing-investment/environmental-stewardship1>). See also the Resource Management Act 1991 (NZ) 1991/69 in New Zealand.

<sup>217</sup> Davina Cooper, "Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property" (2007) 32 *Law Soc Inq* 3 625 at 328; See also, Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (New York: Routledge, 2014).

<sup>218</sup> Cooper, *supra* note 59 at 329.

<sup>219</sup> *Ibid* at 630.

<sup>220</sup> *Ibid*.

while ignoring, discounting or rejecting others,” which may flow from formal institutional sources or informal ones.<sup>221</sup> Power, she argues, is whether the particular coding of property has the capacity to “make a difference”, both in relation to collective and individual interests in the thing itself but also “in promoting personal, civic and boundary norms.”<sup>222</sup> Cooper, therefore, not only provides tools to examine how the dominant model of property is produced and sustained, she helps us to see new possibilities to produce and perform alternative property relations.

While the emergence of ‘new’ models of property and forms of organizing property regimes is important, and several promising examples have been outlined above from both social and ecological perspectives, it is important to acknowledge the presence of existing alternatives and their predecessors. While the importance of understanding, recognizing and respecting Indigenous laws and land use jurisdiction was noted above in subsection 1.A, and engages a range of constitutional and social justice related concerns about Indigenous self-determination, it is also important not to essentialize or racialize notions of ‘sustainability’ or perpetuate stereotypical associations of Indigenous People with nature that continue to be used to justify racist colonial policies both legally and culturally in Canada and elsewhere.<sup>223</sup> One way to guard against this is to consider a range of land use systems that depart from the ownership model of property across a range of geographical and cultural contexts. Indeed, from a historical perspective, it is essential to recall that the Lockean model influenced both colonial dispossession of Indigenous land and the domestic enclosure of common land in England for private gain of land-holders and the introduction of industrial agriculture. In 17<sup>th</sup> century England, the result was the displacement of complex and longstanding land use governance frameworks developed to both share and sustain land and natural resources.<sup>224</sup> Further, contemporary scholarship on “the commons,” most notably economist Elinor Ostrom’s Noble Prize winning work in *Governing the Commons: The Evolution of Institutions for Collective Action*,<sup>225</sup> unequivocally demonstrates a broad range of existing

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<sup>221</sup> *Ibid* at 631.

<sup>222</sup> *Ibid* at 630–631.

<sup>223</sup> Michael Eugene Harkin & David Rich Lewis, *Native Americans and the Environment: Perspectives on the ecological Indian* (U of Nebraska Press, 2007); Nicole Graham, “Owning the Earth” in *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Kent Town, South Australia: Wakefield Press, 2011) 259 at 267.

<sup>224</sup> Neeson, *supra* note 62.

<sup>225</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1990).

and enduring approaches to defining and practicing property beyond the twin-poles of command-and-control state-based regulation versus private property regimes.<sup>226</sup> Indeed, as commons scholars Frank van Laerhoven and Erling Berg argue, the focus of this research has shifted from proving that Garrett Hardin's *Tragedy of the Commons* was wrong, to demonstrating the conditions under which communities can establish and maintain systems to govern common pool resources on their own.<sup>227</sup>

Rose argues that cultural and political recognition of alternative property relations has the potential to change our definition of property and property practices. In her view, the ownership model of property has so influenced cultural understandings of what property is and what it does, other forms of property such as common pool resources, or what she calls limited common property regimes, "do not look like property at all to us, and we have tended to ignore them."<sup>228</sup> Further, she argues, such claims are often made by persons or groups "somehow deemed inappropriate to make claims of entitlement."<sup>229</sup> The result, Rose argues, is that certain types of claims are recognized and others are not, with potentially violent and unequal material effects.<sup>230</sup>

While my project does not study common pool resources, this literature is important as both a base of sound empirical research about the potential for property and ownership relations to be conceptualized and practised outside of the ownership model, particularly in connection with place-based and experiential knowledge. The work of Ostrom and other commons scholars does the very important work of viewing people-place relations in practice and questioning the currency and accuracy of the state versus private control dichotomy in environmental and land use theory practice. As Rose argues, this can have important implications for opening space for a wider range of claims to land and resources. At the same time, my work exposes the problems of conceiving of land use disputes as a particular 'resource,' rather than about 'places' which comprise complex interconnections of ecological and social networks. If considered in isolation from their relationships with hydrological systems, soil, farmers, forests, animals, plants, hikers, and other human and nonhuman actors,

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<sup>226</sup> Frank van Laerhoven & Elinor Ostrom, "Traditions and Trends in the Study of the Commons" (2007) 1 Int J Commons 1 3.

<sup>227</sup> *Ibid.*

<sup>228</sup> Carol M Rose, "Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems" (1998) 83 Minn Law Rev 129 at 141.

<sup>229</sup> *Ibid* at 142.

<sup>230</sup> *Ibid* at 143.



aggregate minerals as a non-renewable subsurface resources may be seen as ideally managed through a private property regime. However, the multiple and overlapping claims to the places in which they are situated point to the need for a more nuanced and complex understanding of what is being ‘managed,’ and for whom.

### **Legal Geography**

Legal geography encompasses a range of interdisciplinary scholarship in which space is the organizing principle. Melinda Harm Benson points to the early formation of two separate trajectories of legal geography research, applied legal geography and critical legal geography.<sup>231</sup> Below I focus on the theoretically oriented critical legal geography stream as an explicitly critical body of scholarship that provides important insights into the production of law and space.<sup>232</sup>

According to Benson, the starting point for the theoretical stream of legal geography scholarship was the emergence of an interest in the relationship between law, space and the state amongst geographers.<sup>233</sup> The work of critical scholars including Henri Lefebvre<sup>234</sup> and Edward Soja<sup>235</sup> pointed to the socially constructed nature of space and the mutually constitutive relationship between the spatial, the social and the temporal. Legal geography builds on these key ideas to explore the ways in which space and law are produced through social relations.<sup>236</sup> Irus Braverman et al. describe the focus of legal geography as “interconnections between law and spatiality, and especially their reciprocal construction.”<sup>237</sup> Sarah Keenan notes that legal geography exposes the political nature of space by examining spatial connectivity with the legal and social.<sup>238</sup> What is critical for legal geography is that

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<sup>231</sup> Melinda Harm Benson, “Mining sacred space: law’s enactment of competing ontologies in the American West” (2012) 44 *Environ Plan A* 6 1443 at 1145.

<sup>232</sup> For examples of applied legal geography see, Darla K Munroe, Cynthia Croissant & Abigail M York, “Land use policy and landscape fragmentation in an urbanizing region: Assessing the impact of zoning” (2005) 25 *Appl Geogr* 2 121; Otis W Templer, “Municipal conjunctive water use on the Texas high plains” (2002) 38 *Soc Sci J* 4 597; Jennifer F Brewer, “Don’t fence me in: boundaries, policy, and deliberation in Maine’s lobster commons” (2012) 102 *Ann Assoc Am Geogr* 2 383; Rutherford H Platt, *Land Use and Society, Revised Edition: Geography, Law, and Public Policy* (Washington DC: Island Press, 2004).

<sup>233</sup> Benson, *supra* note 231 at 1145.

<sup>234</sup> Henri Lefebvre, *The Production of Space* (London: Wiley, 1991).

<sup>235</sup> Edward Soja, “The Spatiality of Social Life: Towards a Transformative Retheorisation” (1985) *Soc Relat Spat Struct* 90.

<sup>236</sup> Deborah Martin, Alexander Scherr & Christopher City, “Making Law, Making Place: Lawyers and the Production of Space” (2010) 34 *Prog Hum Geogr* 2 175 at 177–178; Lefebvre, *supra* note 234.

<sup>237</sup> Irus Braverman et al, “Introduction: Expanding the Spaces of Law”, Irus Braverman et al. eds., *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014) 1.

<sup>238</sup> Sarah Keenan, “Property as Governance: Time, Space and Belonging in Australia’s Northern Territory Intervention” (2013) 76:3 *Mod Law Rev* 464 at 468.

law and space are not simply brought together; they are understood as “enmeshed” and mutually constitutive.<sup>239</sup> Or, as Keenan notes, “[A]ll of this shows that law operates *through* rather than upon space.”<sup>240</sup>

Nicholas Blomley et al. identify the significance of this convergence of legal and geographical perspectives as the potential to open up the concepts of ‘space’ and ‘law’ and ‘society’ to new questions and inquiries.<sup>241</sup> Sarah Blandy and David Sibley describe the dual focus of traditional legal geography research as, “a concern with legal actions in public space, and, the ways in which concepts of property and jurisdiction shape material landscapes through legal meaning.”<sup>242</sup> Legal geography has been the subject of ongoing internal debate about its limitations, potential and future possibilities. As David Delaney notes, “there is an increasing sense that this project has gotten stuck in its bridging phase and that inherited conceptual dualisms are impeding further progress.”<sup>243</sup> He points to the persistence of conceptions of law as the immaterial realm of language and meaning, and space as the inactive material setting that “contains” what law produces.<sup>244</sup> However, as Delaney has more recently argued, the emerging role of legal geography is “to investigate the contingencies and constraints of spatial justice.”<sup>245</sup>

Delaney himself proposes a new approach to move from a law and geography binary towards an examination of the mutually constitutive nature of legal forms and their “lived geographies.”<sup>246</sup> He argues that the focus of the inquiry should shift from what spatial and legal phenomenon are or their relatedness, to examinations of “how they *happen*” - what he calls the “pragmatics of world-making.” Delaney calls for scholarship that both politicizes and historicizes world-making through attention to performativity and the enactment of power through space and law.<sup>247</sup> As discussed in more detail below, Blomley takes up this

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<sup>239</sup> Martin, Scherr & City, *supra* note 236 at 117; Blomley, Delaney & Ford, *supra* note 138 at xix; Iruș Braverman et al, “Introduction”, *supra* note 237.

<sup>240</sup> Keenan, *supra* note 61 at 29.

<sup>241</sup> Blomley, Delaney & Ford, *supra* note 138 at xviii.

<sup>242</sup> Sarah Blandy & David Sibley, “Law, Boundaries and the Production of Space” (2010) 19 Soc Leg Stud 275 3 at 277.

<sup>243</sup> David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (New York: Routledge, 2010) at 11.

<sup>244</sup> *Ibid* at 13.

<sup>245</sup> David Delaney, “Legal geography II” (2016) 40 Prog Hum Geogr 2 267 at 268.

<sup>246</sup> Nicholas Blomley, “The Boundaries of Property: Lessons from Beatrix Potter” (2004) 48 Can Geogr 2 91 at 99; Delaney, *supra* note 243; Benson, *supra* note 231 at 1446.

<sup>247</sup> Delaney, *supra* note 243 at 14, 19, 23.

approach in his recent re-examination of his critique of property in ways that have particular relevance for my project.<sup>248</sup>

Blomley and Mariana Valverde have directed their attention to exposing specific “legal knowledges” and the work of particular legal actors.<sup>249</sup> As Delaney notes, “[l]egal geographers take us into the workshops where space, law and (in)justice are the means of the co-production of each other.”<sup>250</sup> Braverman et al. also call for more careful and specific thinking about temporal dimensions and space-time conceptions.<sup>251</sup> Attention to spatiotemporalities has been taken up directly by Valverde who reminds us to “always ask about temporalization as well, and indeed about the ways in which spatialization affects temporalization and vice versa”. As discussed in Section 4 below, this project considers the interrelations of space and time in the context of land use disputes, in particular how private ownership of land works through law to assert both spatial and temporal power. Some legal geographers have also called for a shift away from the human-centered focus of legal geography to account for the “crucial legal work performed by (and with) things.”<sup>252</sup> Consequently, they note the importance of engaging with previously disregarded fields such as physical geography and economics, as well as the humanities.<sup>253</sup> As will be discussed below in this section, my project also points to the importance of engagement with the more-than-human world and with the natural sciences, such as ecology, hydrology and geology, and environmental history, as part of undertaking place-based research.

Irus Braverman’s use of ethnographic methodologies illuminates the spatio-legal dynamics of “the social life of power” in socio-nature relations.<sup>254</sup> In her, “Who’s Afraid of Methodology?,” Braverman points to the failure of legal geographers to adequately reflect on

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<sup>248</sup> Nicholas Blomley, “Performing Property, Making the World” (2013) 26 Can J Law Jur 1 23.

<sup>249</sup> Mariana Valverde, “Taking Land Use Seriously: Toward an Ontology of Municipal Law” (2005) 9 Law Text Cult 34; Mariana Valverde, “Seeing like a city: the dialectic of modern and premodern ways of seeing in urban governance” (2011) 45 Law Soc Rev 2 277.

<sup>250</sup> Delaney, *supra* note 245 at 268.

<sup>251</sup> Braverman et al, *supra* note 237 at 19–20.

<sup>252</sup> *Ibid*.

<sup>253</sup> *Ibid* at 20.

<sup>254</sup> *Ibid* at 16; Irus Braverman, “Everybody Loves Trees: Policing American Cities Through Street Trees” (2008) 19 Duke Envtl Pol F 81; Irus Braverman, “Governing Certain Things: The Regulation of Street Trees in Four North American Cities” (2008) 22 Tul Envtl LJ 35.

their methods.<sup>255</sup> Given the explicitly critical orientation of legal geography, she argued in an earlier version of the paper, “We should be devoting much more attention to the methodological question.”<sup>256</sup> She reflects on her own experimentation with a “studying-up”, engaged ethnography approach.<sup>257</sup> As outlined in Chapter Three, I take up her call for the application of specific and transparent methodological approaches and thus apply a hybrid qualitative placed-based methodology to this project.

As these descriptions make clear, theoretical legal geography is broad in range and diverse in approach and perspective.<sup>258</sup> For the limited purposes of my study, there are three related themes of particular relevance that emerge in this literature: i) the construction, materialization, and practice of property and property relations; ii) place-making and the politics of place in the context of conflicts about land and environment; and, iii) the convergence of legal and spatial constructions of nature and the consequences for landscapes and environments.

#### A. Property

British geographer Sarah Whatmore points to property as, “one of, if not, *the* primary currency of ongoing conversations between Law and Geography.”<sup>259</sup> A consistent theme in Blomley’s well-known work is the need to examine and understand the concept of property and what it does in law and in society.<sup>260</sup> Blomley pays particular attention to the forms of spatial organization and representation involved in legal arrangements and the ways in which these make legal power possible. Much of his research considers the work that property law does in ordering space in specific contexts, such as the urban sidewalk, gardening or urban poverty and homelessness.<sup>261</sup> Space, in Blomley’s work, is a key element of the

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<sup>255</sup> Irus Braverman, “Who’s Afraid of Methodology? Advocating a Methodological Turn in Law and Geography”, Irus Braverman et al. eds., *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014) 120 at 122.

<sup>256</sup> Irus Braverman, *Who’s Afraid of Engaged Legal Geography? Advocating a Methodological Turn in Law and Geography* (Buffalo, New York: The Baldy Centre for Law and Social Policy, 2012) at 2; E Fisher et al, “Maturity and Methodology: Starting a Debate about Environmental Law Scholarship” (2009) 21 *J Environ Law* 2 213.

<sup>257</sup> Braverman, *supra* note 256 at 2; Braverman, *supra* note 255 at 125.

<sup>258</sup> Martin, Scherr & City, *supra* note 236 at 177.

<sup>259</sup> Sarah Whatmore, *Hybrid Geographies: Natures Cultures Spaces* (London: SAGE, 2002) at 59.

<sup>260</sup> Nicholas Blomley, “Remember Property?” (2005) 29 *Prog Hum Geogr* 2 125.

<sup>261</sup> Nicholas K Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004); Blomley, *supra* note 246; Nicholas Blomley, “Flowers in the Bathtub: Boundary Crossings at the Public–Private Divide” (2005) 36 *Geoforum* 3 281; Nicholas Blomley, “The Borrowed View: Privacy, Propriety, and

materialization of power.<sup>262</sup> Law not only produces and is produced by the social, it is spatialized and as such can reinforce power relations through processes of exclusion, coding or locating.<sup>263</sup> “Law’s geographies,” he states, “materialize and visually communicate legal rules.” In doing so, he argues, they “produce particular forms of legal subjectivity.”<sup>264</sup> Spatial boundaries take on the form of legal meanings, ascribing legal categories to both people and places, such as trespasser versus owner or public versus private space. In his words, “law does more than act upon the world: to varying degrees, it makes the world, helping to constitute the understanding and beliefs that make the world unfold *this* way rather than *that* way.”<sup>265</sup>

Blomley points to the centrality of the public-private divide in liberal conceptions of property, serving as a “categorical boundary” for spatial ordering.<sup>266</sup> He points out two fundamental assumptions that speak to the cultural blindness to alternative models of property noted by Rose. First, property is either private or state-based; and, second, these presumed domains of property are distinguishable: “On the zero-sum assumption that property rights cannot easily be unbundled and shared, it is assumed that one owner must be effectively sovereign within the spatial bounds of property. The idea of multiple owners, ideologically at least, is anathema.”<sup>267</sup> In the context of disputes about the use of land, this places critical conceptual and practical constraints on the types of claims that parties articulate, and even further constraint on their recognition. As Blomley notes, the maintenance of the public-private divide has re-emerged as a critical site for legal intervention under neo-liberal governments in Canada: “A bright line is drawn between the owner and the state. Although the state may intervene to limit these rights if they threaten harm to others, such interventions are seen as secondary to the core rights of the owner.”<sup>268</sup>

Much of Blomley’s past work has focused on demonstrating that property is a more “heterogeneous” and “hybrid” concept than this ownership model allows and exposing how

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the Entanglements of Property” (2005) 30 Law Soc Inq 4 617; Nicholas Blomley, “Making Private Property: Enclosure, Common Right and the Work of Hedges” (2007) 18 Rural Hist 1 1; Blomley, *supra* note 248.

<sup>262</sup> Blomley, *supra* note 261 at 282.

<sup>263</sup> *Ibid* at 283.

<sup>264</sup> *Ibid* at 286.

<sup>265</sup> *Ibid* at 282.

<sup>266</sup> *Ibid* at 283.

<sup>267</sup> *Ibid* at 285.

<sup>268</sup> *Ibid* at 284.

people produce “hybrid space” in everyday life despite the power of dominant spatial and legal categories in informing policy and government decision-making: “People seem to live in much more complicated, fluid and hybrid worlds when it comes to categories such as property, which relies upon clarity, order and fixity.”<sup>269</sup> Blomley and others, such as Nick Jackson and John Wightman,<sup>270</sup> and Sarah Whatmore,<sup>271</sup> have examined alternative constructions of property that fall outside the individualized ownership relationship of liberal property theory and practice. In *Flowers in the Bathtub*, his study of gardening in a Vancouver neighbourhood, Blomley explores how acts of “encroachment” serve as a form of boundary crossing between public and private property. While gardening is traditionally associated with private activity, he shows that it can spill over into public space and transgress important legal boundaries. Such “interstitial activities” create an uncertainty that is uncomfortable for law, which seeks to resolve it and recreate the boundaries of the public/private divide. As with his recent book on sidewalk regulation,<sup>272</sup> Blomley’s study of gardening is focused on exposing “everyday legal geographies” and the specificity of legal tools and logics rather than the ideological dimensions of law.<sup>273</sup> In a later article based on the same data, Blomley assesses and complicates Smith and Merrill’s conception of property boundaries as sending necessarily simplistic messages to those outside, as discussed in Section 1, against detailed empirical accounts of everyday interactions with property boundaries: “A property boundary is a legal spatiality that is itself embedded in and productive of dense relational geographies (normative, practical, visual, complex, social, political, and so on).”<sup>274</sup> In the context of planning and land use law, his work demonstrates the importance of detailed examination of the specific operation of law in place. My project takes this up in the context of aggregate extraction regulation.

This research is consistent with the broader body of critical property scholarship outlined above in Section 1 in adopting the “mismatch critique,”<sup>275</sup> an approach which Blomley has

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<sup>269</sup> *Ibid* at 294.

<sup>270</sup> John Wightman & Nick Jackson, “Spatial Dimensions of Private Law” J Holder & C Harrison, eds, *Law Geography: Current Legal Issues* (Oxford: Oxford University Press, 2003) 35.

<sup>271</sup> Whatmore, *supra* note 259.

<sup>272</sup> Nicholas Blomley, *Rights of Passage: Sidewalks and the Regulation of Public Flow* (New York: Routledge, 2011).

<sup>273</sup> Braverman et al, *supra* note 237 at 18.

<sup>274</sup> Nicholas Blomley, “The Boundaries of Property: Complexity, Relationality, and Spatiality” (2016) 50 *Law Soc Rev* 1 224 at 252.

<sup>275</sup> Blomley, *supra* note 248 at 32.

himself recently used performativity theory to critique. The mismatch critique is premised on the failure of the ownership model of property to accurately represent the reality of property in the world.<sup>276</sup> “Put baldly, it argues that our representations of property’s reality are incorrect, and that these incorrect representations lead us to make bad choices. Better understandings of the reality of property should lead to better representations, and thus improved outcomes.”<sup>277</sup> Following from Delany, Blomley uses performativity theory to question the mismatch approach. Treating the ownership model as “unitary” and presuming its social and legal dominance, he argues, obscures the ways in which it succeeds at constructing property vis-à-vis other versions of property and why. Rather, he argues, the ownership model can be more accurately understood as multiple “performances” of property that successfully shape legal and social relations and practices. Performativity, he argues, reveals the varied extent to which a model of property relations has “performative effect” or success in “constituting the reality of property in particular ways.”<sup>278</sup> Further, he argues, from a performativity perspective, property is not fixed in reality prior to the performances that constitute it as something to represent (or misrepresent).<sup>279</sup>

For Blomley, performativity is a way to trace and understand the success of the ownership model despite the laudable work that critical property scholars, and indeed he himself, have engaged in to demonstrate its flaws as well as to pose alternatives. In the context of my research, this is an important and worthwhile project: why do private property ownership relations have so much power and influence in land use decision-making despite both such theoretical critiques and the range of claims and interests that are continually asserted, both within and outside the boundaries of formal legal processes? Exposing the specific work that is done to make, remake, and sustain property as “certain and secure,” Blomley argues, is critical to understanding how the ownership model is maintained and made real in the face of such critiques and alternatives.<sup>280</sup> In Blomley’s view, the critical distinction is between the “success” of a particular representation and its “truth”. In other words, the “felicity,” or the degree to which it is successfully actualized in the world is what matters. Its performative power does not rest on the accuracy of its representations, but its ability to enrol resources

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<sup>276</sup> Blomley, *supra* note 261 at 25–32.

<sup>277</sup> Blomley, *supra* note 248 at 32.

<sup>278</sup> *Ibid* at 34.

<sup>279</sup> *Ibid* at 32–33.

<sup>280</sup> *Ibid* at 37–38.

and arrange other representations.<sup>281</sup> Blomley adopts the concept of “bracketing” to understand the particular ways law works to organize disputes and the consequences: “[A] set of relations specified as legally consequential are bracketed and detached from entanglements (ethical, practical, ecological, ontological) that are now placed outside the frame.”<sup>282</sup> This process is always partial, but nonetheless political as the power to frame the boundaries of a particular dispute successfully is not evenly distributed.<sup>283</sup> Blomley is careful to note that bracketing does not mean simplification, rather, that it works to draw on specific and often complex relations while attempting to sever others and therefore to succeed in successfully producing law in particular ways.<sup>284</sup> Here I adopt the concept of bracketing to examine the work that private property, particularly the land ownership, does through law to negotiate the success of specific forms of land use and people-place relations. Following from Blomley, I expose attempts to foreground particular relations in land use disputes while severing others. I attempt to expose the role of private ownership in creating a world in which particular extractive forms of land use succeed while other instrumental and non-instrumental uses do not.

For Blomley, the failure of critical property scholarship to bring about change demonstrates that it is not enough to point to alternatives and expose the inadequacies of the dominant model of property relations.<sup>285</sup> For him, scholarship should identify “new spaces of ‘property-politics,’ such as those that seek to recover and rework the commons.”<sup>286</sup> The question for Blomley is, “What sort of property do we wish to see performed?”<sup>287</sup> My project engages with this notion of performativity to examine whether the people-place relations emerging in contemporary land use disputes contribute to broader conversations about how we live together in networks of human and more-than-human relation.

Notably, despite performativity theory’s focus on representation, Blomley does not understand the performance of property as a wholly human enterprise. Drawing on Bruno

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<sup>281</sup> *Ibid* at 42.

<sup>282</sup> Nicholas Blomley, “Disentangling Law: The Practice of Bracketing” (2014) 10 *Annu Rev Law Soc Sci* 1 133 at 136.

<sup>283</sup> Nicholas Blomley, *supra* note 272 at 139.

<sup>284</sup> Blomley, *supra* note 282 at 145.

<sup>285</sup> Blomley, *supra* note 248 at 46.

<sup>286</sup> *Ibid* at 47.

<sup>287</sup> *Ibid*.



Latour, he argues that it encompasses both elaborate human communication, such as “words and ideas” as well as “relations between bodies and things.”<sup>288</sup> To this end, Blomley points to the relational nature of performing property through “assemblages”, as well as the “particular relational arrangements.”<sup>289</sup> However, he maintains a conceptual divide between human and nonhuman “objects” or “things” with humans as the “agents who arrange and assemble” and “things that have been arranged.”<sup>290</sup> In my view, this kind of performative analysis would benefit from a richer understanding of the role of the nonhuman and the relationality of people *with* and *as* things. The feminist and relational theory approaches presented in Section 2, such as the work of Nedelsky, Cooper and Keenan, have important roles to play in this reconception and recognition of alternative relational properties. In particular, Keenan has built on relational approaches and Cooper’s conception of property as belonging, outlined in Section 1, to argue that “property is a spatial formation that occurs when relations of belonging are held up by the spaces in and through which these relations exist.”<sup>291</sup> In this way she seeks to shift the focus from the propertied subject, building on Doreen Massey’s theorization of space and place discussed in subsection ii,<sup>292</sup> towards “the space that surrounds, includes and constitutes the subject”, which she understands as “multiplicitous and dynamic”.<sup>293</sup> As Keenan notes, space is also produced by property through material effects that facilitate the continuation of particular relations of belonging.<sup>294</sup> This temporal dimension, Keenan argues, is significant because property, particularly in land, tends to produce linear time. This temporal orientation, she argues, is dependent on the past, but also “tends to shape the future in the same mould as the past.”<sup>295</sup> By constructing property as spatially contingent, Keenan concludes that it has “significant potential” – it can be reshaped to produce “alternative spaces of belonging.”<sup>296</sup> Like Blomley’s “new spaces of ‘property-politics’”, Keenan argues that “subversive property” can unsettle and actually reshape the world around it.<sup>297</sup>

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<sup>288</sup> *Ibid* at 39.

<sup>289</sup> *Ibid*.

<sup>290</sup> *Ibid*.

<sup>291</sup> Keenan, *supra* note 61 at 65.

<sup>292</sup> Doreen Massey, *For Space* (London, SAGE, 2005).

<sup>293</sup> Keenan, *supra* note 61 at 73.

<sup>294</sup> *Ibid* at 86.

<sup>295</sup> *Ibid* at 90.

<sup>296</sup> *Ibid* at 93.

<sup>297</sup> *Ibid* at 96.

The impact of relational approaches to space on legal geography promises to be significant, shifting from stable conceptions of spaces as objects in themselves, towards understanding the “dynamic and unfolding processes” continuously shaping both space and specific places.<sup>298</sup> However, as Braverman et al. argue, it is important to recognize the continuing performative force of static and fixed understandings of space and scale in legal knowledges and categories.<sup>299</sup> Relational perspectives offer an opportunity to “trace the ways in which scale solidifies and is made real” and to see law’s spaces as “complicated effects” rather than as objects in the world.<sup>300</sup> Work on place as relational as well as on nature, nonhuman actors and agency discussed below in subsections B and C also contributes to this shift towards relationality.

## B. Place

Building on critical scholarship on space by Henri Lefebvre<sup>301</sup> and David Harvey,<sup>302</sup> scholars including Andrew Merrifield<sup>303</sup> and Doreen Massey<sup>304</sup> have theorized “place” as a socially constructed ‘spatialized moment.’<sup>305</sup> Deborah Martin summarizes this concept of place as, “a setting for and situated in the operation of social and economic processes, and it also provides a “grounding” for everyday life and experience.”<sup>306</sup> Massey’s work emphasises the “thrown-togetherness” of places, which are made of up social and material dimensions and human and more-than human encounters.<sup>307</sup> Emphasising the uncertain and dynamic nature of place, Massey situates place as a site of ongoing negotiation.<sup>308</sup> For her, “multiplicity, antagonisms and contrasting temporalities are the stuff of all places.”<sup>309</sup> She is careful to reject an oppositional approach to space and place, arguing that both are “concrete, grounded, real, lived.”<sup>310</sup> Places, she argues, are events in which broader spatial and temporal networks are

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<sup>298</sup> Braverman et al, *supra* note 237 at 24.

<sup>299</sup> *Ibid* at 25.

<sup>300</sup> *Ibid* at 26.

<sup>301</sup> Lefebvre, *supra* note 234.

<sup>302</sup> David Harvey, *Justice, Nature and the Geography of Difference* (London: Blackwell, 1996).

<sup>303</sup> Andrew Merrifield, “Place and space: a Lefebvrian reconciliation” (1993) *Trans Inst Br Geogr* 516.

<sup>304</sup> Massey, *supra* note 292; Doreen Massey, “Geographies of Responsibility” (2004) 86 *Geogr Ann Ser B Hum Geogr* 1 5; Doreen Massey, “The Responsibilities of Space” (2004) 19 *Local Econ* 2 97.

<sup>305</sup> Doreen Massey, “A Global Sense of Place” (1991) 35 *Marx Today* 6 24; Deborah G Martin, “‘Place-framing’ as Place-Making: Constituting a Neighborhood for Organizing and Activism” (2003) 93 *Ann Assoc Am Geogr* 3 730 at 732.

<sup>306</sup> Martin, Scherr & City, *supra* note 236 at 732.

<sup>307</sup> Massey, *supra* note 304 at 140–141; Massey, *supra* note 292 at 139.

<sup>308</sup> Massey, *supra* note 304 at 7.

<sup>309</sup> Massey, *supra* note 292 at 158.

<sup>310</sup> *Ibid* at 184–185.

integrated in a particular moment.<sup>311</sup> Thus, in Massey's view, the politics of place is precisely the challenge of continuing to negotiate how we will live together. They "implicate us, perforce, in the lives of human others, and in our relations with nonhumans they ask how we shall respond to our temporary meeting-up with these particular rocks and stones and trees."<sup>312</sup> Building on Massey's conception of place, this project adopts the language of place in the context of land use law in order to avoid the division of networks of ecological and social relation into separate severable, and therefore alienable, 'resources' – in this case, the rock formations embedded in multiple and overlapping physical, ecological, and social systems throughout Ontario. As well, Massey's conception of place includes the affective dimensions of people-place relations that are necessarily a part of the ongoing encounter and negotiations that make up the particular spatialized moments examined in this project.

Building on Massey's conception of place, Martin et al. use the term "place claims" to discuss the way people represent "attachments to, and identification with, specific places" and their "ideals about land use and how spatial processes should unfold."<sup>313</sup> The disconnect between people's place claims and law, they argue, is "one of the central features of the law-space nexus."<sup>314</sup> They call for more research to explore this relationship between the actors and networks that mediate the spatio-legal production involved in struggles over land use.<sup>315</sup> My place-based examination of relational claims in disputes about aggregate extraction will contribute precisely to this type of research. This concept of 'place claims' compliments Blomley's work on 'bracketing' discussion in subsection ii above, as well as research about 'place meanings' and 'place attachment' discussed in Chapter Three in relation to place-based research methods.

Pierce et al. introduced the concept of "relational place-making" to integrate bodies of scholarship on place, politics and networks towards a "networked politics of place."<sup>316</sup> They construct a multi-scalar and relational concept of place as "bundles of space-time trajectories". In adopting Massey's bundle metaphor to argue that "*all* places are relational

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<sup>311</sup> *Ibid* at 130.

<sup>312</sup> *Ibid* at 141.

<sup>313</sup> Martin, Scherr & City, *supra* note 236 at 182.

<sup>314</sup> *Ibid*.

<sup>315</sup> *Ibid* at 188.

<sup>316</sup> Joseph Pierce, Deborah G Martin & James T Murphy, "Relational Place-Making: The Networked Politics of Place" (2011) 36 *Trans Inst Br Geogr* 1 54 at 54.

places,<sup>317</sup> they point to four key elements of place as relational. First, they argue, places are made up of “raw materials,” including, “physical features, individuals, coalitions, corporations and groups, as well as myriad parts of the built environment.”<sup>318</sup> These raw materials are diverse and multi-scalar in nature.<sup>319</sup> Second, the process of selection amongst these raw materials makes up the places of “individual human-environment experiences.”<sup>320</sup> Third, as these “bundles” are “framed” toward social and political ends, groups form shared understandings about places and their meaning in pursuit of collective goals.<sup>321</sup> Finally, they argue, these bundles are dynamic, ongoing and change over time, each place-frame being only ever a negotiated and strategic “fraction of a place.”<sup>322</sup> Critically, Pierce et al. note the “simultaneously structural and agentic” and “inherently political” nature of place-making: “common places develop from pervasive structural forces that produce particular built environments and values.”<sup>323</sup> Elsewhere Pierce and Martin note, “[A] relational place perspective provides a flexible conceptual scaffolding for attention to the political economic dimensions or bundles of place without insisting on a solitary focus on the (socio)-spatial.”<sup>324</sup> As British geographer Jonathon Murdoch notes, spatial relations are “power-filled” and the spaces and relations that do *not* emerge are as interesting and important as those that do.<sup>325</sup> He points to the role of both consensual and contested processes in relational space production and Massey’s attention to the “power-geometry” of specific places.<sup>326</sup> This project specifically interrogates the framing process in producing and upholding land use law by applying both Pierce et al.’s relational place-making framework and Blomley’s concept of ‘bracketing’ to the broad range of interests engaged by aggregate extraction disputes.

As an analytical approach aimed at assisting researchers to, “unpack the multi-scalar, multifaceted place-frames enacted in contestations over competing place/bundles through research that focuses on relationalities between diverse people, institutions, materials and processes that are inscribed in, and engaged through, socio-spatial conflicts” Pierce et al.’s

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<sup>317</sup> *Ibid* at 60.

<sup>318</sup> *Ibid* at 59.

<sup>319</sup> *Ibid* at 60.

<sup>320</sup> *Ibid*.

<sup>321</sup> *Ibid*.

<sup>322</sup> *Ibid* at 59–60.

<sup>323</sup> *Ibid* at 60.

<sup>324</sup> Joseph Pierce & Deborah G Martin, “Placing Lefebvre” (2015) 47 *Antipode* 5 1279 at 1294.

<sup>325</sup> Jon Murdoch, *Post-structuralist Geography: A Guide to Relational Space* (London: SAGE, 2005) at 23.

<sup>326</sup> *Ibid*.

framework is highly relevant to my examination of people-place relations in land use disputes. Pierce et al. argue that the concept of relational-place is “particularly relevant to conflicts that centre on change in and of places” and call for empirical research about the production of place through networked politics.<sup>327</sup> They propose four “methodological hooks” for researchers: First, identify a conflict for study; second, identify and examine the place-frames central to the conflict; third, identify those actors and institutions key to place-framing; and, finally, “unpack and interrogate the place/bundles” that inform the positions of the actors and institutions.”<sup>328</sup> This approach informs the development of the eco-relational methodology outlined in Chapter Three by grounding it in as place-based inquiry examining the work that law does in situating actors in land use disputes.

Martin et al. argue that legal geographers have focused on the framing of geographical concepts in the outcomes of legal process to the neglect of the process through which individuals and groups make legal claims and use the law: “Much of the existing literature implies the raising and contesting of claims, but it does not trace this process through in detail so as to understand the shaping influence of various actors.”<sup>329</sup> Land use disputes, they argue, expose the “discontinuity between place identity and legal regulation of place.”<sup>330</sup> The relevant legal frameworks, they argue, do not account for the range of concerns and attachments expressed by parties to such disputes. Claims made by communities, or rooted in community relations to place, rather than an individual ownership model are rejected as unrecognizable to the law. While parties seek ways to use the law and legal process to advance their claims and express their concerns, as they point out, these interests do not necessarily translate into existing legal narratives.<sup>331</sup>

Their work examines the role of lawyers and specific legal practices involved in disputes about land use and property: “We view lawyers as playing a critical, and largely unexamined, role in mediating between community concerns about geography, land use, and development and the legal structures through which these concerns are so often addressed.”<sup>332</sup> In that study, Martin et al. are interested in place claims and place-making in land use disputes and

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<sup>327</sup> Pierce, Martin & Murphy, *supra* note 316 at 61.

<sup>328</sup> *Ibid.*

<sup>329</sup> Martin, Scherr & City, *supra* note 236 at 179.

<sup>330</sup> *Ibid* at 182.

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid* at 176.

offer their case study as one example of how “strategic practices of parties” to land use disputes create space through law and legal practices.<sup>333</sup> They offer questions for future research that I take up in my study by examining the role of parties with more-than-ownership interests, including, “when and why are space claims legalized?” And, “[h]ow are place-based community-disputes articulated in legal forms, both in public policy arenas such as hearings, and more formal legal administrative settings such as litigation?”<sup>334</sup> As Martin et al. point out, it is not clear what may be lost, gained or altered in the process of shaping claims to existing legal concepts and processes.<sup>335</sup>

### C. Law, Nature and Rurality

Delaney argues that the work of human geographers on the social construction of nature has failed to adequately consider the role of law in this process. At the same time, he argues, the tendency of legal scholars to deal with nature through the categories of liberal property, in which it is the other and the object, has left little room for engagement with the insights of social theory about the concept of nature and its production.<sup>336</sup> Delaney’s own work has sought to expand legal geography scholarship through examination of the role of legal discourse and practices in the production of nature to understand the “physicality of law”.<sup>337</sup> Like Blomley, Delaney points to law’s materialization of power and authority:

What it says about nature is enforced by the organized violence of the centralized state. This force is frequently realized in the physical world, on landscapes and on bodies. Although other discourses of nature undoubtedly have material effects, this more direct relation to physical force makes law rather distinctive.<sup>338</sup>

In particular, he notes the inherent connection between legal conceptions of property as the right to use and the material understanding of nature as resource for human exploitation.<sup>339</sup> Drawing on the vast literature on the social construction of nature, particularly within geography<sup>340</sup> and feminist theory,<sup>341</sup> Delaney argues that the legal

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<sup>333</sup> *Ibid* at 188.

<sup>334</sup> *Ibid* at 183.

<sup>335</sup> *Ibid*.

<sup>336</sup> Blomley, Delaney & Ford, *supra* note 138 at 218–219.

<sup>337</sup> David Delaney, “Making Nature/Marking Humans: Law as a Site of (Cultural) Production” (2001) 91 *Ann Assoc Am Geogr* 3 487 at 489.

<sup>338</sup> *Ibid*.

<sup>339</sup> *Ibid*.

<sup>340</sup> Noel Castree, “Neoliberalism and the Biophysical Environment 3: Putting Theory into Practice” (2011) 5 *Geogr Compass* 1 35; Bruce Braun & Noel Castree, *Remaking Reality: Nature at the Millenium* (Routledge, 2005).

<sup>341</sup> Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (London: Routledge, 1991); Kate Soper, *What is Nature? Culture, Politics and the Non-Human* (Oxford: Blackwell, 1995); Stacy Alaimo

categorization of the world through inclusion and exclusion - ‘nature’ as excluded from ‘human’ and vice versa – realizes these metaphysical distinctions on the material world.<sup>342</sup> The concept of nature as “external,” Delaney argues, illustrates the role of notions of “the social” or “human” as denoting the metaphysical rather than physical exclusion of the nonhuman world. Conceived of in terms of an externally limiting force, nature presents obstacles. Delaney notes critiques of notions of development and progress as conceived in terms of the human potential to overcome natural limits and links these critiques directly to the role of law and legal practices.<sup>343</sup>

Poststructuralist thinking in geography has also influenced legal geography as taken up by human geographers, including Murdoch, Massey, and Whatmore. By looking to the diversity of human-nonhuman relations that make up spatial formations, these authors acknowledge the complexity of interactions amongst and between the social and ecological.<sup>344</sup> In doing so, they have the potential to add to and enrich Blomley’s performativity framework and Pierce et al.’s relational place approach by accounting for the connectivity and immanence of ‘more-than-human’<sup>345</sup> worlds in which people-place relations are lived. Whatmore has argued that legal geographers have largely neglected, and therefore perpetuated, the human/nonhuman and social/material binaries in their examinations of property.<sup>346</sup> Like Blomley and Delaney, Whatmore points to property as fundamental to the construction and enforcement of persons as distinct from things, and to law, as obscuring and naturalizing this distinction as self-evident.<sup>347</sup> She turns to feminist ‘corporeality’<sup>348</sup> and Latour’s ‘hybridity,’<sup>349</sup> “[i]n an effort to articulate a relational understanding of ethical connectivity that does not presume or reinforce the cartographies of humanism.”<sup>350</sup> In this way, she argues, she is “recuperating” moral claims of humanity from the universalizing autonomous human self and “redirecting our

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and Susan Hekman, *Material Feminisms* (Bloomington: Indiana University Press, 2008); Karen Barad, “Posthumanist Performativity: Toward an Understanding of How Matter Comes to Matter” (2003) 28 *Signs J Women Cult Soc* 3 801.

<sup>342</sup> Delaney, *supra* note 337 at 489.

<sup>343</sup> *Ibid* at 491–492.

<sup>344</sup> Murdoch, *supra* note 325 at 19; Massey, *supra* note 292; Whatmore, *supra* note 259.

<sup>345</sup> Whatmore, *supra* note 259.

<sup>346</sup> *Ibid*.

<sup>347</sup> *Ibid* at 61.

<sup>348</sup> Elizabeth A Grosz, *Relational Place-Making: The Networked Politics of Place* (Bloomington: Indiana University Press, 1994).

<sup>349</sup> Bruno Latour, *We Have Never Been Modern* (Harvard University Press, 1993).

<sup>350</sup> Whatmore, *supra* note 259 at 161.

attention to the affective relations between heterogeneous bodies.”<sup>351</sup> Whatmore calls for research that “gets up close and personal” to the mundane operation of law to “track the power of law...through the effacement of its own practices.”<sup>352</sup> In particular, Whatmore points to methodological possibilities that complement the approach outlined in Chapter 2, including, examination of “interpretive communities,” the specificity of language, and “technologies of documentation and record.”<sup>353</sup>

Lisa Pruitt similarly points to legal geography’s neglect of the “rural lawscape.” In fact, she argues, the work of both legal scholars and critical geographers is largely “metrocentric” and “urban-normative.”<sup>354</sup> In the context of my project, this urban-focus does limit the application of the otherwise compelling legal geography literature. Indeed, as noted in Chapter 7, Canadian legal scholarship has underexplored the concept of rurality and its role in land use decision-making. Pruitt’s work has important implications for non-urban research contexts where different spatio-legal relations make legal geography difficult to apply. In particular, she points to the need for a more complex understanding of how law works in non-urban places. Rurality, she notes, is often defined in relation to “emptiness” and the absence of the familiar markers of habitation and the built environment, producing a “perceived lack of materiality” despite the material presence of both human and nonhuman actors.<sup>355</sup> This project examines the people-place relations of land use disputes in areas both legally designated as ‘rural’ and constructed as rural by various social actors. This work contributes to developing a more complex understanding of non-urban places in Canada, particularly the relationship between law and rural places in Ontario. As discussed in the following Section and in Chapter Eight, part of this complex understanding is exploring the application of environmental justice frameworks in the context of rural land use politics and to contribute to scholarship advocating a shift away from reductivist labelling of rural land use politics as NIMBY-ism.<sup>356</sup> Rather, this project seeks to expose the complexity of place-attachment and

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<sup>351</sup> *Ibid* at 161–162.

<sup>352</sup> S Whatmore, “On Doing Rural Research (Or Breaking the Boundaries)” (1993) 25:5 *Environ Plan A* 605.

<sup>353</sup> *Ibid*.

<sup>354</sup> Lisa Pruitt, “The Rural Lawscape: Space Tames Law Tames Space”, Irus Braverman et al. eds., *Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014) 190.

<sup>355</sup> *Ibid*.

<sup>356</sup> Kate Burningham, “Using the Language of NIMBY: A topic for research, not an activity for researchers” (2000) 5 *Local Environ* 1 55; Phil Hubbard, “NIMBY by Another Name? A Reply to Wolsink” (2006) *Trans Inst Br Geogr* 92; Katie McClymont & Paul O’Hare, “‘We’re not NIMBYs!’ Contrasting local protest groups with idealised conceptions of sustainable communities” (2008) 13 *Local Environ* 4 321; Maarten Wolsink,



practices of belonging and exclusion that characterize rural land use while remaining attentive to the potential for localism and parochial approaches to place to contribute to depoliticizing land use decision-making.<sup>357</sup>

Murdoch's study of the role of environmental movements in constructing the urban-rural divide in the UK also demonstrates the need for more complex and heterogeneous understandings of spatial relations than traditional zoning concepts allow for: "Thus, we discern an ecological politics focused on the consolidation of a dynamic and complex system of socio-natural relations in which the urban and the rural are combined in some kind of 'sustainable assemblage.'"<sup>358</sup>

Like Whatmore, Murdoch relies on Bruno Latour's understanding of attempts to separate 'nature' from 'society' as characteristic of modernity. Murdoch points to preservationist environmentalism as spatializing a specific concept of nature requiring distinct and divided spatial zones.<sup>359</sup> The planning system, he argues, has been particularly important for environmental movements attempting to maintain this spatial order.<sup>360</sup> Murdoch identifies multiple paradoxes resulting from environmental preservationist efforts to 'protect' the pure nature of rural England from the 'dangerous' effects of the dirty city. He points to the growth of industrialized agricultural and rural gentrification and to the growing realization that protecting urban nature and sound housing policy is essential to sustaining life in rural areas.<sup>361</sup> In fact, he argues, maintenance of the strict classification of rural and urban zones facilitates the urban commodification of externalized nature in the rural. The rural, he notes, becomes a source of outflows of resources and inflows of waste to ensure the urban is kept free of 'nature' and the rural is defined by its presence.<sup>362</sup> In Ontario, planning scholar Jennifer Foster's study of the Niagara Escarpment demonstrated how environmentalism has reinforced colonial land use narratives and constructions of landscape, serving to uphold

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"Invalid theory impedes our understanding: a critique on the persistence of the language of NIMBY" (2006) 31 *Trans Inst Br Geogr* 1 85.

<sup>357</sup> Michael Woods et al, "The country (side) is angry": emotion and explanation in protest mobilization" (2012) 13 *Soc Cultural Geographies* 6 567 at 568; Jennifer Foster, "Landscape Continuity: Ecology, Power and Social Order in Environmental Planning" (2010) 11 *Plan Theory Pract* 2 167.

<sup>358</sup> Murdoch, *supra* note 325 at 126.

<sup>359</sup> *Ibid* at 109.

<sup>360</sup> *Ibid* at 110.

<sup>361</sup> *Ibid* at 115, 118, 122, 126.

<sup>362</sup> *Ibid* at 125.

“social exclusion and xenophobia” in rural places and obstruct movements for environmental justice.<sup>363</sup> In Murdoch’s view, urban and rural are no longer tenable as separate and oppositional zones, rather he argues for a set of “circular relations in which the valued natural assets of the city and the countryside are nurtured and sustained simultaneously.”<sup>364</sup> This rethinking of urban-rural relationality and interdependence in the context of land use disputes provides a useful framework for thinking through the way aggregate minerals are constructed as both rural and urban. As I describe in this project, urban-rural relations have implications for a conception of environmental justice that include rurality while simultaneously rejecting exclusionary property practices and the preservation versus development binary.

Unlike Whatmore and Murdoch, Pruitt is largely concerned with the person-person relations in rurality and examines a number of legal contexts in which the relationship between the individual and the state is displayed, such as legal responses to partner violence or the ability of ‘outlaw’ actors to hide in rural areas. On this basis she argues that, “rural spatiality mediates law’s performance such that law is less likely to seep deeply into the nooks and crannies of rural space – into its hollows, forests, plains.”<sup>365</sup> Pruitt argues that there is a fundamental tension between the material characteristics of rurality, formal law and legal actors that results in a critical separation of rural residents from the state. In her view, “rural spatiality disables or impedes formal law and its functioning.” However, it is unclear how Pruitt’s conclusions about the effect of rural spatiality apply with respect to person-place relations and the law.

Rural and remote places in Ontario, Pruitt’s “hollows and forests and plains,” are themselves constructed through ownership claims, legally sanctioned land use practices, and resource development claims and proposals that are or will transform material places through forms of harvesting, extraction or preservation. While law may underperform with respect to environmental enforcement regimes for the reasons Pruitt describes, such as distance and the failure to report concerns in planning and natural resource management, in some ways it performs more directly and visibly on rurality as places are removed or transformed through the mundane legal processes of permit approvals, leases and licenses. In many places, Pruitt’s ‘emptiness’ is carved out of places with complex spatial and temporal person-place relations

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<sup>363</sup> Foster, *supra* note 357.

<sup>364</sup> Murdoch, *supra* note 325 at 23.

<sup>365</sup> Pruitt, *supra* note 354.

through specific legal manoeuvres aimed at defining those places as sites of exploitation and extraction for human use. As Rob Nixon notes, the “invention of emptiness” is fundamentally linked to the imposition of Lockean person-place relations wherein only certain forms of habitation and land use are deemed legitimate.<sup>366</sup> As this project argues, it is important to recognize the ways the materiality of those places shape and reshape law as it adapts to the particularities of local ecologies and, eventually, the limits of particular land use practices.<sup>367</sup> At the same time, it also recognizes law’s reach into rural spaces of limited human habitation as equally productive of people-place relations as the legal forces regulate spaces of dense human population.

### **Governance, Planning, and Environmental Justice**

Law is one aspect of the broader framework through which land use, natural resources and people-place relations are governed in Ontario. The use of private land is regulated by multiple complex regimes, including a range of land use planning statutes and policies, environmental regulations, and the common law of property, as well as extra-legal norms and rules through networks of economic and civil society actors.<sup>368</sup> In order to locate land use law within this broader context of economic, social and ecological relations, this section draws on governance and planning literatures, as well the environmental justice scholarship. While these literatures are vast and wide-reaching, this project is specifically concerned with governance in the context of land use planning and natural resource management. The discussion below reflects this focus by drawing on environmental governance scholarship, land use planning scholarship, and the work of environmental justice scholars. As well, while I engage with a diversity of sources, Canadian scholarship has been the focus on this examination in order to situate ‘governance’ in the historical, legal and cultural context in which this research has taken place.

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<sup>366</sup> Rob Nixon, *Slow Violence* (Harvard University Press, 2011) at 165.

<sup>367</sup> See for example the discussion of how the geography of Georgian Bay shaped land use practices and governance structures in Ontario’s Near North region, Claire Elizabeth Campbell, *Shaped by the West Wind: Nature and History in Georgian Bay* (Vancouver: UBC Press, 2005).

<sup>368</sup> See Chapter 4 for a detailed description of the legal framework for land use planning in Ontario.

## A. Governance

Governance can be used to refer broadly to the governing of organizations and societies.<sup>369</sup> As, Bridge and Perreault argue, the widespread adoption of ‘governance’ in social science scholarship demonstrates its explanatory adaptability in a range of contexts.<sup>370</sup> Despite the lack of a fixed definition, as an analytical category it broadly refers to a shift away from “state-centric” understandings of social and economic regulation and the expansion of formal and informal roles for non-state actors. Further, governance scholarship often problematizes analytical categories such as public, private, the state and government.<sup>371</sup> As Bridge and Perreault argue, “[i]n both analytical and policy approaches, the *discourse* of governance is strongly associated with social and economic change.”<sup>372</sup> As Judy Fudge and Brenda Cossman argue in the Canadian context, the liberal state is undergoing a process of fundamental reconfiguration as a neo-liberal state.<sup>373</sup> While the challenge of defining what is meant by neoliberalism, and how to best study it, has been the subject of longstanding debate,<sup>374</sup> for my purposes I adopt the characteristics identified by Peck et al: “deep antipathies to social collectivities and sociospatial redistribution; and open-ended commitments to market-like governance systems, non-bureaucratic modes of regulation, privatization, and corporate expansion.”<sup>375</sup> Cossman and Fudge identify ‘privatization’ as central to this reconfiguration, which they argue, “has come to represent a fundamental shift not only in government policy but also in the balance of public and private power, both globally and nationally.”<sup>376</sup> According to Fudge and Cossman, in the Canadian context the practices of reconfiguration include, “the

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<sup>369</sup> Jon Pierre, *Debating Governance: Authority, Steering, and Democracy* (Oxford: Oxford University Press, 2000).

<sup>370</sup> T Perreault & G Bridge, “Environmental Governance” in *Companion to Environmental Geography* (Oxford: John Wiley & Sons, 2009) 475 at 476.

<sup>371</sup> Matthew Himley, “Geographies of Environmental Governance: The Nexus of Nature and Neoliberalism” (2008) 2 *Geogr Compass* 2 433; Bob Jessop, “The Regulation Approach, Governance and Post-Fordism: Alternative Perspectives on Economic and Political Change?” (1995) 24 *Econ Soc* 3 307; Perreault & Bridge, *supra* note 370 at 476.

<sup>372</sup> Perreault & Bridge, *supra* note 370 at 476.

<sup>373</sup> Brenda Cossman & Judy Fudge, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 3.

<sup>374</sup> N Castree, “The Epistemology of Particulars: Human Geography, Case Studies and ‘Context’” (2005) 36 *Geoforum* 5 541; Noel Castree, “Neoliberalising Nature: Processes, Effects, and Evaluations” (2008) 40 *Environ Plan A* 1 153; Noel Castree, “Neoliberalising Nature: The Logics of Deregulation and Reregulation” (2008) 40 *Environ Plan A* 1 131; Noel Castree, “Researching Neoliberal Environmental Governance: A Reply to Karen Bakker” (2009) 41 *Environ Plan A* 8 1788; Karen Bakker, “The limits of ‘neoliberal natures’: Debating green neoliberalism” (2010) 34 *Prog Hum Geogr* 6 715; Karen Bakker, “Neoliberal nature, ecological fixes, and the pitfalls of comparative research” (2009) 41 *Environ Plan A* 8 1781.

<sup>375</sup> Jamie Peck, Nik Theodore & Neil Brenner, “Postneoliberalism and its Malcontents” (2010) 41 *Antipode* 1 94 at 104.

<sup>376</sup> Cossman & Fudge, *supra* note 373 at 4.

sale of government assets, the transfer of government functions to the private sector ... the restructuring of government activities to more closely emulate market norms”, and, a retrenchment of state social welfare programs combined with increased investment in private sector service delivery and reliance on familial or charitable institutions.<sup>377</sup> They point to the importance of law in this reconfiguration as providing a “justificatory framework, defining and redefining values ... for the invocation of state power.”<sup>378</sup> In particular, they note a crucial extension of corporate private property rights on a global scale to restrain state-based regulatory power as well as a shift away from collective, public responsibility for individual welfare towards private individual responsibility.<sup>379</sup> As discussed below, this understanding of the reconfiguration of the liberal state has particular resonance for the forms of environmental and natural resource regulation that are the focus of this project.

### *i. Environmental Governance*

Bridge and Perreault adopt ‘environmental governance’ as an analytical framework “for examining the complex and multiscale institutional arrangements, social practices and actors engaged in environmental decision-making.”<sup>380</sup> In their view, despite its “widespread, uncritical use,” environmental governance “can enable relatively nuanced analysis of how power is produced and exercised over and through the nonhuman world, and the ends to which power is directed.”<sup>381</sup> As a concept that Bridge and Perreault identify as extending a “broad embrace,” environmental governance moves away from the problematic divisions between land use, natural resource and environmental issues in Ontario’s legal framework. Further, they argue, by asserting the centrality of political processes of decision-making, the environmental governance concept can open up space for creative thinking about people-place relations.<sup>382</sup> However, I also adopt their caution that it is a concept that can be used to mask power relations and therefore, “a careful examination of differing epistemological, normative and rights claims to and about nature should be central to any treatment of environmental governance.”<sup>383</sup> As Bridge and Perreault argue, “[e]nvironmental governance is a concept more popular than precise.”<sup>384</sup> For a review of the treatment of environmental governance generally see Bridge

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<sup>377</sup> *Ibid* at 3–5.

<sup>378</sup> *Ibid* at 5.

<sup>379</sup> *Ibid* at 3–5, 33.

<sup>380</sup> Perreault & Bridge, *supra* note 370 at 491.

<sup>381</sup> *Ibid* at 486.

<sup>382</sup> *Ibid* at 485.

<sup>383</sup> *Ibid* at 492.

<sup>384</sup> *Ibid* at 491.

and Perreault<sup>385</sup> and Lemos and Agrawal,<sup>386</sup> and in geography see Himley.<sup>387</sup> Environmental governance has emerged as an important concept across several disciplines including geography,<sup>388</sup> ecology,<sup>389</sup> political science,<sup>390</sup> and to a lesser extent, law.<sup>391</sup> In their review of the literature, Maria Camen Lemos and Arun Agrawal define environmental governance as “the set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes.”<sup>392</sup>

Geographers have employed environmental governance as a “broad analytical framework for addressing the institutional arrangements, spatial scales, organizational structures and social actors” engaged in environmental decision-making.<sup>393</sup> Critical geography scholars of environmental governance, including Bakker,<sup>394</sup> Bridge,<sup>395</sup> and Mansfield<sup>396</sup>, have examined a range of governance arrangements as constitutive of the nature-society relationship and how these maintain particular elements of neoliberal capitalism.<sup>397</sup> Ecological perspectives, particularly studies of collective action and co-management models have focused on the shift towards decentralized natural resources decision-making in environmental policy since the 1990s.<sup>398</sup> Political scientists have focused on questions of agency and participation in environmental decision-making.<sup>399</sup> Critical accounts, such as Roger Keil and Gene Desfor’s

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<sup>385</sup> Perreault & Bridge, *supra* note 370.

<sup>386</sup> Maria Carmen Lemos & Arun Agrawal, “Environmental Governance” (2006) 31 *Annu Rev Environ Resour* 1 297.

<sup>387</sup> Himley, *supra* note 371.

<sup>388</sup> *Ibid.*

<sup>389</sup> Paul Martin & Neil Gunningham, “Leading Reform of Natural Resource Management Law: Core principles” (2011) 28 *Environ Plan Law J* 2 137; Lemos & Agrawal, *supra* note 386.

<sup>390</sup> Roger Keil & Gene Desfor, “Ecological Modernisation in Los Angeles and Toronto” (2003) 8 *Local Environ* 1 27.

<sup>391</sup> N Gunningham, “Environment Law, Regulation and Governance: Shifting Architectures” (2009) 21 *J Environ Law* 2 179.

<sup>392</sup> Lemos & Agrawal, *supra* note 386 at 298.

<sup>393</sup> Perreault & Bridge, *supra* note 370 at 486.

<sup>394</sup> Karen J Bakker, “A Political Ecology of Water Privatization” (2003) 70 *Stud Polit Econ* 1 35.

<sup>395</sup> Gavin Bridge, “Mapping the bonanza: geographies of mining investment in an era of neoliberal reform” (2004) 56 *Prof Geogr* 3 406.

<sup>396</sup> Becky Mansfield, “Property, Markets, and Dispossession: The Western Alaska Community Development Quota as Neoliberalism, Social Justice, Both, and Neither” (2007) 39 *Antipode* 3 479.

<sup>397</sup> Neoliberal capitalism is used to refer to the form(s) of capitalist social organization emerging in post-Keynesian Welfare State liberal democracies through which a range of practices have been deployed to shift the balance between public and private power as discussed by Cossman and Fudge and by Peck et al, see the text accompanying footnotes 6-12.

<sup>398</sup> Lars Carlsson & Fikret Berkes, “Co-Management: Concepts and Methodological Implications” (2005) 75 *J Environ Manage* 1 65; Ostrom, *supra* note 225; Susan J Buck, *The Global Commons: An Introduction* (Washington DC: Island Press, 1998).

<sup>399</sup> Keil & Desfor, *supra* note 390.

examination of environmental policy in Toronto and Los Angeles point to the importance of processes of decision-making and policy development as sites for contestation rather than technocratic or expert-driven exercises in consultation.<sup>400</sup>

Political economy and regulation theory scholars such as Jessop<sup>401</sup> and Gibbs and Jonas<sup>402</sup> have emphasized the “hollowing out” of the state as well as the expanded role of non-state actors in regulation and rescaling of environmental policy making. In contrast, Australian legal scholar Neil Gunningham argues that rather than a ‘decentering’ of the state; recent environmental policy initiatives have remade the “regulatory architecture” of environmental management.<sup>403</sup> “New environmental governance,” he argues, actually demonstrates an enduring and “essential policy coordination role for government in encouraging, facilitating, rewarding and shaping outcomes.”<sup>404</sup> While they do not examine environmental regulation, Fudge and Cossman similarly argue that neoliberal privatization in the Canadian context “involves a reconfiguration of the form of state regulation rather than deregulation”, what they refer to as “*reregulation*”. In particular, they note the importance of the common law, including property law, to the success of *laissez-faire* policies and citing Roger Cotterrell argue, [L]aw is being extensively used to ‘recreate a climate of free enterprise’ and distribution by market forces.<sup>405</sup> This more nuanced understanding of the changing role of regulation rather than deregulation provides important background to understand the evolution of aggregate extraction regulation in Ontario, as discussed in Chapter Four. Detailed and specific attention to the particular role of law in reconfiguring the state is also consistent with my approach to exposing and critically examining the role of private property in land use decision-making in Ontario.

Notably, while environmental governance scholars have observed and debated changes to environmental management, decision-making and dispute resolution in a variety of jurisdictions since the mid-1980s, there is little agreement about the nature and the depth of

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<sup>400</sup> Ibid.

<sup>401</sup> Jessop, *supra* note 371; Bob Jessop, “Capitalism and its Future: Remarks on Regulation, Government and Governance” (1997) 4 Rev Int Polit Econ 3 561.

<sup>402</sup> David Gibbs & Andrew EG Jonas, “Governance and Regulation in Local Environmental Policy: The Utility of a Regime Approach” (2000) 31 Geoforum 3 299.

<sup>403</sup> Gunningham, *supra* note 391 at 207.

<sup>404</sup> *Ibid* at 208.

<sup>405</sup> Cossman & Fudge, *supra* note 373 at 33–34; Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Oxford: Oxford University Press, 1997).

such changes.<sup>406</sup> Indeed, despite the widespread claims about the shift away from state power under neoliberalism, Gunningham argues that the state is not “simply one amongst a number of actors” in the context of environmental policy.<sup>407</sup> In his view, the success of emerging environmental policy initiatives has been reliant on at least three roles for the state in natural resources management: “definitional guidance” wherein the state “describes and defines” the governance arrangement; “participatory incentives” whereby the state provides positive or negative incentives for particular actors; and, “enforcement capability” to ensure that obligations are fulfilled and evaluate success.<sup>408</sup> He argues that the concept of “regulatory capitalism” better reflects contemporary environmental governance<sup>409</sup> by reflecting how regulation has in fact increased as markets are enrolled as regulatory mechanisms. Simultaneously, non-state actors are increasingly taking on regulatory roles as governance networks evolve through “hybridity between the privatization of the public and the publicization of the private.”<sup>410</sup> This understanding of hybrid regulatory networks is highly relevant to increasingly proponent-driven nature of aggregate regulation in Ontario and the role of aggregate resource owners and developers and aligned technical experts in shaping land use law and policy.

My project examines whether and how the neoliberal governance features identified by Cossman and Fudge<sup>411</sup> and Peck et al.<sup>412</sup> have emerged in the context of Ontario’s land use planning system. Gunningham’s framework provides a useful tool for the delineation of the specific mechanisms at work in Ontario’s land use planning system. In particular, he proposes a continuum in the role of the state, from law to regulation, to governance.<sup>413</sup> In his view, law refers to specific state-based statutes while regulation encompasses a broader range of flexible instruments that enrol a range of non-state actors while still operating “in the shadow of the state.” Governance mechanisms, he argues, do not privilege the state or require formal authority, as power and responsibility are diffuse.<sup>414</sup> This is an important clarification in the

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<sup>406</sup> Lemos & Agrawal, *supra* note 386 at 303.

<sup>407</sup> Neil Gunningham, “The New Collaborative Environmental Governance: The Localization of Regulation” (2009) 36 J Law Soc 145 1 at 165.

<sup>408</sup> *Ibid* at 164.

<sup>409</sup> John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Northampton, MA: Edward Elgar Publishing, 2008).

<sup>410</sup> Gunningham, *supra* note 391 at 209; Braithwaite, *supra* note 409; David Levi-Faur, “The Global Diffusion of Regulatory Capitalism” (2005) 598 Ann Am Acad Pol Soc Sci 1 12.

<sup>411</sup> Cossman & Fudge, *supra* note 373 at 4.

<sup>412</sup> Peck, Theodore & Brenner, *supra* note 375.

<sup>413</sup> Gunningham, *supra* note 391 at 181.

<sup>414</sup> *Ibid*.



governance debates as the role of law and its relationship to other forms of social and economic regulation can be obscured, making it difficult to trace the ways in which specific legal tools influence people-place relations. The overview of relevant law and policy in Chapter Four provides a detailed description of the range of tools used by various actors in aggregate extraction decision-making. In particular, I examine how the role of owner and non-owner parties are fundamentally shaped by the way in which state and non-state actors define, control and enforce land use law.

*ii. Environmental governance and people-place relations*

Lemos and Agrawal note that the structure of environmental decision-making and power relations related to natural resources not only affects the relationships between different levels of decision makers and between decision makers and constituents, but also critically shapes “the subjective relationships of people with each other and with the environment.”<sup>415</sup> They note that this aspect of environmental governance has received little attention in the literature.<sup>416</sup> The notable exceptions to this are work on ‘environmentality,’ such as the work of Arun Agrawal and that of political scientist Timothy Luke,<sup>417</sup> and, examinations of neoliberal modes of environmental governance discussed above.<sup>418</sup> As Himley notes, these scholars build on insights from political ecology<sup>419</sup> as well as “theoretical tools” from both urban regime theory,<sup>420</sup> and regulation theory,<sup>421</sup> particularly geographers like Peck and Tickell who have drawn attention to the role of actors at the subnational scale.<sup>422</sup>

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<sup>415</sup> Lemos & Agrawal, *supra* note 386 at 304.

<sup>416</sup> *Ibid.*

<sup>417</sup> Robert Fletcher, “Neoliberal Environmentalism: Towards a Poststructuralist Political Ecology of the Conservation Debate” (2010) 8 *Conserv Soc* 3 171; Timothy W Luke, “On Environmentalism: Geo-power and Eco-knowledge in the Discourses of Contemporary Environmentalism” (1995) 31 *Cult Crit* 57; Arun Agrawal et al, “Environmentalism: Community, Intimate Government, and the Making of Environmental Subjects in Kumaon, India 1” (2005) 46 *Curr Anthropol* 2 161.

<sup>418</sup> See *supra* notes 367 to 402.

<sup>419</sup> Richard Peet & Michael Watts, *Liberation ecologies: environment, development and social movements* (New York: Routledge, 2002).

<sup>420</sup> Gavin Bridge & Andrew E G Jonas, “Governing Nature: The Reregulation of Resource Access, Production, and Consumption” (2002) 34 *Environ Plan A* 5 759; Thomas D Feldman & Andrew EG Jonas, “Sage scrub revolution? Property rights, political fragmentation, and conservation planning in Southern California under the federal Endangered Species Act” (2000) 90 *Ann Assoc Am Geogr* 2 256.

<sup>421</sup> Jessop, *supra* note 371; Jessop, *supra* note 401.

<sup>422</sup> Jamie A Peck & Adam Tickell, “Local Modes of Social Regulation? Regulation Theory, Thatcherism and Uneven Development” (1992) 23 *Geoforum* 3 347.

Geographers Karen Bakker,<sup>423</sup> Noel Castree<sup>424</sup> and Becky Mansfield<sup>425</sup> and urban studies scholars David Young, Gene Desfor, and Roger Keil<sup>426</sup> point to neoliberalism as a transformative force in shaping and reshaping contemporary human relationships with the more-than-human world.<sup>427</sup> In particular, concerns about privatization, the production and protection of private property, and the increasingly pervasive use of markets as mechanisms of environmental governance are central concerns in these accounts of environmental governance.<sup>428</sup> Planning scholar Tore Sager notes the importance of neoliberalism as “an essential descriptor of the transformations of regulatory systems and changing urban conditions throughout the world.”<sup>429</sup> As noted above, this project follows from governance scholars in examining the effect of neoliberal forms of regulation on human relationships with the more-than-human world, particularly drawing on the concerns expressed by environmental governance scholars about the role of private property in land use governance.

In large part these scholars have focused on case studies of particular resources or systems of environmental management. This detailed empirical work has exposed how the materiality of specific places matters to governance as the biophysical properties of land and ecological systems “impinge on and shape the organizational and institutional systems through which they are governed.”<sup>430</sup> For example, Scott Prudham’s work on forests in the Pacific Northwest as well as Karen Bakker’s work on water point to nonhuman resistance to specific political-economic forms of control, such as commodification.<sup>431</sup> Mansfield focuses on private property environmental governance mechanisms and argues, “Property has become the central mode of regulating multiple forms of nature.”<sup>432</sup> Mansfield argues that this “re-making of nature-society

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<sup>423</sup> Bakker, *supra* note 394; Karen Bakker, “The ‘Commons’ Versus the ‘Commodity’: Alter-globalization, Anti-privatization and the Human Right to Water in the Global South” (2007) 39 *Antipode* 3 430.

<sup>424</sup> Castree, *supra* note 340.

<sup>425</sup> Becky Mansfield, “Privatization: Property and the Remaking of Nature–Society Relations Introduction to the Special Issue” (2007) 39 *Antipode* 3 393.

<sup>426</sup> Douglas Young & Roger Keil, “Urinetown or Morainetown? Debates on the Reregulation of the Urban Water Regime in Toronto” (2005) 16 *Capital Nat Social* 2 61; Keil & Desfor, *supra* note 390.

<sup>427</sup> Young & Keil, *supra* note 426 at 64.

<sup>428</sup> Bakker, *supra* note 394 at 715; Perreault & Bridge, *supra* note 370 at 487.

<sup>429</sup> Tore Sager, “Neo-Liberal Urban Planning Policies: A Literature Survey 1990–2010” (2011) 76 *Prog Plan* 4 147 at 154.

<sup>430</sup> Himley, *supra* note 371 at 440; Thomas Perreault, “State Restructuring and the Scale Politics of Rural Water Governance in Bolivia” (2005) 37 *Environ Plan A* 2 263; Bakker, *supra* note 394; Bakker, *supra* note 423; James McCarthy, “Scale, Sovereignty, and Strategy in Environmental Governance” (2005) 37 *Antipode* 4 731.

<sup>431</sup> B Braun, “Environmental Issues: Inventive Life” (2008) 32 *Prog Hum Geogr* 667 5 at 668; S Prudham, *Knock on wood* (New York: Routledge, 2005); Bakker, *supra* note 394.

<sup>432</sup> Mansfield, *supra* note 425 at 393.

relations,<sup>433</sup> through multiple forms of privatization produces owners and non-owners through a market-based subjectivity and discipline wherein ‘owners’ are constructed as “efficient, profit-seeking, ‘rational’ individuals” without regard to the nature of their relationship with the owned-place or thing.<sup>434</sup> My project engages with this work by examining the production of owners and non-owners through land use law and the social and material consequences for people-place relations in the specific context of aggregate mineral extraction.

Bakker notes how the physicality of the resource being governed strongly influences the particular forms of resource governance selected by neoliberal governments.<sup>435</sup> For example, she argues that private property regimes are more easily established for particular types of resources “because of their biophysical characteristics, behaviours, and articulation (co-constitution) of labour and consumption practices.”<sup>436</sup> This work has important implications for the examination of people-place relations and how they emerge in the context of land use disputes. Indeed in the context of aggregate extraction, Canadian environmental scholars Anders Sandberg and Lisa Wallace recently drew attention to the importance of particular properties of mineral deposits as a factor in decision-making.<sup>437</sup> This research argues that the geologically fixed nature of aggregate mineral resources is compounded by the development of aggregate resources on privately owned land. As McCarthy argues, this unavoidable materiality makes environmental issues a unique realm of regulation. This, Bridge and Perreault argue, makes environmental governance a critical area of research for geographers. In my view, this is also true of legal scholars. Indeed, as noted above in Section 1, the materiality and connectivity of the more-than-human world challenge the anthropocentric premises of property law and the desire to see property as imposing a clear and orderly set of relations between people and about things.

The complex context of land use disputes problematizes attempts to understand environmental governance in relation to a particular ‘resource’ in isolation from the broader ecosystem of which it is an integral part. Indeed, the layers of competing claims in land use disputes are inextricably linked to the material reality of resources in place and problematize decision-

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<sup>433</sup> *Ibid* at 394.

<sup>434</sup> *Ibid* at 396.

<sup>435</sup> Bakker, *supra* note 423 at 436.

<sup>436</sup> Bakker, *supra* note 374.

<sup>437</sup> L Anders Sandberg & Lisa Wallace, “Leave the Sand in the Land, Let the Stone Alone: Pits, Quarries and Climate Change” (2013) 12 *ACME: An International Journal for Critical Geographies* 1; Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford: Oxford University Press, 2005).

making that divides the nonhuman world into distinct and separate pieces. Following from the discussion of place above in Section 2, this project recognizes that aggregate resources occur in specific places. These places are constituted through complex networks of human uses and attachments with soil, wetlands, forest and hydrogeological features, which intersect with the relations within the more-than-human world. These messy interconnections pose critical challenges to planning and property law and it is vital that legal scholarship grapple with how the presence of places as complex interconnected eco-social systems challenges law and legal decision-making. My project will specifically develop an understanding of how private property relations work through law to bracket the human and more-than-human relationships with, and within, the places at stake.

### *iii. More-than-human environmental governance*

While environmental geography scholars do provide for nonhuman agency, Braun argues that scholarship on neoliberal natures fails to “incorporate the ‘nonhuman...as a constitutive element of social and economic life.’”<sup>438</sup> Bridge and Perreault exemplify this when they suggest interpreting environmental governance as “governance through nature” rather than “governance of nature”.<sup>439</sup> This maintains the anthropocentric conception of socio-natural relations and the validity of a hierarchical human-nature divide as a foundation for governance. As a result of the failure to go beyond a social constructionist critique of socio-nature relations, Bakker argues, these accounts do not fully address the range of “environmental processes and socio-natural entities subsumed within processes of neoliberalization.”<sup>440</sup> Instead she calls for the interrogation of “the status of nonhumans as political subjects,” through the incorporation of political ecology, emotional geography, and ecological sciences methodologies and a break from the humanist model of political economy in which ‘neoliberal natures’ scholarship has been embedded.<sup>441</sup> Braun goes further, calling for environmental geographers to combine the insights of non-representational theory about human-nonhuman relations and the “radical uncertainty of complex systems and the capacity of bodies for affect”<sup>442</sup> with the physical geographers’ acknowledgement that “a great deal of order nevertheless exists.”<sup>443</sup>

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<sup>438</sup> Braun, *supra* note 431 at 668.

<sup>439</sup> Perreault & Bridge, *supra* note 370 at 492.

<sup>440</sup> Bakker, *supra* note 374 at 717.

<sup>441</sup> *Ibid* at 718; Steve Pile, “Emotions and Affect in Recent Human Geography” (2010) 35 *Trans Inst Br Geogr* 15.

<sup>442</sup> Braun, *supra* note 431 at 676.

<sup>443</sup> *Ibid* at 675–676.

While these critiques are important, particularly with respect to the production of ‘nature,’ land and resources through property and land use law, and for the potential for relationships of reciprocity with place and non-instrumental relations with the nonhuman environment, they also present significant risks. As Lorimer cautions, such “[m]ore than human approaches deploy political categories alien to the hard-fought taxonomies of modern legislation and representation – including human rights.”<sup>444</sup> Arguably, such perspectives are fundamentally incompatible with the legal logics of modern property, planning and even environmental law. As work by both Valverde and Blomley has demonstrated, activist legal strategies that attempt to introduce legal concepts that are fundamentally incompatible with logics and tools of planning and land use law risk the possibility of failing to gain entry to the debate.<sup>445</sup> This project specifically examines the ways in which land use law includes and excludes particular claims and knowledges about the more-than-human world. With this understanding, it aims to consider how the logics and tools of land use planning might be reoriented towards just and reciprocal relations with place.

As outlined above, the critical environmental governance scholarship provides a number of important and useful analytical tools to account for human-more-than-human relations in the context of land use planning and property law. However, in my view, the focus on neoliberalism and relatively recent developments in legal and policy approaches to socio-nature relations is somewhat limiting. As the discussion of property law and theory above in Section 1 make clear, people-place relations have long been shaped, defined and controlled through the ideology of private property and the legal and cultural practices of private property relations. Indeed, the commodification of places and their nonhuman inhabitants was central to the colonial settlement of Ontario, the dispossession of Indigenous land and the establishment of a resource-based capitalist economy.<sup>446</sup> Therefore, while struggles over enclosure, commodification and the power to define people-place relations may be a feature of neoliberal governance,<sup>447</sup> they are not uniquely so. In fact, in the context of aggregate extraction, shifts towards centralization of decision-making and the expanded role of corporate actors in defining legal and policy strategies pre-dated the rise of neoliberal governments in Canada, Ontario, and Toronto. Therefore, this project engages primarily with aspects of this scholarship that draw

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<sup>444</sup> J Lorimer, “Multinatural Geographies for the Anthropocene” (2012) 36 *Prog Hum Geogr* 5 593.

<sup>445</sup> Valverde, *supra* note 249; Nicholas Blomley, *supra* note 272.

<sup>446</sup> Wood, *supra* note 58.

<sup>447</sup> Young & Keil, *supra* note 426 at 65.

attention to the more-than-human world, the materiality of the environment in decision-making and governance, and the importance of understanding the specific role of state law in the larger historical and socio-natural context of liberal property regimes, land use planning and natural resource management.

## B. Planning

Land use planning disputes are classic examples of “wicked problems”.<sup>448</sup> Paul Lachapelle and Stephen McCool define wicked problems as involving “multiple and competing values and goals, little scientific agreement on cause-effect relationships, limited time and resources, incomplete information, and structural inequities in access to information and the distribution of political power.”<sup>449</sup> As planning scholar Barry Cullingworth argues, while land use disputes involve detailed scientific information, they cannot be treated as purely scientific or technical problems. He argues, “[I]nvariably the outcome is based upon a mixture of scientific, social, economic and political issues as perceived by the multiplicity of organizations and individuals involved in the planning process.”<sup>450</sup> Planning, Murdoch argues, “has considerable difficulty in ‘representing’ the complex and heterogeneous spaces in which it is inevitably immersed.”<sup>451</sup> As a result, he argues, planning produces inclusions and exclusions, notably the exclusion of non-ownership relations with land and the nonhuman environment.<sup>452</sup> This project examines this process of inclusion and exclusion in the specific context of aggregate siting disputes.

What is missing from such accounts of the complexity of land use disputes is attention to the particular role of law as part of land use planning processes through which such wicked problems are defined and inclusions and exclusions are negotiated and enforced. My research explores how land use law works in the face of these wicked problems. In particular, I consider how law accounts for and responds to the complexity of human relationships with place and the materiality of the nonhuman world that are uniquely exposed in disputes about land use. This section briefly situates this exploration of Ontario’s land use planning law in

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<sup>448</sup> H W J Rittel & M M Webber, “Wicked problems” (1974) 26 *Man-Made Futur* 1 272.

<sup>449</sup> Paul R Lachapelle & Stephen F McCool, “Exploring the Concept of ‘Ownership’ in Natural Resource Planning” (2005) 18 *Soc Nat Resour* 3 279 at 279.

<sup>450</sup> J B Cullingworth, *Urban and Regional Planning in Canada* (Transaction Publishers, 1987) at 6.

<sup>451</sup> Murdoch, *supra* note 325 at 131.

<sup>452</sup> Murdoch, *supra* note 325.

the historical context of planning in Canada. It will then examine theoretical approaches to land use planning law and specifically consider research on participation in planning.

*i. Planning History and Theory*

Canadian planning evolved from both the British town-planning garden city and the American city efficient planning ideologies.<sup>453</sup> The dual influences on planning in Canada were summarized by Gerald Hodge: “The broad social view of responsibility for community health and housing is derived from the British; the functional view of arranging streets, utilities and the use of zoning is distinctively American.”<sup>454</sup> However, planning scholars J.B. Cullingworth and Stephen V. Ward argue that it is a mistake to see Canadian planning as simply a variant of either British or American planning.<sup>455</sup> In the context of my research, this caution informs my reading of both American and British planning scholarship and reinforces the importance of locating my research in the specificity of Southwestern Ontario, as well as recognizing Indigenous land law and environmental governance jurisdiction. Attending to the influence of both traditions on Ontario’s land use law, this project understands planning as having a unique trajectory and development in Canada, influenced by local legal and political cultures, but also by distinctive institutional structures and responses to economic and social events.<sup>456</sup> As Canadian planning scholar Zack Taylor points out, the British North American colony that would later become Ontario adopted a rules-based system for municipal government early on in the history of planning with the *Upper Canada Municipal Corporations Act*: “[T]he Baldwin Act was the first legislation in the English-speaking world to consolidate enabling provisions for all forms of general-purpose municipal governments, both urban and rural.”<sup>457</sup> In this sense, Ontario’s approach to planning law has long been distinctive despite the range of international influences that have shaped particular elements and approaches therein.

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<sup>453</sup> Stephen V Ward, “The International Diffusion of Planning: A Review and a Canadian Case Study” (1999) 4:1 Int Plan Stud 53 at 60.

<sup>454</sup> Gerald Hodge, *Planning Canadian Communities. An Introduction to the Principles, Practice, and Participants* (Scarborough: Nelson Canada, 1991); Thomas I. Gunton, “The Evolution of Urban and Regional Planning in Canada: 1900-1960,” Ph. D. dissertation, University of British Columbia, 1981) [unpublished].

<sup>455</sup> Cullingworth, *supra* note 450 at 468; Ward, *supra* note 453 at 58.

<sup>456</sup> Zack Taylor, “If Different, then Why?: Explaining the Divergent Political Development of Canadian and American Local Governance” (2014) 49 Int J Can Stud 53 at 57.

<sup>457</sup> *Ibid* at 58.

Professional planning in Canada was historically linked to the role of technical and scientific experts in planning processes.<sup>458</sup> As Sager argues, this idea of planning as based on “professionally good solutions” rather than politics or the market is common to a range of planning traditions.<sup>459</sup> Thomas Adams, a key influence on Canadian planning who was recruited from England to head up the Commission of Conservation in 1914, advocated for a scientific approach to planning and emphasized objectivity and efficiency:<sup>460</sup> “Adams’ focus on numbers, standards, and statistics clearly promulgated the value that planning could bring to society.”<sup>461</sup> In Canada, the separation of planning and political decision-making is linked to the establishment of specialist appointed bodies to oversee municipal affairs, such as the Ontario Railway and Municipal Board, which later became Ontario’s primary adjudicative planning body, the Ontario Municipal Board.<sup>462</sup> Political scientist John Chipman traces the historical establishment of the Ontario Railway and Municipal Board in 1906 and its transition to the Ontario Municipal Board in 1932, to the desire of political officials to remove contentious disputes about urban development and complex ‘technical’ matters outside of the political realm into the hands of ‘expert’ decision makers.<sup>463</sup> Emerging issues about the ‘public interest’ in infrastructure development, such as municipal railways and energy utilities, were seen as time consuming and complex. Therefore, the Board was created to “remove from the shoulders of elected politicians and place on those of a tribunal composed of non-elected experts the time consuming responsibility for decision-making.”<sup>464</sup>

As Peter Moore argues, the quasi-independent nature of these decision-making bodies “ensured that the “politics” was kept out of planning.”<sup>465</sup> However, despite the historical depoliticization of planning as a technical exercise, critics such as Bent Flyvberg have argued

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<sup>458</sup> Kaplinsky, *supra* note 34 at 223; Wayne J Caldwell, *Rediscovering Thomas Adams: Rural Planning and Development in Canada* (Vancouver: UBC Press, 2011) at 336; Walter Van Nus, “Towards the City Efficient: The Theory and Practice of Zoning, 1919-1939” Alan F. J. Artibise and Gilbert A. Stelter, eds., *The Usable Urban Past: Planning and Politics in the Modern Canadian City* (Toronto: Macmillan, 1979) 226 at 226; Peter W Moore, “Zoning and Planning: The Toronto Experience, 1904-1970” (1979) Alan F. J. Artibise and Gilbert A. Stelter, eds., *The Usable Urban Past: Planning and Politics in the Modern Canadian City* (Toronto: Macmillan, 1979) 320 at 325–326.

<sup>459</sup> Sager, *supra* note 429 at 149.

<sup>460</sup> Caldwell, *supra* note 458 at 336.

<sup>461</sup> *Ibid* at xxi.

<sup>462</sup> Taylor, *supra* note 456 at 64–65.

<sup>463</sup> Chipman, *supra* note 34 at 11.

<sup>464</sup> *Ibid* at 12.

<sup>465</sup> Moore, *supra* note 458 at 326.



that it is a thoroughly political exercise that is “*always* set within relations of power.”<sup>466</sup> In Ontario, early planning was not without politics, but rather a closed and elite system of governance. As Moore notes, removing planning from the formal political sphere resulted in a planning system strongly influenced by the interests of the provincial business elite.<sup>467</sup> Indeed Taylor has speculated that the “narrow electoral franchise” linking participation to property ownership at the municipal level is one of the key institutional influences on the nature of municipal governance and local politics in Canada.<sup>468</sup> Chipman notes that the Ontario Municipal Board’s early oversight power for municipal bylaws was explicitly linked to property ownership.<sup>469</sup> While this language restricting participation in planning decisions has been removed from provincial law, his study found that the Board’s approach to land use disputes perpetuates this link between private property rights and planning.<sup>470</sup> In examining the public interest in contemporary planning law in Ontario, Marcia Valiante concludes that while the protection of private property rights may not be expressly embedded in contemporary legislation, it endures as “part of the culture of planning law.”<sup>471</sup>

Scholars have paid particular attention to the history of zoning in Canadian planning law. Zoning, Moore argues in his study of its historic development in Toronto, was a tool that fit squarely within the “scientific management” approach to city planning that was emerging by the 1920s.<sup>472</sup> Legal scholar Eran Kaplinsky argues that while planning systems in North America were purportedly intended to shift land use control away from private law notions of nuisance and restrictive covenants, the imposition of regulatory control over private land through zoning laws was politically palatable because of its appeal to private property owners and developers.<sup>473</sup> The “practice of zoning,” Kaplinsky argues, has been shaped by a social, political and economic context, resulting in a focus on “the protection of private property values.”<sup>474</sup> Indeed Cullingworth notes that policymakers explicitly linked zoning to the

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<sup>466</sup> Bent Flyvbjerg, *Rationality and power: Democracy in practice* (Chicago: University of Chicago press, 1998) at 2.

<sup>467</sup> Moore, *supra* note 458 at 326.

<sup>468</sup> Taylor, *supra* note 456 at 60–61.

<sup>469</sup> Chipman, *supra* note 34.

<sup>470</sup> *Ibid.*

<sup>471</sup> Marcia Valiante, “In Search of the ‘Public Interest’ in Ontario Planning Decisions” in Marcia Valiante & Anneke Smit, eds, *Public Interest Private Property: Property Law and Planning Policy in Canada* (Vancouver: UBC Press, 2015) at 121.

<sup>472</sup> Moore, *supra* note 458 at 320.

<sup>473</sup> Kaplinsky, *supra* note 34 at 223.

<sup>474</sup> *Ibid* at 227.

protection of property in early attempts to bring it into law in Ontario.<sup>475</sup> Tracing the early history of zoning, Walter Van Nus argues that early on Canadian planners “exchanged the goal of an optimally efficient urban organism for that of an optimally profitable one for the property industry.”<sup>476</sup> With respect to the Ontario Municipal Board, Chipman’s study concluded that the Board has adopted a private law nuisance framework to deal with land use disputes and notes the problematic blurring of the public interest with the private interests of local neighbours.<sup>477</sup>

Blomley notes that we should be cautious about characterizing the adoption of zoning as purely in the service of private interests in light of the continuing influence of utilitarian conceptions of land use employed by early planners.<sup>478</sup> Appeals to economic arguments may have been politically expedient for planners, but they were not necessarily the underlying motivation.<sup>479</sup> The relationship between private property and planning is more nuanced, Blomley argues, and we need to understand the specific ways in which it works through land use law to organize space. Blomley traces the historical development of debates about the role of Canadian planning and draws attention to the utilitarian emphasis on improvement of land and avoidance of waste by influential thinkers, such as Adams. Because of the emphasis on achieving a specific vision of the common good through efficient development of land and resources for human benefit, Blomley argues, these early planners understood private ownership as a potential source of waste that needed to be controlled and directed towards proper and productive purposes – namely the development of property for economic productivity.<sup>480</sup> In Blomley’s view, this utilitarian logic continues to shape contemporary land use planning in consequential ways.<sup>481</sup> This research adopts a nuanced approach to understanding the role of private property in planning law and explores the particular consequences of the enduring anthropocentric, development-focused orientation for the places involved in aggregate mineral extraction.

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<sup>475</sup> Cullingworth, *supra* note 450 at 555–556.

<sup>476</sup> Van Nus, *supra* note 458 at 243.

<sup>477</sup> Chipman, *supra* note 34 at 45–49, 98.

<sup>478</sup> Nicholas Blomley, “Land use, planning, and the ‘difficult character of property’” (2016) *Plan Theory Pract* 1 at 10.

<sup>479</sup> *Ibid* at 11.

<sup>480</sup> *Ibid* at 9.

<sup>481</sup> *Ibid* at 11.

Marcia Valiante and Anneke Smit note that early zoning decisions in Ontario accepted the impact on property rights as legitimate in pursuing public benefits. However, they note a simultaneous effort by courts and tribunals “to ensure that private rights were not lost to arbitrary municipal decisions.”<sup>482</sup> This balancing exercise remains central to planning decisions in Ontario. Yet, as Valiante points out, not only are there always “multiple public interests at play,” land use conflicts expose tensions between different private interests.<sup>483</sup> This research provides further insight into this relationship by focusing on the more-than-ownership interests asserted in aggregate siting disputes. These interests, I argue, are not easily characterized as purely private or public in nature. Rather, they at times combine interests in privately owned land neighbouring the proposed site with concerns about environmental, landscape, social and cultural impacts on a particular place. As this research demonstrates, claims by parties with private interests as neighbours may also be excluded where they do not fit into the frame of proper land use considerations. In my view, Chipman’s finding that direct adverse impacts on neighbouring private property owners tended to outweigh less tangible claims to collective benefits<sup>484</sup> points not only to the importance of characterizing who is making the claim, but also to the need to trace how different stories about what is at stake and what is to be gained in a particular dispute succeed. Indeed, while we should remain cautious about the parochial and exclusionary politics invoked to maintain conceptions of character or amenity in planning, this research demonstrates that the role of interests in neighbouring land has a more complex relationship with private property development than the research might suggest, particularly with respect to industrial and extractive development and corporate proponents.

While the historical relationship between planning and the protection of private property pre-dates neoliberalism and recent changes to land use planning and environmental governance in Ontario, commentators on regional and infrastructure planning in Ontario argue that neoliberalism is an important contextual concept for understanding contemporary planning in Ontario.<sup>485</sup> Indeed Sager argues that the “shift from bureaucratic regulation to public

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<sup>482</sup> Smit & Valiante, *supra* note 42 at 12.

<sup>483</sup> Valiante, *supra* note 471 at 106.

<sup>484</sup> Chipman, *supra* note 34 at 45–49.

<sup>485</sup> Young & Keil, *supra* note 426; Keil & Desfor, *supra* note 390; Julie-Anne Boudreau, Roger Keil & Douglas Young, *Changing Toronto: governing urban neoliberalism* (University of Toronto Press, 2009); Roger Keil, “‘Common-Sense’ Neoliberalism: Progressive Conservative Urbanism in Toronto, Canada” (2002) 34 *Antipode* 3 578; Scott Prudham, “Poisoning the well: neoliberalism and the contamination of municipal water in

entrepreneurialism” in urban planning policy and politics has profoundly impacted planning in a number of countries.<sup>486</sup> He specifically notes that contemporary investment in large-scale infrastructure is shaped by the competition for global investment capital between urban regions and serves as a “crucial precondition” for neoliberal policies. This pro-growth agenda builds on the utilitarian roots of planning in Ontario and directly shapes the demand for aggregate minerals as “physical products of urban entrepreneurship” with spatial and material effects in both urban and rural places.<sup>487</sup> At the same time, it is important to understand how neoliberal governance strategies have also maintained and re-enforced the bureaucratic model of technical expertise and “decide-announce-defend model of planning” that emerged in the first half of the twentieth century.<sup>488</sup> This link between past and recent strategies and politics of urban development and rural planning is an important part of understanding the legal boundaries of people-place relations in Ontario and the ways in which non-ownership relations challenge assumptions in the provincial planning framework. Therefore, while neoliberalism is not responsible for planning’s private property and technical orientation, this research demonstrates that it has facilitated a reinscription and purification of the private property ideology and scientific managerial approaches in Ontario’s land use law.

### *ii. Planning Law*

Understanding planning in this historical context as political and entangled in power relations, my project takes up Blomley’s call to explore the relationship between private property and planning. Planning, he argues, ‘often appears to distance itself from questions regarding property. Its declared focus is the spatial organization of something called “land use.”’<sup>489</sup> Building on Valverde’s unpacking of ‘land use’, Blomley argues, “[L]and use ... does not quite sever planning from its relation to property, but rather hooks the two together in quite a particular and particularly consequential manner.”<sup>490</sup> Private property, he notes, is enrolled by land use planning “in order to achieve desired ends.”<sup>491</sup> This nuanced attention to the relationship between private property and planning is critical to my project, which

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Walkerton, Ontario” (2004) 35 *Geoforum* 3 343; Neil Brenner & Nikolas Theodore, *Spaces of neoliberalism: urban restructuring in North America and Western Europe* (Oxford: Blackwell, 2002).

<sup>486</sup> Sager, *supra* note 429 at 156.

<sup>487</sup> *Ibid* at 154; Sandberg & Wallace, *supra* note 437.

<sup>488</sup> Christopher Groves, Max Munday & Natalia Yakovleva, “Fighting the Pipe: Neoliberal Governance and Barriers to Effective Community Participation in Energy Infrastructure Planning” (2013) 31 *Environ Plan C Gov Policy* 1 340 at 346.

<sup>489</sup> Blomley, *supra* note 478 at 2.

<sup>490</sup> *Ibid*.

<sup>491</sup> *Ibid* at 3.

specifically considers the role that law plays in upholding particular private property relations and facilitating specific uses of land. Canadian socio-legal scholar Mariana Valverde points to law “as a mode or a conduit for governance.”<sup>492</sup> She argues that in the context of urban governance, law may be only one aspect of the everyday at the local level, but nonetheless “law does matter.”<sup>493</sup>

Planning law in Ontario operates through a complex web of legislation and policy that is described in detail in Chapter Four and critically examined throughout this project. In the context of aggregate extraction, the key legal tools include municipal power over zoning and official plans and centralized provincial planning policy through the *Planning Act*<sup>494</sup>, the *Provincial Policy Statement*<sup>495</sup> and the *Aggregate Resources Act*<sup>496</sup> and associated Ministry of Natural Resources guidelines.<sup>497</sup> There is an impressive body of scholarship examining Anglo-American and Canadian planning generally.<sup>498</sup> However, with some notable exceptions discussed in this section, there is a surprising lack of critical scholarship focused on Canadian planning law.<sup>499</sup> In her book *Everyday Law on the Street: City Governance in an Age of Diversity*, Valverde points out, “the main scholarly literatures on the urban either

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<sup>492</sup> Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015) at 83.

<sup>493</sup> Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (University of Chicago Press, 2012) at 6.

<sup>494</sup> RSO 1990, c P.13.

<sup>495</sup> (Ministry of Municipal Affairs and Housing, 2014), [the “2014 PPS”]; (Ministry of Municipal Affairs and Housing, 2005) [the “2005 PPS”]. In April 2014 the Ministry of Municipal Affairs and Housing released the current 2014 Policy Statement, which took effect on April 30, 2014; however, the cases examined here took place prior to the new PPS.

<sup>496</sup> R.S.O. 1990, c. A. 8 [the “Act”].

<sup>497</sup> *Aggregate Resources Provincial Standards*, (Ministry of Natural Resources, 1997), [the “Standards”]. [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 Policy and Internal Procedures Manual*, (Ministry of Natural Resources, Land and Water Branch, Aggregate and Petroleum Resources Section, 1996) [the “Manual”].

[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).

<sup>498</sup> Cullingworth, *supra* note 450; Aaron Alexander Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development* (Toronto: University of Toronto Press, 2013); Gerald M Adler, *Land Planning by Administrative Regulation: The Policies of the Ontario Municipal Board* (Toronto: University of Toronto Press, 1971); Gerald E Frug & David J Barron, “International Local Government Law” (2006) 38 *Urb Law* 1; Gerald E Frug & David J Barron, *City Bound: How States Stifle Urban Innovation* (Ithica: Cornell University Press, 2008); Warren Magnusson & Andrew Sancton, *City Politics in Canada* (Toronto: University of Toronto Press Toronto, 1983); Andrew Sancton & Robert A Young, *Foundations of Governance: Municipal Government in Canada’s Provinces* (Toronto: University of Toronto Press, 2009); Nicholas K Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford Publication, 1994); Nicholas Blomley, *supra* note 272; Boudreau, Keil & Young, *supra* note 485; Michael Ekers, Pierre Hamel & Roger Keil, “Governing Suburbia: Modalities and Mechanisms of Suburban Governance” (2012) 46 *Reg Stud* 3 405; Ward, *supra* note 453; Sancton & Young, *supra* note.

<sup>499</sup> Smit & Valiante, *supra* note 42; Harris, *supra* note 90; Kaplinsky, *supra* note 34; Valverde, *supra* note 249; Ron Levi & Mariana Valverde, “Freedom of the City: Canadian cities and the quest for governmental status” (2006) 44 *Osgoode Hall LJ* 409.

ignore law's power or show it only as an exceptional force or a set of antiquated rules."<sup>500</sup> Where critical scholarship has directly considered Canadian planning law, the focus has often been explicitly on the 'urban' and city planning to the exclusion of rural or peri-urban regions and their connections to urban regions.<sup>501</sup> More particularly, again with a few exceptions including contributions to the 2015 edited collection *Public Interest, Private Property*, Canadian legal scholarship has rarely examined the relationship between private property and planning law.<sup>502</sup> In their introduction to the collection, Editors Marcia Valiante and Anneke Smit call for "a more active debate in Canada on the appropriate parameters of the public planning power and role, the acceptable limitations on the enjoyment of private property rights, and the influence of both on the shape of urban Canada."<sup>503</sup> Similarly, the Ontario Municipal Board has also received surprisingly little attention from legal scholars,<sup>504</sup> though it has been the subject of more attention from other disciplines.<sup>505</sup> This lack of attention is surprising both because it is the oldest existing specialist planning tribunal in the world, as well as the oldest quasi-judicial body in the province with broad and powerful jurisdiction to deal with issues and disputes under over 100 statutes.<sup>506</sup> However, it is consistent with an internationally recognized gap in legal and planning scholarship with respect to planning appeal tribunals.<sup>507</sup> In light of these gaps, my project makes an original contribution to both legal and planning scholarship by providing a detailed and critical examination of Ontario's planning framework and the role of the Ontario Municipal Board in the context of aggregate extraction. Further, because aggregate extraction is both an urban and rural planning issue, it necessitates exploration of how the law operates along the spectrum of urban, suburban and rural places and their people-place relations.

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<sup>500</sup> Valverde, *supra* note 493 at 8.

<sup>501</sup> Valverde, *supra* note 249; Valverde, *supra* note 493; Levi & Valverde, *supra* note 499.

<sup>502</sup> Blomley, *supra* note 478; Smit & Valiante, *supra* note 42.

<sup>503</sup> Smit & Valiante, *supra* note 42 at 3.

<sup>504</sup> Bruce Wayne Krushelnicki, *A Practical Guide to the Ontario Municipal Board* (Toronto: Lexis Nexis (Canada), 2007); Kaplinsky, *supra* note 34.

<sup>505</sup> Chipman, *supra* note 34; Moore, *supra* note 498; Sandeep Kumar, "Urban Design Decision-Making: A Study Of Ontario Municipal Board Decisions In Toronto" (2005) 14 Can J Urban Res Winn 2 209; Angela Syadel et al, "Wetlands on trial: Ontario Municipal Board decisions affecting wetlands, 1980–1993" (1995) 38 Can Public Adm 2 222; Aaron Alexander Moore, "Passing the Buck: The Ontario Municipal Board and Local Politicians in Toronto, 2000-2006" (Paper delivered at Canadian Political Science Association Annual Meeting, Ottawa, 27-29 May, 2009); Steven Webber & Tony Hernandez, "Big box battles: the Ontario Municipal Board and large-format retail land-use planning conflicts in the Greater Toronto Area" (2016) 21 Int Plan Stud 2 117; Moore, *supra* note 458.

<sup>506</sup> Chipman, *supra* note 34 at 12; Nir Mualam, "Where Planning Meets the Law: The Rise of Appeal Tribunals for Deciding Land-use Disputes" (2014) 29 Journal of Planning Literature 4 370 at 377, 381.

<sup>507</sup> Mualam, *ibid*, at 370; Stephen Willey, "Planning Appeal Processes: Reflections on a Comparative Study" (2007) 39 Environ Plan A 7 1676 at 1677.

Planning conflicts engage specific legal and regulatory frameworks and a detailed examination of how these “mechanisms” actually operate is an important, but often neglected, part of understanding land use disputes. Whether the goal is theoretical or political, Valverde notes the importance of understanding the distinctive “logics that are not unique but nevertheless characteristic of local governance.”<sup>508</sup> Valverde’s work is explicitly focused on the urban; however, her “law in action” approach<sup>509</sup> to making the everyday operation of local regulatory and legal tools visible can be adapted to the geographic and jurisdictional contexts of this project. Valverde builds a detailed place-based “legal inventory of laws” as the starting point of her inquiry.<sup>510</sup> In Chapter Four, I adapt this inventory approach to the rural land use context in Ontario aiming to provide an overview of the “basic legal architecture” and spaces of aggregate resource management. Understanding the specific networks of legal tools involved is equally critical to the organization of everyday life outside of the ‘urban.’ Indeed, the complexity of planning law is arguably part of what makes land use disputes wicked problems wherever they take place.

Valverde points to the unique ways in which planning law works through categories of ‘use’: “Governing people, things and spaces through ‘use’ is a different kind of governmental operation than the much better known operation of governing through legal categories of personhood and group identity.”<sup>511</sup> In her view, “use” operates as a distinct legal technology in the context of municipal and planning law.<sup>512</sup> Instead of acting on persons, or even directly on property, she argues, land use law acts on specific uses, which obscures law’s work of ordering people and things.<sup>513</sup> For Valverde, this has particular legal and political significance because she concludes that use logics are “incommensurable” with the logic of rights, and therefore, the currency of rights-based claims fails to “translate” into legal success at the local level.<sup>514</sup> This poses important challenges to activist strategies attempting to find adjudicative solutions to the failure of decision-making processes to account for person-place relations. While I argue that such logics extend to various scales of planning governance, not just the local, her focus on the ‘how’ of planning governance is highly relevant to understanding the

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<sup>508</sup> Valverde, *supra* note 249 at 35.

<sup>509</sup> Valverde, *supra* note 493 at 28.

<sup>510</sup> *Ibid* at 21, 28.

<sup>511</sup> Valverde, *supra* note 249 at 37.

<sup>512</sup> *Ibid* at 42.

<sup>513</sup> *Ibid*.

<sup>514</sup> *Ibid* at 40–41.

success of aggregate development proponents in Ontario. Complimenting Blomley's performativity approach and his use of 'bracketing', Valverde's attention to particular legal mechanisms and relationships informs my detailed consideration of how concepts like ownership and rurality work through law to shape aggregate siting decisions. Further, as Blomley notes, "[P]lanning, and its instruments, such as zoning, do not have an essential politics, and can be deployed for multiple ends."<sup>515</sup> Therefore, understanding how such instruments are successfully used towards particular ends can inform activist strategies for environmentally just planning and land use decisions, and potentially even transformative legal change.

Valverde has more recently built on this work by attending to the relationship between spatial and temporal dimensions of law.<sup>516</sup> In this more recent work she draws attention to the depoliticizing effect of jurisdiction, noting, "[I]n general, for law to work smoothly, disputes about the substance and the qualitative features of governance have to be turned into seemingly mundane and technical questions about who has control over a particular spacetime (an inheritance, a quantity of lumber, a murder)".<sup>517</sup> As will be examined in Chapter Four, the shift of regulatory power from local to provincial authorities was a direct result of the historically contentious nature of aggregate siting in Ontario. As Valverde notes, this shift not only changes the actors, but also what can be claimed, debated, and decided: "[T]he consumers of legal decisions are kept from asking: how should problem X or Y be governed in the first place."<sup>518</sup> As I argue in Chapter Five, the powerful role of centralized provincial planning policy in aggregate disputes limits the influence of public planning instruments at the local level.

Valiante attempts to unpack conceptions of the "public interest" and "the common good" that have historically justified the limitations on private ownership imposed through land use law in Ontario.<sup>519</sup> As discussed in Chapter Four, the public interest is not defined in Ontario planning law. Rather, a very broadly defined 'provincial interest' guides decision-making and informs the case-by-case "balancing of competing interests" by local authorities and the

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<sup>515</sup> Blomley, *supra* note 478 at 11.

<sup>516</sup> Valverde, *supra* note 492 at 82.

<sup>517</sup> *Ibid* at 84.

<sup>518</sup> *Ibid* at 86.

<sup>519</sup> Valiante, *supra* note 471.



Ontario Municipal Board.<sup>520</sup> Thus, while she characterizes provincial planning policy as “highly prescriptive”, the concept of ‘public interest’ “at the heart of this direction” remains highly contested.<sup>521</sup> Yet, Valiante argues, as a result of the closed-nature of the approach to policy making in Ontario’s planning framework and the reliance on site-specific amendments to plans at the municipal level, “participants at every level are restricted to raising concerns about a specific proposal and have no forum in which to debate the logic of the prevailing approach to growth and development and the underlying assumptions about the benefits that are supposed to flow inevitably.”<sup>522</sup> The result, she concludes, is that “[T]he assumptions and beliefs that underlie current planning discourse are thus sheltered from public debate.”<sup>523</sup> While Valiante calls for more and better opportunities for participation as a result of this closure, which will be discussed in subsection iii, it also suggests the need to unpack key legal tools and concepts involved in bracketing conflicts and decisions about land use issues. Of particular relevance to this project are the relationships between private property ownership and development siting, the development-focused orientation of provincial planning, and the tension between expertise, knowledge and experience.

The vast majority of aggregate development occurs on private land. As Blomley notes, rather than neutralizing it, the fact that provincial planning law brackets “[i]ssues of property acquisition and distribution” implicates planning in reproducing existing forms of exclusion and hierarchies of interest, and perhaps even in producing new ones.<sup>524</sup> Indeed, it is argued here that the relationship of private owners to the land where an aggregate mine is proposed imports specific forms of spatial, temporal, and interpretive privilege. Therefore, while it is important to understand how land use governance operates through uses rather than persons as Valverde suggests,<sup>525</sup> and, while “land use planning does not question who owns, or how”,<sup>526</sup> this research demonstrates that ownership and owners matter in aggregate extraction disputes. What Blomley and Valverde’s work provide is a nuanced approach to understanding how and to what ends. In the case of aggregate extraction in Ontario, land use planning law builds on the foundational privileges that flow through ownership *and* is used

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<sup>520</sup> *Ibid* at 118.

<sup>521</sup> *Ibid* at 105.

<sup>522</sup> *Ibid* at 124.

<sup>523</sup> *Ibid* at 125.

<sup>524</sup> Blomley, *supra* note 478 at 11.

<sup>525</sup> Valverde, *supra* note 492 at 13.

<sup>526</sup> Blomley, *supra* note 478 at 11.

use to construct extraction as a proper use of land. This “particular arrangement of property”<sup>527</sup> profoundly shapes people-place relations in the province.

### *iii. Participation*

One of the critical aspects of planning law and policy for understanding land use disputes is the structure of participation at all decision-making stages, and the legal rights of appeal and standing in subsequent adjudicative processes. The importance of decision-making structures and structural opportunities for contestation is emphasized by the environmental governance literature, such as works by Bakker,<sup>528</sup> McCarthy,<sup>529</sup> and Perreault.<sup>530</sup> These scholars consider the role of social movements in disputing, shaping and reinforcing governance structures alongside the specific ways in which injustice and inequality are codified by neoliberal control of natural resources and environmental decision-making.<sup>531</sup> In the UK context, Eloise Scotford and Rachael Walsh have argued that land use regimes have redefined property relations away from commodification through private property rights and towards a democratized form of environmental decision-making.<sup>532</sup> However, in the context of Ontario’s land use law, Valiante concludes that while there are “multiple public interests at play ... procedural opportunities to participate do not fully account for all the multiple interests, and that private economic and property interests heavily influence the outcomes of development decisions nominally made in the public interest.”<sup>533</sup> While early twentieth century Canadian planning “assumed” the public interest based on the collection of ‘objective’ data collection and the influence of elites,<sup>534</sup> planners and planning scholars now recognize the plurality of public interests engaged by land use planning.<sup>535</sup> As a result, Valiante argues, focus has shifted from defining the public interest to the procedural aspects of planning decisions.<sup>536</sup> My research seeks to look beyond aspirational statutory goals with respect to environmental outcomes or public participation to examine how Ontario’s land use planning regime both creates and constrains space for contestation about the use of private

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<sup>527</sup> Ibid.

<sup>528</sup> Bakker, *supra* note 394.

<sup>529</sup> James McCarthy, “Privatizing conditions of production: trade agreements as neoliberal environmental governance” 35 *Geoforum* 3 327; McCarthy, *supra* note 430.

<sup>530</sup> Perreault, *supra* note 430.

<sup>531</sup> Himley, *supra* note 371 at 444.

<sup>532</sup> Eloise Scotford & Rachael Walsh, “The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context” (2013) 76 *Mod Law Rev* 6 1010.

<sup>533</sup> Valiante, *supra* note 471 at 106.

<sup>534</sup> Moore, *supra* note 458 at 326.

<sup>535</sup> Valiante, *supra* note 471 at 108.

<sup>536</sup> *Ibid* at 109.

land. Therefore, while planning processes do provide for participation in ways that other traditional legal forums do not, I seek to understand the specific ways in which law brackets both the process and the substance of land use disputes. Valiante and Smit note, “the balance between public and private interests in Canadian planning law must be understood as evolving and continually in need of negotiation.”<sup>537</sup> In this sense, it is critical to understand who and what is being included in the negotiations and who and what are being excluded, both in order to understand the consequences, and to find strategic openings to intervene and transform people-place relations. In this way, the detailed research undertaken in this project can point to strategic opportunities to rethink and reassert non-ownership relations. Additionally, it proposes ways to avoid the pitfalls of legal translation between “incommensurable logics” that Valverde and Blomley discuss.

Murdoch argues that planning should not be understood as a “normative ideal,” but rather as “immanently enmeshed” in socio-political context.<sup>538</sup> As discussed above, despite the ongoing depoliticization of land use planning, the rationality of technical expertise is mobilized to justify and enforce prior political decisions about spatial order.<sup>539</sup> This is particularly important when dealing with environmental issues and people-place relations because, as legal geographers Carolyn Harrison and Tracey Bedford argue on the basis of several studies in the United Kingdom, “a planning system underpinned by an ideology of private property rights and a free market forecloses alternative ways of valuing the natural world.”<sup>540</sup> In the United States, Lachapelle and McCool argue that the “technocentric utilitarianism” in planning and natural resource governance has led to the “mechanization” of natural resource decision-making, in which public input is often seen as “little more than another source of data.”<sup>541</sup> This technological “way of seeing,” Murdoch argues, results in the selective inclusion of actors in planning processes.<sup>542</sup> Further, as Harrison and Bedford argue,

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<sup>537</sup> Smit & Valiante, *supra* note 42 at 25.

<sup>538</sup> Murdoch, *supra* note 325 at 149.

<sup>539</sup> Flyvbjerg, *supra* note 466 at 27; Murdoch, *supra* note 325 at 147.

<sup>540</sup> Tracey Bedford and Carolyn Harrison, “Environmental gains? Collaborative planning, planning obligations and issues of closure in local land-use planning in the UK”, Holder, J and Harrison, C, eds., *Law and Geography - Current Legal Issues* (Oxford: Oxford University Press, 2003) 343 at 352; Susan Boucher & Sarah Whatmore, “Green Gains? Planning by agreement and nature conservation” (1993) 36 *Journal of Environmental Planning and Management* 1 33; John Bellamy Foster, *Valuing Nature?: Economics, ethics and environment* (New York: Routledge, 2002); Richard Cowell & Jonathan Murdoch, “Land Use and the Limits to (Regional) Governance: Some Lessons from Planning for Housing and Minerals in England” (1999) 23 *Int J Urban Reg Res* 4 654.

<sup>541</sup> Lachapelle & McCool, *supra* note 449 at 280.

<sup>542</sup> Murdoch, *supra* note 325 at 131.

reliance on technical experts and the resulting instrumental rationality can result in “institutional closure” to the range of value orientations engaged by environmental decisions.<sup>543</sup> In particular, Nash et al. note affective dimensions of place-based relations can be excluded by the technical orientation of planning decision-making.<sup>544</sup> This project demonstrates that these concerns extend to the Canadian context, in which a range of more-than-owner claims are excluded or fail to be considered, not only as a result of the barriers to participation, but because of the closure of planning decision makers to non-instrumental, affective, and relational claims about place.

Planning and urban studies scholars have drawn attention to the operation and control of specific discursive frames that influence land use and environmental governance. Young and Keil’s study of regional water planning points to the discourse of “scarcity” that operates to drive regional development in Southwestern Ontario by casting the vulnerability of the region’s ecological systems as an investment opportunity through the politics and practice of planning.<sup>545</sup> Groves et al. similarly argue that ‘risk thinking’ “shapes the distribution of power” in the context of energy infrastructure planning in the United Kingdom.<sup>546</sup> In particular, they point to the growing role of quasi-state and non-state actors as “centres of calculation” controlling the production, organization and distribution of information about risks related to resource demand and supply.<sup>547</sup> In their study of oil and gas-producing provinces in Canada, Carter et al. identified that not only were there barriers to participation, access to basic information about extractive impacts was difficult to obtain.<sup>548</sup> While Carter et al. examined decisions falling under the federal environment assessment regime, the processes share key characteristics with aggregate framework examined in this project, including proponent control over timing and knowledge production, as well as a trend towards exemptions for a wide range of activities and an increasing role for private actors within environmental governance.<sup>549</sup> They also note that limitations on participation were combined with deliberate weakening of regulatory capacity and scientific knowledge,

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<sup>543</sup> Harrison et al, *supra* note 540 at 343.

<sup>544</sup> Nicholas Nash, Alan Lewis & Christine Griffin, “Not in our front garden: Land use conflict, spatial meaning and the politics of naming place” (2010) 20 J Community Appl Soc Psychol 1 44.

<sup>545</sup> Young & Keil, *supra* note 426 at 68–69.

<sup>546</sup> Groves, Munday & Yakovleva, *supra* note 488.

<sup>547</sup> *Ibid* at 343.

<sup>548</sup> Carter, Fraser & Zalik, *supra* note 24 at 69.

<sup>549</sup> Meinhard Doelle, “CEAA 2012: The End of Federal EA as We Know it” (2012) 24 J Environ Law Pract 1 1.

increasing reliance on non-state actors for aspects of environmental governance.<sup>550</sup> Policy makers, Carter et al. found, routinely defended oil and gas development with economic justifications about the need for revenue.<sup>551</sup> The resulting “narratives of necessity”<sup>552</sup> place conceptual limits on the terms of debate about specific land use decisions with important implications for attempts to assert non-ownership relations with place.

My research builds on insights from planning and urban studies scholars by examining the context of aggregate extraction as a site where “assumptions and storylines”<sup>553</sup> interact with land use law to frame environmental governance and people-place relations in Ontario. Aggregate sites are places with complex material and eco-social relations, but for the purposes of land use law, they are divided into different kinds of space for particular human uses: agricultural fields, ‘natural’ sites such as forests or wetlands, recreational sites such as trails, and subsurface resources such as mineral deposits and groundwater sources. People-place relations are defined and constrained through these categories and associated legal logics of ‘use’ and ‘need’, as well as through broader discursive frames about development and human-environment relations. In Ontario, these underlying discourses fundamentally shape individual planning decisions, and therefore, as discussed in Chapter Four, the closed-nature of provincial policy making means “many of the most basic assumptions and policy directions of planning the province are off the table” even during formal consultation processes about guiding instruments in the planning framework.<sup>554</sup> In the case of aggregate mineral planning, this is compounded by the involvement of technical experts who are simultaneously engaged to prepare reports that will inform government policy and are retained by aggregate developers for siting applications.<sup>555</sup>

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<sup>550</sup> Carter, Fraser & Zalik, *supra* note 24 at 71.

<sup>551</sup> *Ibid* at 70.

<sup>552</sup> Susan Owens & Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (New York: Routledge, 2010).

<sup>553</sup> Groves, Munday & Yakovleva, *supra* note 488.

<sup>554</sup> Valiante, *supra* note 471 at 113.

<sup>555</sup> Altus Group Economic Consulting, *State of the Aggregate Resource in Ontario Study: Paper1-Aggregate Consumption and Demand* (Ministry of Natural Resources, 2010); AECOM, *State of the Aggregate Resource in Ontario Study: Paper3-Value of Aggregates* (Ministry of Natural Resources, 2010); MHBC Planning, *State of the Aggregate Resource in Ontario Study: Paper2-Future Availability & Alternatives* (Ministry of Natural Resources, 2010); LVM Jegel, *State of the Aggregate Resource in Ontario Study: Paper 4-Reuse & Recycling* (Ministry of Natural Resources, 2010); Golder Associates, *State of the Aggregate Resource in Ontario Study: Paper 5-Aggregate Reserves* (Ministry of Natural Resources, 2010); Mark L Dorfman, *A Review of “The State of the Aggregate Resource in Ontario Study” and the “Aggregate Resource Advisory Committee” Consensus Recommendations* (Gravel Watch Ontario, 2011).

British geographers Richard Cowell and Susan Owens link the integration of environmental concerns into the land use decision-making framework to the successful use of participatory opportunities by environmental interests and concerned communities.<sup>556</sup> In particular, they point to the locally based resistance to aggregate extraction in rural England as having successfully “reframed” both the problems and the solutions related to extraction.<sup>557</sup> According to Cowell and Owens, this “subversive” use of the planning system has been related to particular “opportunity structures”<sup>558</sup> and “theatrical opportunities”<sup>559</sup> within the public-inquiry based system. As they argue,

...the importance of planning lies not simply in its instrumental capacity to deliver environmental sustainability, but in its relative openness to influence by environmental interests and concerned communities, which enable connections to be drawn between projects, plans and wider policies.<sup>560</sup>

Groves et al. build on Cowell and Owen’s work to argue that in addition to having instrumental utility in terms of enhancing the evidence base for decision-making, participatory process may also facilitate “public reflection on substantive issues” and furthering social justice by providing recognition of inequity and historical injustice.<sup>561</sup> In particular, they argue, planning forums can provide critical opportunities to examine and rethink assumptions built into planning law and policy as well as consider larger questions about social, economic and ecological relations: “If a piece of infrastructure is a kind of solution to a problem, participatory governance may, by including more perspectives, enable the problem itself to be examined, along with the ways in which it has been framed *as a problem.*”<sup>562</sup> In this sense, planning disputes can be opportunities for creative rethinking about people-place relations despite being grounded in seemingly narrow or mundane issues of infrastructure siting or zoning and despite presumptions about ‘need’ and ‘demand.’ As Gibson notes in the Canadian context, “[P]ublic participants have historically been the actors

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<sup>556</sup> Richard Cowell & Susan Owens, “Governing space: planning reform and the politics of sustainability” (2006) 24 *Environ Plan C* 403 at 406; Owens & Cowell, *Land and Limits*, *supra* note 552.

<sup>557</sup> Cowell & Owens, *supra* note 556 at 405–406.

<sup>558</sup> *Ibid* at 412.

<sup>559</sup> *Ibid*.

<sup>560</sup> *Ibid* at 417.

<sup>561</sup> Groves, Munday & Yakovleva, *supra* note 488 at 342.

<sup>562</sup> *Ibid*.

most motivated and often most effective in ensuring careful critical review of project proposals and associated environmental assessment work.”<sup>563</sup>

While planning disputes, particularly disputes about the siting of infrastructure such as quarries, are often characterized as conflicts between localized ‘not-in-my-backyard’ politics and broader public interest, this project adopts the perspective that land use disputes are much more complex and often raise significant substantive issues that are otherwise left out of public planning processes. In this sense, my research demonstrates that not only does more-than-owner participation serve to legitimize the outcome of planning decisions,<sup>564</sup> it has the potential to improve substantive outcomes by ensuring that critical issues are raised and evidence considered. Critics such as Kaplinsky have raised valid concerns about the specific forms of objection used by private land owners in disputes over new land uses, particularly the cloaking of concerns in the language of “traffic,” “parking,” “environmental,” or other concerns about supposed tangible impact.”<sup>565</sup> Indeed, Valverde also points to the “hijacking” of participatory processes by homeowners, particularly in the context of affordable housing development.<sup>566</sup> However, as Groves et al. argue, “siting conflicts over such infrastructure often act as condensation points for wider concerns, which can ‘cross scale’ from the interests of a specific community to connect with national and international issues.”<sup>567</sup> Indeed the *Stop the Mega Quarry* campaign discussed in Chapter One began as a localized conflict in the small rural township of Melancthon, Ontario, yet it has evolved into an ambitious and ongoing “Food and Water First” campaign about environmental and food policy at multiple scales. In my view, it is possible to acknowledge the unequal distribution of power and access to participation in planning without reducing the issues raised in such disputes as NIMBYism ‘cloaked’ in environmental or other impact concerns. The more interesting questions are whether and how legal and policy frameworks may constrain the types of claims made by parties such that broader questions about social priorities, people-place relations and alternative conceptions of the public interest are narrowed to fit within the particular logics familiar to land use planning decision makers. Following from Michael Woods et al., I seek

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<sup>563</sup> Robert B Gibson, “In full retreat: the Canadian government’s new environmental assessment law undoes decades of progress” (2012) 30 *Impact Assess Proj Apprais* 3 179 at 184.

<sup>564</sup> Patrick McAuslan, *The Ideologies of Planning Law* (London: Pergamon, 1980).

<sup>565</sup> Kaplinsky, *supra* note 34 at 231.

<sup>566</sup> Valverde, *supra* note 493 at 22, 108.

<sup>567</sup> Groves, Munday & Yakovleva, *supra* note 488 at 340.

to engage with the “complex relations of attachment, belonging, exclusion and otherness that permeate such conflicts.”<sup>568</sup>

The failure to meaningfully involve communities in planning policy development prior to the approval process for site-specific proposals and the framing of participation as ‘objection’ may not only constrain who participates, but also how they articulate and assert claims.<sup>569</sup> In the context of natural resources planning, Lachapelle and McCool emphasize the importance of opportunities to redefine problems and solutions in natural resource planning. They point to the concept of ‘ownership’ in participation as one way to account for a range of forms of knowledge about a particular place or environment and to facilitate the redistribution of power in relation to decisions about that place.<sup>570</sup> This relational conception of ownership in participation is characterized by “responsibility, obligation, and caring imbued by citizens and agencies for both the problem and the process of public resource planning and management.”<sup>571</sup> Lachapelle and McCool argue that transformative potential in natural resource planning depends on both the willingness of decision makers to share responsibility and deal with issues of structural inequality, as well as their capacity as decision makers to develop relationships of trust and cooperation with the public.<sup>572</sup> Critically, the authors referred to in this subsection point to specific conditions under which participation in planning processes provide the kind of opportunities outlined above. These include the following: early participation prior to decisions being or the terms of debate being defined; a rethinking of the role of experts in planning; access to information; meaningful opportunities to impact and influence the outcome; accounting for a diversity of values and perspectives; acknowledging the multi-scalar effects of planning decisions; transparency about the process; and, provision on clear and principled reasons for every decision.<sup>573</sup> While Cowell and Owens emphasize that good planning decisions are not correlated to a particular scale of decision-making, the “upscaling” of planning in the UK from local to regional levels eliminated “a key deliberative forum.”<sup>574</sup> They argue that in England the local level forum

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<sup>568</sup> Woods et al, *supra* note 357 at 568.

<sup>569</sup> Harrison et al, *supra* note 540 at 346; Groves, Munday & Yakovleva, *supra* note 488 at 344.

<sup>570</sup> Lachapelle & McCool, *supra* note 385 at 283.

<sup>571</sup> *Ibid* at 281; Julia M Wondolleck & Steven Lewis Yaffee, *Making Collaboration Work: Lessons From Innovation In Natural Resource Management* (Washington DC, Island Press, 2000).

<sup>572</sup> Lachapelle & McCool, *supra* note 449 at 284.

<sup>573</sup> Groves, Munday & Yakovleva, *supra* note 488 at 342; Lachapelle & McCool, *supra* note 449 at 281; Harrison et al, *supra* note 540 at 364; Valiante, *supra* note 471 at 126.

<sup>574</sup> Cowell & Owens, *supra* note 556 at 409.



served as “a space in which the links between grounded experiences of development become linked to policy learning and change.”<sup>575</sup> This resonates with Valiante’s concerns about the closure of provincial planning policy processes in Ontario.<sup>576</sup> Echoing Fudge and Cossman, Groves et al. describe how neoliberal decentralization through privatization and the resulting recentralization of decision-making power<sup>577</sup> has resulted in “systemic difficulties” for the participation of the “wider publics” in planning decisions.<sup>578</sup> This project examines how one particular land use has been ‘scaled-up’ and despite the role of municipal governance in land use planning in Ontario, it is hierarchically privileged by this closed policy-led provincial planning framework. However, I note that scaling-up planning decisions should not be understood as inherently negative, just as local control does not necessarily further social or environmental justice. As Valverde has demonstrated, ‘local’ control over certain types of planning decisions tends to privilege particular notions of morality and social hierarchy, in particular with respect to the siting of shelter housing and other attempts to shift away from the dominance of the single-family home in residential areas.<sup>579</sup>

As Sager notes, the push for “flexible planning” and for faster planning processes is linked to neoliberal governance and the emphasis on entrepreneurialism in planning policy.<sup>580</sup> What Owens refers to as the “planning cascade”<sup>581</sup> limits participation to objection to specific development proposals and issues of siting in the context of predetermined ‘need’ and predefined policy problems. In this way, land use conflicts appear to be the types of localized NIMBY conflicts in which vested interests clash with the public interest and the need for, or possibility of, “substantive reflection on strategic problems” is rejected or ignored.<sup>582</sup> According to scholars in both the United Kingdom<sup>583</sup> and Canada,<sup>584</sup> it is precisely these political opportunities for deliberation on substantive issues that have been the target of

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<sup>575</sup> Ibid.

<sup>576</sup> Valiante, *supra* note 471 at 113.

<sup>577</sup> Groves, Munday & Yakovleva, *supra* note 488 at 341.

<sup>578</sup> Cowell & Owens, *supra* note 556 at 409.

<sup>579</sup> Valverde, *supra* note 493 at 116.

<sup>580</sup> Sager, *supra* note 429 at 155.

<sup>581</sup> Susan Owens, “Siting, sustainable development and social priorities” (2004) 7 J Risk Res 2 101.

<sup>582</sup> Groves, Munday & Yakovleva, *supra* note 488 at 344.

<sup>583</sup> Owens & Cowell, *supra* note 552; Richard Cowell, “The Greenest Government Ever? Planning and Sustainability in England after the May 2010 Elections” (2013) 28 Plan Pract Res 1 27; Cowell & Owens, *supra* note 556; Groves, Munday & Yakovleva, *supra* note 488.

<sup>584</sup> Keil & Desfor, *supra* note 390; Boudreau, Keil & Young, *supra* note 485; Young & Keil, *supra* note 426; Prudham, *supra* note 485; Mark S Winfield & Greg Jenish, “Comment-Ontario’s Environment and the ‘Common Sense Revolution’” (1998) 57 Stud Polit Econ 129; Judith McKenzie, *Environmental politics in Canada: Managing the commons into the 21st century* (Oxford: Oxford University Press, 2001).

government reforms aimed at ‘modernising’ or ‘streamlining’ planning processes. Constructed as being “obstructive,” these “subversive functions of planning” are replaced with a “technical-rational” model of land use decision-making that reinforces the scientific managerial vision of planning.<sup>585</sup> Despite the relative historical effectiveness of groups in shifting planning discourse towards environmental sustainability, these types of deliberative opportunities are depicted as inappropriate “blockages” and environmentalists are depicted as anti-growth, anti-progress and even more recently in Canada, dangerous.<sup>586</sup>

Changes to Canada’s federal environmental assessment in 2012 not only directly limited participation, but more importantly by dramatically reducing the number of projects that would be assessed and narrowing the scope of assessment, the *Canadian Environmental Assessment Act* of 2012 “eliminates many opportunities for public participation and limit[s] the potential range of public contributions, probably excluding the most significant public concerns.”<sup>587</sup> The changes responded to “unprecedented attempts at public objections to oil and gas industry expansion.”<sup>588</sup> They leave key responsibilities to provincial frameworks, which in the case of Ontario has also been compromised, according to Gibson.<sup>589</sup> The subsequent federal Liberal government has undertaken a review of the Act and environmental assessment processes, which was still underway at the time of writing.<sup>590</sup> In the context of oil and gas extraction Carter et al. found “ongoing and increased impediments to public

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<sup>585</sup> Cowell & Owens, *supra* note 556 at 406.

<sup>586</sup> Groves, Munday & Yakovleva, *supra* note 121; Young & Keil, *supra* note 59; McKenzie, *supra* note 215; Tyler A McCreary & Richard A Milligan, “Pipelines, permits, and protests: Carrier Sekani encounters with the Enbridge Northern Gateway Project” (2014) 21 *Cultural Geographies* 1 115; Tyler McCreary & Vanessa Lamb, “A Political Ecology of Sovereignty in Practice and on the Map: The Technicalities of Law, Participatory Mapping, and Environmental Governance” (2014) 27 *Leiden Journal of International Law* 3 595; Gordon Christie, “Discourse and Negotiations Across the Indigenous/Non-Indigenous Divide: ‘Obligations’, Decolonization and Indigenous Rights to Governance” (2014) 27 *Can JL & Juris* 259; Dayna Nadine Scott, “The Networked Infrastructure of Fossil Capitalism: Implications of the New Pipeline Debates for Environmental Justice in Canada” (2013) 43 *Revue générale de droit* 11

<sup>587</sup> Gibson, *supra* note 563.

<sup>588</sup> Carter, Fraser & Zalik, *supra* note 24 at 67.

<sup>589</sup> Gibson, *supra* note 563 at 187.

<sup>590</sup> Details about the review and an update on its progress can be found online:

<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html#about>. When this project was completed the Expert Panel had undertaken a consultation process and delivered its report to the Minister of Environment and Climate Change. The Report is available online: <[https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#\\_Toc002](https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#_Toc002)>. An online comment process provided a period for public comments at [www.LetsTalkEA.ca](http://www.LetsTalkEA.ca). The government is also reviewing the *Fisheries Act*, RSC 1985, c F-14, and the *Navigation Protection Act*, RSC, 1985, c N-22, both of which were also significantly weakened by the previous Conservative government.

involvement.”<sup>591</sup> Cowell and Owens also point to the ability of policymakers, and developers, to constrain debate and participation through adopting and defining concepts such as ‘sustainable development’ in ways that may “discipline” alternative conceptions.<sup>592</sup> Examining a federal oil and gas review in Canada, Anna Zalik argues, “[I]t offers a venue through which competing responses to ecological/economic crises are offered by capital and its opponents; but it also encloses the affective and most unruly elements of such struggles – within formal procedures shaped by the interests of extractive capital/state alliances.”<sup>593</sup> My project will specifically examine how Ontario’s land use planning framework constrains opportunities for debate and limits creative articulations of people-place relations.

#### *iv. Planning, place, and the ‘more-than-human’ world*

One of the more challenging elements of focusing my project on people-place relations rather than on more general aspects of environmental concerns and participation in land use disputes is the difficulty of the ‘more-than-human’.<sup>594</sup> The emphasis on improvement and use noted by Blomley continues to influence contemporary planning. My detailed examination of aggregate extraction law and policy demonstrates that the anthropocentric conception of ‘conservation’ as protecting resources for human use promoted by early planners continues to fundamentally inform contemporary planning in Ontario. As Adams wrote of land use in early twentieth century Ontario: “To conserve land resources means to prevent deterioration of the productive uses of the land that has already been equipped and improved, and simultaneously to develop more intensive use of such land, as well as to open up and improve new lands.”<sup>595</sup> Zalik points to the use of ‘resource sterilization’ by both proponents and the state in the context of oil and gas development in Alberta to describe both environmental protection measures and use-based claims by First Nations that were argued should prevent mining. As discussed in Chapter Four, Ontario’s guiding planning policy provides for absolute protection of aggregate mineral resources and operations from development and activities that “hinder expansion or continued use” or would be “incompatible” for public health, safety or environmental impact related reasons.<sup>596</sup> In the 2010 State of the Aggregate

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<sup>591</sup> Carter, Fraser & Zalik, *supra* note 24 at 70.

<sup>592</sup> Cowell & Owens, *supra* note 556 at 416.

<sup>593</sup> Anna Zalik, “Resource sterilization: reserve replacement, financial risk, and environmental review in Canada’s tar sands” (2015) 47 *Environ Plan A* 12 2446 at 2453.

<sup>594</sup> Whatmore, *supra* note 259; Sarah Whatmore, “Materialist returns: practising cultural geography in and for a more-than-human world” (2006) 13 *Cultural Geographies* 4 600.

<sup>595</sup> Caldwell, *supra* note 458 at 6.

<sup>596</sup> *Provincial Policy Statement* (2014), *supra* note 495 at s 2.5.2.4.

Resource Report prepared for government, overlapping “planning, environmental and agricultural” uses and interests were characterized as “constraints” on resource development, indicating the pro-development orientation of the analysis.<sup>597</sup> As Harrison and Bedford note, existing legal frameworks perpetuate an understanding of nature as separate from society and fail to account for relations of connectivity and dependence between humans and nonhumans.<sup>598</sup> They call for new planning structures and practices that can account for a diversity of perspectives and values, as well as opening space for ecological systems to join the debate on their own terms.<sup>599</sup> As noted above, recognition and respect for Indigenous legal orders and jurisdiction over land use decision-making is a particularly promising way to facilitate such a shift in Canada. For example in Anishinabek law, rocks have legal personality and interests that must be considered in decision-making: “it would be inappropriate to use rocks without their acquiescence and participation because such inaction could oppress their liberty in some circumstances.”<sup>600</sup> In *Canada’s Indigenous Constitution*, John Borrows describes a legal process in his home community, Neyashiingmiing, to decide whether an alvar area of the Niagara Escarpment could be used as a new pow-wow site. Based on “community deliberation, naturalistic observation drawn from scientists and Elders and sacred teachings” the decision-making process provided for the appropriate “respect and reverence” towards the alvar and resulted in a decision not to relocate the pow-wow site to that location.<sup>601</sup> As discussed below, Indigenous contributions are leading calls for a broadened conception of environmental justice in Canada.<sup>602</sup> In New Zealand, some Treaty of Waitangi settlements have resulted in sophisticated and creative engagements with Māori law to redress historical breaches and grievances. These include the Whanganui River, which is now a legal person with trustees from the Whanganui iwi and the Crown jointly-appointed to act in its interest;<sup>603</sup> and, Te Urewera, a site of violent suppression of anti-colonial resistance

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<sup>597</sup> Policy Division, Ministry of Natural Resources, *State of the Aggregate Resource in Ontario Study: Consolidated Report* (Ontario: Ontario Government, Ministry of Natural Resources, 2010) at 18.

<sup>598</sup> Harrison et al, *supra* note 540 at 342, 355.

<sup>599</sup> *Ibid* at 355.

<sup>600</sup> Borrows, *supra* note 11.

<sup>601</sup> John Borrows, “The Durability of Terra Nullius: Tsilhqot’in Nation v. British Columbia” (2015) 48 UBC Law Rev 701 at 247–248.

<sup>602</sup> Deborah McGregor, “Honouring our Relations: An Anishnaabe Perspective on Environmental Justice” in *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2010) 27; Julian Agyeman et al., “Introduction. Speaking for Ourselves, Speaking Together: Environmental Justice in Canada” in Julian Agyeman et al. eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2010) 1.

<sup>603</sup> *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, 2017/7; Linda Te Aho, “Ruruku Whakatupua Te Mana o te Awa Tupua – Upholding the Mana of the Whanganui River at Māori Law Review” (2014) May Maori Law Rev; Catherine J Iorns Magallanes, “Nature as an Ancestor: Two Examples of Legal Personality for

and a former national park, which is now vested in its own legal identity, owning itself in perpetuity, and governed by the laws of the Tūhoe people through the Te Urewera Board.<sup>604</sup>

Political ecology and place-based perspectives also hold promise for moving this project forward. Building on the critical geography and political ecology perspectives outlined above, Murdoch challenges the humanist and anthropocentric foundations of planning by calling for the ‘ecologizing’ of planning.<sup>605</sup> He argues that the unequal distribution of power in the inherently political processes of planning has meant that earlier efforts to incorporate environmental and sustainability concerns failed to fundamentally shift the instrumental understanding of human-nature relations as powerful interests were able to define notions of capacity and sustainability in their interests.<sup>606</sup> Following from Latour, Murdoch challenges scholars of planning theory and practice to “rethink the distinctions between the physical, the social, the political and the environmental.”<sup>607</sup> The resulting uncertainty and complexity is profoundly challenging to basic precepts of planning and property law. In particular, his call to enlarge planning procedures to ‘give voice’ to nonhumans such that all those affected by planning’s operation can take part in decision-making requires a rethinking of both planning theory and practice.<sup>608</sup> While my project does not take this up directly, by focusing on the role of human-nonhuman relations as they emerge in the context of land use disputes, my project will push thinking about planning law and techniques for the inclusion of human-more-than-human relations forward. This project draws particular attention to the environmentally-focused narratives of more-than-owner parties in aggregate disputes to understand whether and how articulations of relationships with the more-than-human world may serve as a foundation for an environmentally just politics of rural place. As outlined in the following subsection, this project also supports the call for a shift in environmental justice

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Nature in New Zealand” (2015) Hors-série 22 Vertigo - Rev Électronique En Sci Environ, online: <<http://vertigo.revues.org/16199>>.

<sup>604</sup> Carwyn Jones, “Tūhoe-Crown Settlement – Tūhoe Claims Settlement Act 2014; Te Urewera Report of the Waitangi Tribunal” (2014) October Maori Law Rev; Jacinta Ruru, “Tūhoe-Crown settlement – Te Urewera Act 2014 at Māori Law Review” (2014) October Maori Law Rev, online: <<http://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/>>; *Te Urewera Act 2014*, 2014/51 [*Te Urewera Act*].

<sup>605</sup> Murdoch, *supra* note 325 at 26.

<sup>606</sup> *Ibid* at 152.

<sup>607</sup> *Ibid* at 155.

<sup>608</sup> *Ibid* at 155–156.

approaches that foregrounds the leadership of Indigenous voices and integrates ecological integrity with environmental justice to account for the more-than-human world.<sup>609</sup>

### C. Environmental Justice

Environmental justice is both a theoretical approach in academia and a framing tool used by activists and policy makers.<sup>610</sup> While the literature on environmental justice is broad, this project engages with environmental justice scholarship in two key ways: i) to support calls for a shift away from anthropocentric understandings of justice towards more relational approaches that extend to the more-than-human world; and ii) to understand how rurality can be understood as a dimension of environmental justice. In doing so, this project primarily engages with Canadian environmental justice scholars in order to situate the case of aggregate resource extraction within the specific context of patterns of environmental inequity in the Canadian state and the particular historical and ongoing processes of colonialism and resource extractivism contributing to such patterns. By focusing on Canadian scholarship, I seek to engage with other Canadian research about the distribution of environmental harms and impacts, entitlement to environmental benefits, as well as access to and participation in environmental decision-making. While environmental justice approaches and practices emerged in the context of the United States to contend with the uneven distribution of environmental harms, particularly the impact of industrial development on African-American communities and the grassroots responses,<sup>611</sup> Canadian scholarship is adapting the framework to a range of contexts.<sup>612</sup> As Agyeman et al. point out, environmental

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<sup>609</sup> Aelita Neimanis, Heather Castleden & Daniel Rainham, “Examining the place of ecological integrity in environmental justice: A systematic review” (2012) 17 *Local Environ* 3 349.

<sup>610</sup> Agyeman et al, *supra* note 602 at 4.

<sup>611</sup> Robert Doyle Bullard, *Unequal Protection: Environmental Justice and Communities of Color* (San Francisco: Sierra Club Books, 1994); Robert Doyle Bullard, *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (San Francisco: Sierra Club Books, 2005); Luke W Cole & Sheila R Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York: NYU Press, 2001).

<sup>612</sup> Julian Agyeman et al, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2010); Leith Deacon & Jamie Baxter, “No opportunity to say no: a case study of procedural environmental injustice in Canada” (2013) 56 *J Environ Plan Manag* 5 607; Dayna Nadine Scott & Adrian Smith, “Sacrifice Zones in the Green Energy Economy: Towards an Environmental Justice Framework” (Forthcoming) *Special Issue on Environment, People, Power, Rights McGill Law J*; Dianne Draper & Bruce Mitchell, “Environmental justice considerations in Canada” (2001) 45 *Can Geogr Géographe Can* 1 93; Scott, *supra* note 586; Sidra Sabzwari & Dayna Nadine Scott, “The quest for environmental justice on a Canadian aboriginal reserve”, Bouthillier MA Cohen JJ Marquez Gonzalez Mumma Smith Chelten, eds. *Poverty Alleviation and Environmental Law* (London: Edward Elgar, 2012) 85; Andil Gosine & Cheryl Teelucksingh, *Environmental justice and racism in Canada: An introduction* (Toronto: Emond Montgomery Publications Limited, 2008); Randolph Haluza-Delay, “Environmental justice in Canada” (2007) 12 *Local Environ* 6 557; Michael

justice movements have been active in Canada “for centuries (if not millennia), just as there have been struggles over the ownership of land and resources throughout Canadian history – and before the boats came.”<sup>613</sup> In particular, Indigenous struggles to protect territory and ways of life have long been fighting environmental injustice in many forms.<sup>614</sup>

I follow from Agyeman et al. in rejecting the need to provide a fixed definition of environmental justice. Rather than seeking to find “*the* definitive statement on the relationships between land, resources, nature, history, power relations, society, peoples, inequity, and all out (human and other-than-human) relations”,<sup>615</sup> they seek to be part of a larger conversation. This project also aims to contribute to such conversations about how the relations we produce, uphold, and sustain as part of broader social, ecological and physical networks can be more equitable. For the purposes of this project, I broadly understand environmental justice as having both procedural and substantive dimensions which can and do overlap, as well as being concerned with the distribution of both environmental benefits and harms.<sup>616</sup> In addition, more recent work by “Critical Environmental Justice” scholars such as David N. Pellow, examines the ways in which “multiple social categories of difference are entangled in the production of environmental justice, from race, gender, sexuality, ability, and class to species, which would attend to the ways in which both the human and more-than-human world are impacted by and respond to environmental justice.”<sup>617</sup> Scholarship in Canada has also pointed to the need to expand not only definitionally, but also to broaden the voices and worldviews, as well as methodologies within environmental justice theory and practice.<sup>618</sup> Of particular relevance to this project is the need to shift away from an anthropocentric orientation of environmental justice.<sup>619</sup>

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Mascarenhas, “Where the waters divide: First Nations, tainted water and environmental justice in Canada” (2007) 12 *Local Environ* 6 565; McGregor, *supra* note 602.

<sup>613</sup> Agyeman et al, *supra* note 602 at 2.

<sup>614</sup> Agyeman et al, *supra* note 612 at 2–3.

<sup>615</sup> Agyeman et al, *supra* note 602 at 3.

<sup>616</sup> Agyeman et al, *supra* note 602; Draper & Mitchell, *supra* note 612.

<sup>617</sup> David N Pellow, “Toward a Critical Environmental Justice Studies” (2016) 13 *Bois Rev Soc Sci Res Race* 2 1 at 3–4.

<sup>618</sup> Agyeman et al, *supra* note 602.

<sup>619</sup> Randolph Haluza-Delay, Michael J DeMoor & Christopher Peet, “That We May Live Well Together in the Land...: Place Pluralism and Just Sustainability in Canadian and Environmental Studies” (2013) 47 *J Can Stud* *Détudes Can* 3 226; McGregor, *supra* note 602.

*i. Extending Environmental Justice: The More-Than-Human-World*

As McGregor points out, environmental justice scholarship has been focused on people, which she argues “assumes a certain ideology about “environment” – with a focus on how certain groups of people (especially those bearing labels such as “minority,” “poor,” “disadvantaged,” or “Native”) are impacted by environmental destruction, as if the environment were somehow separate from us.”<sup>620</sup> Indeed, environmental justice is now often linked with human rights frameworks.<sup>621</sup> However, McGregor explains how this is a limited conception of environmental justice from an Anishnaabe perspective, which sees environmental justice more broadly: “It is about justice for all beings of Creation, not only because threats to their existence threaten ours but because from an Aboriginal perspective justice among beings of Creation is life-affirming ... While people certainly have a responsibility for justice, so do other beings”.<sup>622</sup> As Neimanis et al. argue, the human-centred conception of environmental justice obscures a key link to the relationship between ecological integrity and the survival and well-being of all forms of life.<sup>623</sup> Therefore, they argue, environmental justice scholarship should work to integrate conceptions of ecological integrity and social and ecological justice.<sup>624</sup> Further, McGregor notes that an Anishnaabe perspective requires environmental justice to recognize the relationships and corresponding responsibilities of all beings in ensuring “the processes of Creation will continue.”<sup>625</sup> The eco-relational approach developed in this project supports this work to foreground people-place relations and interdependence in land use decision-making, as well as recognizing the jurisdiction of Indigenous legal orders that continue to do this work in particular places. In doing so, this project aims to avoid the binaries of anthropocentric versus ecocentric approaches to environmental governance.

Haluza-Delay et al. articulate a goal for an action-oriented scholarly agenda in Canada: “*That we may live well together in this land.*”<sup>626</sup> They propose several dimensions to this: the moral question of “both how to ‘live’ and how to do it ‘well’”; the implicit shift from the individual to “togetherness”; and, the place-based nature of this togetherness to include social and

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<sup>620</sup> McGregor, *supra* note 602 at 28.

<sup>621</sup> Bullard, *supra* note 611 at 7; Neimanis, Castleden & Rainham, *supra* note 609 at 351.

<sup>622</sup> McGregor, *supra* note 602 at 27.

<sup>623</sup> Neimanis, Castleden & Rainham, *supra* note 609 at 351.

<sup>624</sup> *Ibid* at 360.

<sup>625</sup> McGregor, *supra* note 602 at 28.

<sup>626</sup> Haluza-Delay, DeMoor & Peet, *supra* note 619 at 229.



physical dimensions.<sup>627</sup> While they specifically engage with Canadian studies and environmental studies in advocating for “place pluralism,” in my view, their goal is equally relevant to legal scholars seeking to address injustices and work towards environmental justice and decolonization. Further, and of particular relevance to this project, they specifically align this goal with relational and embodied conceptions of place.<sup>628</sup> Indeed, they propose a “place pluralism” that accounts for the “variability of place, and the sutures and fractures in what seems to have material objectivity”, while also making “explicit the participation of more ecological actors.”<sup>629</sup> Building on Gruenewald’s twin bases of “rehabilitation” and “decolonization” for a pluralistic approach to place,<sup>630</sup> Haluza-Delay et al. extend conceptions of recognition in environmental justice towards an “ecological politics of recognition”<sup>631</sup> – one that recognizes “ecological others, of contrasting cultural practices of the land, of our own domination or suppression, and of the past.”<sup>632</sup> Indeed they argue that a conception of “just sustainability” rooted in place pluralism is one of the key Canadian contributions to broader conversations about environmental justice, which they note, “comes about primarily with Indigenous peoples as partners in knowledge formation.”<sup>633</sup> Just sustainability requires the duality of rehabilitating place through the development of ways of living informed by the particularity of place *and* the unsettling and uncomfortable work of decolonization.<sup>634</sup> Haluza-Delay et al. provide a useful framework for understanding when and how place-based claims and place-protection are complicit in reinforcing ongoing colonization, particularly colonial land use patterns linked to exclusion and the distribution of environmental harms.<sup>635</sup> In particular, this project examines the role that law plays in obscuring the plurality of place and excluding embodied and relational understandings of place from decision-making processes. Following from Graham’s work, this project argues that this is one way in which law can limit the potential of land use politics to realize transformative environmental relations.<sup>636</sup>

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<sup>627</sup> *Ibid* at 236.

<sup>628</sup> *Ibid* at 230.

<sup>629</sup> *Ibid* at 248.

<sup>630</sup> David A Gruenewald, “Foundations of Place: A Multidisciplinary Framework for Place-Conscious Education” (2003) 40 *Am Educ Res J* 3 619.

<sup>631</sup> Agyeman et al, *supra* note 612 at 245.

<sup>632</sup> Haluza-Delay, DeMoor & Peet, *supra* note 619 at 244.

<sup>633</sup> Agyeman et al, *supra* note 612 at 244.

<sup>634</sup> *Ibid* at 234–235.

<sup>635</sup> Foster, *supra* note 357.

<sup>636</sup> Graham, *supra* note 7.

### *ii. Rurality and Environmental Justice*

This project also considers whether and how rurality emerges as a dimension of environmental justice. In particular, it examines how the legal construction of the “rural” contributes to environmental injustice and facilitates extractive development. As Pellow notes, “the integrity and future of rural spaces has never been at great risk” from environmental harms associated with resource extraction and development.<sup>637</sup> Nonetheless, the specific role of rurality in vulnerability to the distribution of environmental harms and access to environmental benefits has been underexplored. As Pellow notes, while many sites of environmental justice activism and scholarship may have been rural in nature, including in many rural and remote Indigenous territories and communities in Canada, rurality is “simply not at the heart of this literature.”<sup>638</sup>

Building on critical planning scholarship discussed above in Section 2, my research rejects simplistic accounts of rural land use politics as NIMBYism.<sup>639</sup> In Ontario, engagement in planning decision-making about peri-urban and rural areas by farmers, ex-urbanites, and vacation-homeowners have been characterized as largely self-interested.<sup>640</sup> Such claims are often largely understood as linked to amenity values or property values and as “rooted in the traditional producers’ discourse of individualism and property rights.”<sup>641</sup> As Jennifer Foster’s important research on environmental planning in the Niagara Escarpment and Oak Ridges Moraine in Ontario demonstrates, dominant narratives about environmental preservation and planning have been implicated in “social exclusion and xenophobia”.<sup>642</sup> Further, as Foster argues, they can and do reinforce colonial land use narratives and constructions of place and landscape that erase and exclude Indigenous histories and contemporary jurisdiction and ways of life.<sup>643</sup> These are critical dangers of parochial politics of place and the depoliticization of the planning process through land use law that do emerge as part of rural

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<sup>637</sup> David N Pellow, “Environmental justice and rural studies: A critical conversation and invitation to collaboration” (2016) 47 *Journal of Rural Studies* 38 386 at 382.

<sup>638</sup> *Ibid.*

<sup>639</sup> Burningham, *supra* note 356; Hubbard, *supra* note 356; Mcclymont & O’Hare, *supra* note 356; Wolsink, *supra* note 356.

<sup>640</sup> L Anders Sandberg & Gerda R Wekerle, “Reaping Nature’s Dividends: The Neoliberalization and Gentrification of Nature on the Oak Ridges Moraine” (2010) 12 *J Environ Policy Plan* 1 41; L Anders Sandberg, Gerda R Wekerle & Liette Gilbert, *The Oak Ridges Moraine Battles: Development, Sprawl, and Nature Conservation in the Toronto Region* (Toronto: University of Toronto Press, 2013).

<sup>641</sup> David Pond, “Institutions, political economy and land-use policy: greenbelt politics in Ontario” (2009) 18 *Environ Polit* 2 238 at 252.

<sup>642</sup> Foster, *supra* note 357 at 183.

<sup>643</sup> *Ibid* at 179.

land use politics in Ontario. In the Canadian context, this research argues, rural land use politics must engage with the uncomfortable and difficult work of grappling with settler-colonialism in order to contribute to environmental justice.

At the same time, this project demonstrates that rural people-place relations are complex, and sometimes, contradictory. As researchers we cannot presume claims in rural land use politics are one-dimensional. Following from environmental scholars such as Sandberg et al. and Gilbert et al. who explore the complexity of place-politics in Ontario,<sup>644</sup> my project explores this complexity in order to find strategic opportunities to engage in difficult conversations about living together and with the land. Nuanced and critical examination of expressions of ecological relations, respect for Indigenous histories and legal orders, and assertions of reciprocity with the more-than-human world in the politics of rural places is a crucial part of building environmental justice movements across the rural-urban interface.<sup>645</sup> In this way, as Alexa Scully argues in discussing reconciliation with Indigenous Peoples in Canada, places and the embodied and experiential relations of which they are constituted can serve as “the literal common ground”<sup>646</sup> for realizing progressive planning and environmental justice. Further, in Pellow’s view, work on the intersection of rurality and environmental justice is a key site to explore questions about human-more-than-human relations: “[H]ow can we work together *with* nonhuman natures as our allies and partners to promote and secure environmental justice and sustainability for all?”<sup>647</sup>

Emerging scholarship that examines environmental justice claims in rural contexts can provoke and push scholarship and practice beyond the “mold” of “grassroots, ‘bottom-up’ community reactions by people of colour in low-income neighbourhoods,”<sup>648</sup> as the examination of wind-resistance in Ontario by Dayna N. Scott and Adrian Smith demonstrates. They ask, “How should we react to movements of white, middle class property

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<sup>644</sup> Sandberg, Wekerle & Gilbert, *supra* note 640; Liette Gilbert, L Anders Sandberg & Gerda R Wekerle, “Building bioregional citizenship: the case of the Oak Ridges Moraine, Ontario, Canada” (2009) 14 *Local Environ* 5 387.

<sup>645</sup> Robyn Bartel & Nicole Graham, “Property and place attachment: a legal geographical analysis of biodiversity law reform in New South Wales” (2016) 54 *Geogr Res* 3 267; Foster, *supra* note 357; Leonie Sandercock & Peter Lyssiotis, *Cosmopolis II: Mongrel cities of the 21st century* (New York: Continuum, 2003); Sandberg, Wekerle & Gilbert, *supra* note 640.

<sup>646</sup> Alexa Scully, “Decolonization, reinhabitation and reconciliation: Aboriginal and place-based education” (2012) 17 *Can J Environ Educ* 148 at 152.

<sup>647</sup> Foster, *supra* note 357 at 386.

<sup>648</sup> Scott & Smith, *supra* note 612.

owners articulating claims that resonate with the values and aims that have motivated the environmental justice movement?”<sup>649</sup> While not all rural land use movements share these characteristics, indeed rurality can be associated with poverty and economic marginalization as well as resource dependence, those engaged in the land use politics examined here were predominately white and property owners. As Scott and Smith argue, this necessarily points to an important “enduring privilege” that may powerfully inform their capacity to demand political responses to their resistance and shape their access to decision makers and processes.<sup>650</sup> At the same time, as Pellow argues, explorations of rurality and environmental justice provide an important caution for scholars and activists to guard against assumptions that “inclusion might enable justice”, which he defines as one of the “greatest shortcomings” in environmental justice movements and scholarship.”<sup>651</sup> He notes that this emphasis on procedural inclusion limits the potential to shift away from state-centric frameworks, and therefore, the transformative potential of environmental justice work.<sup>652</sup> Indeed, as this project demonstrates, it also limits our ability to expose how law works to shape people-place relations towards particular property relations and forms of land use through the selective inclusion and exclusion of ‘what is at stake’ in a particular dispute. In this sense, the relative privilege and institutional access of those resisting particular forms of land use and development does not necessarily translate into transformative claims about place-based relations being heard or acknowledged in decision-making processes. Following from Graham and Nedelsky, this research takes an eco-relational approach to examining land use disputes in places legally defined as rural in order to understand claims to environmental justice as more than claims to procedural inclusion. Rather, it interrogates the ways in which the place-based claims expose concerns about the loss or transformation of place and severing of relations with the more-than-human world. In doing so, it cautiously and critically looks for strategic openings to work towards a just and inclusive politics of ‘living well together’ in rural places.

This chapter has introduced the theoretical strands I have woven together to develop the place-based methodology discussed in the following chapter, and to generate my eco-relational approach to land use law, discussed in Chapters Five through Nine, from the

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<sup>649</sup> Ibid.

<sup>650</sup> Ibid.

<sup>651</sup> Pellow, *supra* note 637 at 384.

<sup>652</sup> *Ibid* at 385.

documentary and interview data collected in this project. The following chapters apply the ideas and concepts outlined above to examine the structure of legal relations in Ontario's aggregate mineral planning framework and to uncover the broad more-than-owner relations engaged by these disputes.

## Chapter Three: Methodology

This chapter describes the methodology applied in this project, including the process of constructing the research questions and research plan, and the approach to data analysis. I begin by introducing qualitative approaches and the rationale for adopting them. The second section examines place-based research methods and their application to this study. The third section describes the documentary review, the participants, the research settings and the interview process. The approach to data analysis is established in the fourth section. The final section then examines the validity and generalizability of the research and sets out the limitations.

For this project I developed a qualitative data-based methodology for documentary analysis which includes the design, conduct, and analysis of unstructured interviews with participants in aggregate extraction conflicts. My methodological approach was informed by my desire to privilege the experiences and perspectives of the participants while also uncovering the range of socio-material people-place relations engaged by these disputes. In this way, I was able to develop my original eco-relational framework to foreground the people-place relations engaged in aggregate extraction conflicts and identify the values at stake while also ensuring these are set in the context of broader institutional relations.

### 1. Qualitative Research

The qualitative data-based method adopted in this project is informed by the theoretical framework set out in Chapter Two and place-based approaches to research about environmental issues. Qualitative methodologies begin from an understanding of the social world, including law and regulatory practices, as primarily socially constructed. In doing so, qualitative approaches explicitly acknowledge the need to situate research within the social world.<sup>1</sup> Like other land use conflicts, aggregate extraction disputes are about specific places and environments rather than abstract notions of ‘the environment’. Therefore, detailed examination of the wider context in which these conflicts arise, and conflicting claims are articulated, is essential to understanding the disputes examined here.

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<sup>1</sup> William Gibson & Andrew Brown, *Working with Qualitative Data* (London: SAGE, 2009) at 8.

Qualitative research is characterized by reflexivity, detailed contextual analysis and acknowledgement of the negotiated multiplicity of social life.<sup>2</sup> To illustrate this, Clifford Geertz's notion of "thick description" points to the need for rich contextual description of the actions and practices of people with an interest in the problem being examined in order to identify connections and patterns.<sup>3</sup> Forestry scholars Mae Davenport and Dorothy Anderson argue that research about people-place relations in natural resource scholarship can "extend our understanding of the human-environment relationship beyond the tangible and instrumental to include the symbolic and emotional."<sup>4</sup> In particular, they advocate for qualitative research methodologies in this area of research: "By examining people's connections to places as expressed through their own words, these studies capture the subjective, lived experiences people have with nature."<sup>5</sup> Davenport and Anderson point to the strength of interpretive research in which theory is generated from the data to provide much needed guidance for decision makers and regulatory agencies in the complex context of natural resource and land use conflicts.<sup>6</sup> This kind of inductive approach, Lisa Webley notes, "seeks to derive themes or patterns from the data collected as the research progresses."<sup>7</sup> This project adopts an original place-based qualitative methodology for legal research that seeks to uncover and foreground articulations of relations with place. This methodology is used in order to theorize the work done through law to shape people-place relations, and explore how these relations in turn shape law. In the context of environmental decision-making, Neil Adger et al., note that "thick" analysis also requires interdisciplinary research across the social sciences and beyond.<sup>8</sup> This project extends beyond legal scholarship to engage with geography, political science, history, and sociology scholarship and incorporates Elizabeth Fisher et al.'s call for environmental law scholars to develop "interactional expertise" to ensure "legal scholarship is based on a sound understanding of environmental problems."<sup>9</sup>

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<sup>2</sup> *Ibid.*, at 8.

<sup>3</sup> Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) at 25–26.

<sup>4</sup> Mae A Davenport & Dorothy H Anderson, "Getting From Sense of Place to Place-Based Management: An Interpretive Investigation of Place Meanings and Perceptions of Landscape Change" (2005) 18 *Society & Natural Resources* 7 625 at 629.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at 639.

<sup>7</sup> Lisa Webley, "Qualitative approaches to empirical legal research", Peter Cane & Herbert Kritzer, eds, *The Oxford handbook of empirical legal research* (Oxford: Oxford, 2010) 926 at 928.

<sup>8</sup> W Neil Adger et al, "Governance for Sustainability: Towards a 'Thick' Analysis of Environmental Decisionmaking" (2003) 35 *Environment and Planning A* 6 1095 at 1096.

<sup>9</sup> E Fisher et al, "Maturity and Methodology: Starting a Debate about Environmental Law Scholarship" (2009) 21 *J Environ Law* 2 213.

### A. Place-Based Qualitative Research: The Researcher as a Participant in Place

Place-based research, Antony S. Cheng et al. argue, has the potential to enhance dialogue and deliberation by foregrounding the “rich, layered place meanings that are expressed and valued by people” in natural resource decision-making. For them, one of the central goals of taking a place-based approach is “to foster more equitable, democratic participation in natural resource politics by including a broader range of voices and values centering around places rather than policy positions.”<sup>10</sup> Place-based research, they argue, is qualitative research that seeks to “uncover place-based connections.”<sup>11</sup> In this study, place is used to express an explicit acknowledgement of the relationality of the human and ecological communities.

Ecologists and other scholars interested in areas of natural resource management are using place-based approaches to explore people-place relations in the context of environmental decision-making.<sup>12</sup> However, with the exception of some legal historians, this place-based approach to scholarship has rarely been taken up in legal scholarship. As Fisher et al. observe, non-legal scholarship about environmental law often demonstrates “very little appreciation of the complexity of legal institutions, ideas and processes involved.”<sup>13</sup> In actively adopting a place-based approach by “designing and facilitating processes where a rich diversity of place meanings can be expressed, negotiated, and transformed”,<sup>14</sup> I draw place-based approaches into legal scholarship. At the same time, I extend the place-based perspective by taking the complexity of legal practices and processes seriously and focus on how legal tools and practices are used to include, exclude, and transform people-place relations.

This research goes beyond uncovering and understanding place connections to examining the co-constitutive role of legal concepts, tools, and practices in place-making and the production

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<sup>10</sup> Antony S Cheng, Linda E Kruger & Steven E Daniels, “‘Place’ as an Integrating Concept in Natural Resource Politics: Propositions for a Social Science Research Agenda” (2003) 16:2 *Society & Natural Resources* 87 at 89.

<sup>11</sup> *Ibid* at 100.

<sup>12</sup> Cheng, Kruger & Daniels, *supra* note 682; Richard C Stedman, “Is It Really Just a Social Construction?: The Contribution of the Physical Environment to Sense of Place” (2003) 16 *Society & Natural Resources* 8 671; Davenport & Anderson, *supra* note 4; Herbert W Schroeder, “Ecology of the heart: Understanding how people experience natural environments” (1996) 13 *Natural resource management: The human dimension* 27; Herbert W Schroeder, “Voices From Michigan’s Black River: Obtaining Information On ‘Special Places’ For Natural Resource Planning” (St. Paul, Minn.: U.S. Dept. of Agriculture, Forest Service, North Central Forest Experiment Station, 1996), online: <<http://www.cabdirect.org/abstracts/19980611838.html>>.

<sup>13</sup> Fisher et al, *supra* note 9 at 234.

<sup>14</sup> Cheng, Kruger & Daniels, *supra* note 10 at 101.



of people-place relations. In doing so, I take up Deborah Martin et al.'s call for more research examining the disconnect between people's place claims and law and the actors and networks in land use conflicts.<sup>15</sup> Attention to place-based connections, not only more accurately exposes what is at stake in a particular conflict about land use, it also provides a basis for the relational reorientation of land use law away from instrumental anthropocentrism by creating space for a much wider range of relations *with* place and the values that these relationships uphold. Attention to the range and complexity of place claims in land use disputes reveals connections and commonalities between divergent and overlapping people-place relations and can complicate stereotypes and simplistic characterizations of land use politics.<sup>16</sup> As Cheng et al. argue, "place-based research should [also] seek to question the status quo and to give real meaning and substance to public involvement in natural resource politics."<sup>17</sup> Daniel Williams and Michael Patterson further acknowledge that understanding people-place relations is critical to natural resource management as it "embeds resource attributes into the system of which they are a part".<sup>18</sup> In this way place-based research can expose how decision-making shapes relations beyond the human world. In doing so, the approach adopted here creates space for a broader conversation about the role of land use law and whether relevant legal frameworks have the capacity to account for values and relationships articulated by the participants.<sup>19</sup>

In taking up a place-based approach I also note Richard Stedman's caution about its neglect of the role of the physical dimensions of the environment in constructing these meanings in relationship with people.<sup>20</sup> Davenport and Anderson also push researchers to develop a "holistic and integrated understanding" of the place meanings and the specific physical setting to which they relate.<sup>21</sup> Therefore, beyond adopting qualitative interpretivist approaches, I follow Cheng et al. in acknowledging the need for researchers to experience the places they research. As described in the Introduction, my own familiarity with some of the

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<sup>15</sup> Deborah Martin, Alexander Scherr & Christopher City, "Making Law, Making Place: Lawyers and the Production of Space" (2010) 34 *Prog Hum Geogr* 2 175 at 35.

<sup>16</sup> Cheng, Kruger & Daniels, *supra* note 682 at 99; Andrea M Brandenburg & Matthew S Carroll, "Your place or mine?: The effect of place creation on environmental values and landscape meanings" (1995) 8 *Society & Natural Resources* 5 381 at 391.

<sup>17</sup> Cheng, Kruger & Daniels, *supra* note 10 at 101.

<sup>18</sup> Daniel R Williams & Michael E Patterson, "Environmental meaning and ecosystem management: Perspectives from environmental psychology and human geography" (1996) 9 *Society & Natural Resources* 5 507 at 508.

<sup>19</sup> Martin, Scherr & City, *supra* note 15.

<sup>20</sup> Stedman, *supra* note 12 at 671.

<sup>21</sup> Davenport & Anderson, *supra* note 4 at 630.

places and conflicts involved was a motivation for undertaking this research. While as Cheng et al. note, “[T]here is no objective middle ground” in the context of natural resource conflicts, it is important to recognize that this familiarity and connection positions me as a kind of interested party rather than an objective and neutral observer. The advantages and limitations of this positionality will be discussed in more detail in the next section; however, from a place-based perspective it has particular advantages. While I did not have in-depth experiences of all the places involved in this study, I did have the advantage of intimate knowledge of the geography, as well as general familiarity with the social dynamics of several places involved. This not only provided a basis on which to build the place-based approach adopted here, it contributed to a sense of trust with participants in both the initial stages of recruitment and during the interviews. Put simply, people understood that I saw and cared about the places involved in the disputes and this helped them feel comfortable sharing their narratives and experiences with me.

In addition to my personal understanding and experience of the places involved, participants provided invaluable experiences of place through site visits where possible, and through photos, maps, and narratives about the places involved. Attention to the visual texts provided by participants as well as those included in application materials also provides insight into the ways that these “stand in for the actual site” in planning processes, particularly for decision makers and other legal actors.<sup>22</sup> Environmental history scholarship about Ontario, such as David Wood’s exploration of settlement in Ontario, Claire Elizabeth Campbell’s study of the Georgian Bay region, Neil Forkey’s study of the Trent Valley, Kelly and Larson’s forest history of the Niagara Escarpment and Nick Eyles work on the geological history of the province also augmented my understanding of the places and people-place relations of Ontario.<sup>23</sup>

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<sup>22</sup> Susan Turner, “Rendering the Site Developable: Texts And Local Government Decision Making In Land Use Planning”, Marie L Campbell & Ann Manicom, eds. *Knowledge, Experience, and Ruling Relations* (Toronto: University of Toronto Press, 1995) 234 at 235.

<sup>23</sup> David Wood, *Making Ontario* (Montreal: McGill-Queen’s Press-MQUP, 2000); Claire Elizabeth Campbell, *Shaped by the West Wind: Nature And History in Georgian Bay* (Vancouver: UBC Press, 2005); Neil Stevens Forkey, *Shaping the Upper Canadian frontier: environment, society, and culture in the Trent Valley* (University of Calgary Press, 2003); Peter E Kelly & Douglas W Larson, *The last stand: a journey through the ancient cliff-face forest of the Niagara Escarpment* (Toronto: Dundurn, 2007); Nick Eyles, *Ontario rocks: three billion years of environmental change* (Markham: Fitzhenry & Whiteside Ltd, 2002).

## 2. Data Collection

William Gibson and Andrew Brown point to three ways of thinking about methods in qualitative data collection: “observing people; asking people questions; and reading.”<sup>24</sup> The approach I developed largely involves reading and talking to people through documentary analysis and unstructured key informant interviews. The use of multiple methods provides for an exploration of the problem being examined from different perspectives than would be available simply through documentary or interview research alone.

### A. Reading: Documentary Analysis

The reading, or documentary analysis, in this research includes the literature review of relevant secondary material, critical examination of the legal framework for licensing extraction, review of aggregate extraction licensing applications and appeals between 2001 and 2014 in Ontario, as well as reviewing the written and oral submissions made before a legislative review committee tasked with a review of the *Aggregate Resources Act*.<sup>25</sup>

I begin by developing a map of key issues and actors based on my informal understanding of the relationships in selected aggregate conflicts, identifying important entities, structures, viewpoints, processes and the issues, both recognized and emergent or potential. The core of this mapping exercise includes the development of an “inventory of laws”<sup>26</sup> relevant to aggregate conflicts, which is adapted from Marianna Valverde and included in Chapter Six. This mapping process is also informed by Nedelsky’s relational rights analysis which begins with the question ‘how does law structure relations?’ In developing my eco-relational framework I extend that inquiry to explicitly include the structuring of relations with the more-than-human world. This inventory is used to provide a detailed examination of the everyday operation of land use decisions and to make visible the active role of law in land use planning. The ‘legal system’ is often treated as background by actors in planning disputes and is not the object of scrutiny itself. Incremental changes to legislation or policy may be contemplated, but more fundamental shifts in how the law shapes human relationships with land and the environment are viewed as impossible or impractical, or simply not imagined at

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<sup>24</sup> Gibson & Brown, *supra* note 1, at 54.

<sup>25</sup>In May 2012, an all-party review of the *Aggregate Resources Act* was initiated at the Standing Committee on General Government (Legislative Assembly of Ontario, Orders and Notice Paper, 1<sup>st</sup> session, 40<sup>th</sup> Parliament, March 22, 2012). The review included the consultation process, siting, operations, and rehabilitation, best practices and industry developments, fees and royalties, and, aggregate resource development and protection, including conservation and recycling.

<sup>26</sup> Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (University of Chicago Press, 2012) at 24.

all. Making law's work visible exposes the foundational discourses and worldviews informing legal and cultural notions of 'use', 'value', 'ownership', 'environment' and even the concept of property in land, at the heart of land use law and policy. In doing so, meaningful critique and creative engagement with the legal system is made possible. The 'map' provided by this initial analysis informs both the selection of documentary materials for content analysis and interview sampling by exposing key moments in the legal process in land use decision-making requiring further examination and scrutiny. This includes the pre-application land acquisition, research and preparation, the application and public consultation stage, and finally the hearing where applicable.

The next step is an initial review of the Provincial Environmental Registry, a public online database governed by the *Environmental Bill of Rights* (1993, SO 199s, c 28), where *Aggregate Resources Act* (R.S.O. 1990, c. A. 8 [the "ARA"]) applications are publicly posted. This identified 242 decisions on large-scale industrial aggregate mines, including approvals, withdrawals, and denials between 2001 and 2014. A database of the decisions identifies the dates of proposal and decision, location, depth of extraction, volume of extraction, objections filed, key issues identified, and, the decision maker for each. This provides the basis for the basic quantitative analysis provided in Chapter Seven and for the selection of cases for further analysis. This process informed the development and refinement of the research question by providing a detailed picture of the outcomes and actors in aggregate extraction conflicts.

The next stage is the selection of cases for more detailed analysis through a review of key documents, including decisions of the provincial land use tribunal, the Ontario Municipal Board, and any publically available submission documents from the proponent and other parties. In particular, the review revealed the level and nature of participation by members of the public and regulatory and planning bodies. Cases with high levels of more-than-owner participation were identified and from these I selected proposals or appeals resulting in, or likely to result in, a hearing before the Board, or high levels of public and media attention. The cases included applications that were approved, denied, and withdrawn, as well as some additional cases including both large-scale extensions that were not included in the Provincial reporting regime. Other cases included were identified by a review of media coverage, the legislative review submissions, and through interview participants. These cases are the basis

for the case law analysis in Chapters Five and Eight and inform the participant selection and interview process described below.

## B. Talking to People: Interviews

### *i. Participants*

Based on the documentary analysis, 19 semi-structured in-person key informant interviews were conducted with 25 participants involved in aggregate extraction disputes as either more-than-owner parties or professionals, such as lawyers, planners or scientific technical consultants in multiple locations throughout Ontario. All the disputes were in places deemed ‘rural’ by local or regional plans with the exception of one case study in Northern Ontario. The goal of participant selection was not to be representative of the broader provincial population. Rather, I sought to identify key informants that would “purposefully inform” my understanding by providing in-depth knowledge about what is at stake in disputes about aggregate extraction and experiential perspectives on the associated decision-making processes.<sup>27</sup> By selecting informants from a range of geographic locations who were engaged with distinct conflicts and organizations, I sought to include a range of perspectives and experiences.<sup>28</sup>

Participants are primarily activists in local or regionally-based organizations formed to respond to a specific application or pre-existing organizations who chose to become involved with a particular quarry application based on a particular set of environmental or social concerns. These participants included (1) farmers, (2) residents of communities close to proposed mine sites, (3) non-resident home owners in communities close to proposed mine sites, and (4) members of locally-based environmental and conservation groups. I chose participants based on their involvement in one of the cases identified through documentary analysis or through other participants. Initially I knew the participants personally but I then identified further participants through the documentary data and by “snowball sampling” by asking those participants to refer me to others. In particular, I selected participants who had been involved in cases that were active since 2012 or who were involved in ongoing work related to aggregate extraction so that their experiences would be relatively recent and easier to recall. In one case the conflict was dated earlier, however, it was geographically and legally unique and therefore justified inclusion. Participants in this case remained

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<sup>27</sup> John W Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (London: SAGE Publications, 2006) at 127.

<sup>28</sup> *Ibid* at 129.

knowledgeable and engaged despite the passage of time and had retained many of the documents relevant to the case.

The participants are, or were, all in leadership roles for the groups they were involved with and listed as organizers or spokespersons on websites, formal submissions, or other legal documents. In addition to the more-than-owner participants, two lawyers, one scientific consultant, one policy analyst, one professional naturalist, and two planners were also interviewed. The lawyers had both worked on aggregate siting cases, one for an environmental organization supporting one of the more-than-owner parties, and the other for First Nations facing aggregate extraction proposals. The consultant had worked for multiple more-than-owner parties as a technical expert and witness. The policy analyst was at an independent legislative body. The naturalist worked for a conservation organization that worked with both aggregate developers and more-than-owner parties. One planner was an independent expert who had worked for more-than-owner parties, the other was a planner for a provincial planning agency. All the participants were white but for one expert participant. 15 participants were men and 10 were women. Participants were recruited following the receipt of ethics approval from York University's Human Participants Review Sub-Committee in the Office on Research Ethics.<sup>29</sup> Initial contact with participants was by email with an informed consent letter attached for their review. The letter detailed the project, the interview process and the issues to be discussed, as well as the use of the data in the research. The letter was again reviewed at the outset of the in-person interviews.

Interviews took place in both one-on-one and small group settings. The group interviews were undertaken at the suggestion of the participants. Where possible, interviews with more-than-owner parties took place in the area that was the subject of the conflict. However, locations were selected for the comfort and convenience of the participants and therefore some of the interviews took place in the Greater Toronto Area. The professional interviews took place in the offices of the participants, with the exception of one lawyer whose interview had to be rescheduled and was therefore completed by phone. General interview locations are set out in the table below. In some cases subsequent site visits were made by the author in order to achieve a place-based understanding of the participants' perspectives. In two cases, participants provided extensive guided tours of the proposed sites following the formal

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<sup>29</sup> I received ethics approval on February 06, 2013.

interview. In two cases I am personally familiar with the area. All participants provided maps and often photographs of the site during the interview. Table 1 summarizes the participant affiliations and interview locations.

Interview Number	Location	Affiliation
1	Toronto	More-than-owner party; Farmer resident
2	Municipality of Hamilton	More-than-owner party; Residents (2)
3	Renfrew County	More-than-owner party; Resident
4	Toronto	Professional Planner
5	Toronto	Policy Analyst – Independent Legislative Office
6	Burlington	More-than-owner party; Resident
7	Wellington County	More-than-owner party; Resident
8	Orillia	Professional Naturalist
9	Dufferin County	More-than-owner party; Farmer residents (2)
10	Collingwood	More-than-owner party; Residents, member of local environmental organization (3)
11	Kingston	More-than-owner party; Former resident, member of local environmental organization
12	Oakville	More-than-owner party; Member of local environmental organization
13	Toronto	Lawyer for Environmental Organization
14	Mississauga	Scientific Consultant
15	Toronto (by phone)	Lawyer for First Nations parties
16	Wawa	Residents (4)
17	Port Credit	More-than-owner party; Resident
18	Georgetown (Planner)	Planner – Government Planning Agency
19	Toronto	More-than-owner party; Non-resident home owner, member of local environmental organization

**Table 1: Interviews**

A significant limitation of this research is that it does not include the perspectives and experiences of Indigenous communities facing aggregate development proposals in Ontario. The project was initially designed to include at least one aggregate development in the Niagara Escarpment Development Plan Area or Manitoulin Island, areas in which First Nation parties had been actively involved in the aggregate planning process, in order to include First Nation perspectives, concerns and experiences. I recognized, and continue to recognize, the impact of aggregate development on Indigenous land and relationships with place and community as a pressing concern and an important topic for further research. Further, while Indigenous organizations and individuals did not actively participate in the

disputes I examined,<sup>30</sup> I understand settler-colonialism to be foundational to the structure of property and planning relations engaged by these conflicts. I also recognize Indigenous legal orders and the perspectives of Indigenous people as central to individual land use conflicts, as well as the broader inquiry about how we use to law to structure people-place relations in Canada. However, as a white, settler, legal academic trained in western knowledge systems, I also recognize that this is work that must be done cautiously and with careful negotiation.<sup>31</sup> Upon reflection, and through discussion with both Indigenous and non-Indigenous advisors, I came to the conclusion that a separate research framework and a longer timeline are required to allow for the “relational work”<sup>32</sup> that can inform my understanding of how to do this work “in a good way”.<sup>33</sup> Therefore while my work to develop these relationships with a specific community is ongoing and will inform future work, it is not included in this project. The goal of this ongoing work is to develop a distinct research framework that “takes direction” from a specific community, “connects” with Indigenous knowledge holders and community members, and engages meaningfully with Indigenous legal principles for land use governance.<sup>34</sup> Therefore, the discussion above in Chapter Two and below in the following chapters considers questions and implications related to Indigenous land and legal orders as a critical part of a broader discussion about private property, planning, rurality and environmental justice in Ontario and Canada. However, Indigenous perspectives are not reflected in the empirical data discussed below.

### *ii. The Interview Process*

The interviews took place over seven months. They lasted approximately one hour, however, many participants were eager to share and I accommodated longer interviews where possible. The group interviews tended to be between one and two hours due to the multiple participants. The interviews were taped with the consent of participants and transcribed verbatim. The transcripts and notes were stored electronically on a password-protected

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<sup>30</sup> This should be qualified by noting Indigenous people did join the broader campaign against the Melancthon mega-quarry proposal and developed relationships with the lead organization, the North Dufferin Agricultural Task Force, as noted in Chapter 8, participants in this study reflected on these as positive, important and ongoing.

<sup>31</sup> Linda Tuhiwai Smith, *Decolonizing methodologies: Research and indigenous peoples* (New York: Zed books, 1999) at 180.

<sup>32</sup> Margaret Elizabeth Kovach, *Indigenous methodologies: Characteristics, conversations, and contexts* (Toronto: University of Toronto Press, 2010) at 172.

<sup>33</sup> Jessica Ball & Pauline Janyst, “Enacting research ethics in partnerships with indigenous communities in Canada: ‘Do it in a good way’” (2008) 3 *Journal of Empirical Research on Human Research Ethics* 2 33 at 48.

<sup>34</sup> Kovach, *supra* note 32 at 172.



computer. Anonymized notes from the transcripts were printed during the writing process and shredded prior to being recycled. I also took detailed notes during the interviews and made further reflective notes following the interviews to record my thoughts and reactions as the interviewer as soon as possible thereafter. These were anonymized and kept in a locked filing cabinet. With travel, advance preparation, as well as subsequent site visits and time for reflection, the processes generally took between one-half to one-full day.

The interviews were semi-structured and based on an interview guide. One interview guide was developed for more-than-owner parties and another for professional participants (Appendices A and B). The more-than-owner guide was designed to draw out narratives around four themes: (1) what was at stake in the conflict; (2) the relationship with the place(s) involved; (3) involvement in the decision-making process and relationships with decision makers; and (4) engagement with the legal and policy framework. The professional guide was designed around three themes: (1) the types of legal/technical issues raised in aggregate conflicts; (2) opportunities for and influence of public involvement in the decision-making processes; (3) views on the legal and policy framework and priorities for reform. The professional guide was slightly modified in each case to account for the specific expertise, such as law or planning. The interview guides were informed by the literature review and theoretical framework outlined in Chapter Two, the documentary analysis described above, and discussions with my supervisor. In particular, the guide was informed by Nedelsky's relational approach to legal disputes that foregrounds the work that law does to structure relations,<sup>35</sup> by Joseph Pierce et al's relational placemaking framework,<sup>36</sup> and by the place-based approach to uncovering people-place relations described above.

The guides were revised following the initial interviews with members of each group to reflect this initial interview experience. The guides provided some structure to keep the interview on track and maintain a consistent set of themes. However, I took an open-ended approach and encouraged participants to talk openly about what they considered to be important about their experience. The more-than-owner guide begins with general questions that ask the participants to situate themselves in relation to the specific conflict in which they

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<sup>35</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2012).

<sup>36</sup> Joseph Pierce, Deborah G Martin & James T Murphy, "Relational Place-Making: The Networked Politics of Place" (2011) 36 *Trans Inst Br Geogr* 1 54.

become involved. The guide then prompts them to share the story of their involvement. I approached the interviews as an opportunity for interaction and conversation and to develop relationships with the participants. This approach is in keeping with feminist approaches to research that seek to work with participants and respect their knowledge and expertise.<sup>37</sup> Further, the open-ended approach is consistent with a place-based approach that seeks to understand people's relationships with place in their own words and based on their own experiences.<sup>38</sup> In many interviews, participants continued to cover the themes in the guide without further prompting and the guide was not necessarily referred to after the initial questions. Participants' were enthusiastic and shared detailed narratives about relationships to place, experiences of the planning and legal processes, and described what was at stake for them in the conflict. In many cases participants expressed gratitude for the opportunity to reflect on their experiences and to tell their story. Some contrasted this with the sense that they had not been listened to during the planning process. Participants also raised new issues and topics and I often followed up with more questions and engaged with these topics in addition to those covered in the interview guide. This is also consistent with an approach that values the expertise and experience of research participants.

As described in the introduction and noted above, prior to conducting this study I was engaged in one of the cases selected for examination, which was taking place in an area of personal significance. My involvement consisted of assisting with the preparation of submissions for a local activist group and working closely with their expert consultant. In one sense this locates me as a participant researcher or "insider" conducting research on an issue in which I have also engaged as an activist.<sup>39</sup> Participants often knew this, particularly where they knew me already or had been referred to me through another interviewee. I was also open about this positionality prior to the start of the formal interview. I briefly explained my connection to the Melancthon case and that, while it had been the motivation for me to undertake this study, I was no longer actively working on the issue outside of my PhD research. However, as a trained-lawyer, a doctoral student and academic researcher, as well as an urbanite non-resident in the areas under examination, I was also an outsider. In the

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<sup>37</sup> Marjorie L DeVault & Glenda Gross, "Feminist Qualitative Interviewing: Experience, Talk, and Knowledge" in *Handbook of Feminist Research: Theory and Praxis* (Thousand Oaks, CA: SAGE Publications, Inc., 2012) 206.

<sup>38</sup> Cheng, Kruger & Daniels, *supra* note 12; Davenport & Anderson, *supra* note 4.

<sup>39</sup> Sonya Corbin Dwyer & Jennifer L Buckle, "The Space Between: On Being an Insider-Outsider in Qualitative Research" (2009) 8 *International Journal of Qualitative Methods* 1 54.

context of largely rural communities, and of participants without legal training, often actively engaged in current and ongoing conflicts, I was in a very different position than most of the interviewees. This dual positionality requires attention to how both of these locations as a researcher may influence the research. At the same time, I reject the insider/outsider binary and adopt the view of qualitative researchers as necessarily being “with” and “in ‘relation to’” the participants in this study: “The intimacy of qualitative research no longer allows us to remain true outsiders to the experience under study and, because of our role as researchers, it does not qualify us as complete insiders. We now occupy the space between, with the costs and benefits this status affords.”<sup>40</sup> Indeed, taking a constructivist position, it is clear that there is no neutral position as a researcher since there is no “pure form” of knowledge that exists outside the circumstances of the interview and the knowledge it produces.<sup>41</sup> Rather, it is the attention to biases and assumptions and dedication to representing the experiences shared by participants that matter in ensuring the quality of one’s research: “the core ingredient is not insider or outsider status but an ability to be open, authentic, honest, deeply interested in the experience of one’s research participants, and committed to accurately and adequately representing their experience.”<sup>42</sup>

In general, knowledge of my involvement with the Melancthon quarry case helped to establish “rapport” between myself and the interviewee and helped them to feel comfortable.<sup>43</sup> In one case a participant involved in active and very adversarial litigation only agreed to meet with me on the basis of this connection. As noted above, it also enhanced the place-based approach to the research design and analysis. However, it is possible the participants who perceived me as an insider made assumptions about my knowledge or understanding and may not have fully explained aspects of their experience. In addition, it is possible that this also influenced what aspects they emphasized about their experience by focusing what they perceived as shared factors versus others that might be divergent. My partial insider status also raises concern about the potential influence on my interpretation of the data and, therefore required “disciplined bracketing and detailed reflection on the

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<sup>40</sup> *Ibid* at 60.

<sup>41</sup> Jaber F Gubrium & James A Holstein, “Narrative Ethnography”, Sharlene Nagy Hesse-Biber, Patricia Leavy, eds., *Handbook of Emergent Methods* (New York: Guildford Press, 2008) at 15.

<sup>42</sup> Dwyer & Buckle, *supra* note 39 at 59.

<sup>43</sup> Tim Rapley, “Interviews” in Clive Seale et al, eds, *Qualitative research practice* (Thousand Oaks: SAGE, 2011).

subjective nature of the research process, with a close awareness of one's own personal biases and perspectives".<sup>44</sup>

### 3. Data Analysis

In this project, the collection of data through interviews aims to draw out stories about people-place relations that emerge from specific aggregate conflicts.<sup>45</sup> I examine individual everyday experiences of engagement with the aggregate licensing and planning system in order to situate individual narratives "within a complex institutional field"<sup>46</sup> that serves to coordinate and organize individual involvement in the everyday world to sustain institutional processes.<sup>47</sup> In this way, I engage with individual narratives and experiences while understanding these as an "entry point" into understanding the work that law does to structure and mediate people-place relations and to explore the space for a relational reorientation of land use planning law and practice.<sup>48</sup>

Property theorist Carol Rose argues that property law is upheld by stories produced and circulated in a particular society.<sup>49</sup> Legal geographer Nicholas Blomley has shown how particular property relations are materialized in part by narratives and representations about landscape.<sup>50</sup> Examining how stories are produced and circulated in the social world, and exposing the preferred stories of specific environments, holds enormous potential in the study of law, and property and planning law in particular. As Susan Turner notes, "citizens learn in their experience in 'the process' that how they know the world in their everyday relations is not how it is put together in the relations of planning."<sup>51</sup> Attention to narratives about participation in planning processes can contribute to an understanding of the legal system as an actor rather than a passive system or background. Law actively participates in the cultural construction of specific places and their relationships with the people who live with them, use

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<sup>44</sup> Dwyer & Buckle, *supra* note 39 at 59.

<sup>45</sup> Gubrium & Holstein, *supra* note 41.

<sup>46</sup> Dorothy E Smith, ed., *Institutional Ethnography as Practice* (Toronto: Rowman & Littlefield Publishers, 2006).

<sup>47</sup> Dorothy E Smith, ed. *Institutional ethnography: A sociology for people* (Toronto: Rowman Altamira, 2005); Dorothy E Smith, *The Everyday World as Problematic: A feminist sociology* (Toronto: University of Toronto Press, 1987).

<sup>48</sup> Kevin Walby, "Institutional ethnography and data analysis: making sense of data dialogues" (2013) 16 *International Journal of Social Research Methodology* 141 2 at 142.

<sup>49</sup> Rose, *supra* note 24.

<sup>50</sup> Nicholas Blomley, "Landscapes of property" (1998) *L and Soc Rev* 567.

<sup>51</sup> Susan Turner, "Rendering the site developable: texts and local government decision making in land use planning", Marie L Campbell & Ann Manicom, eds. *Knowledge, Experience, and Ruling Relations* (Toronto: University of Toronto Press, 1995) 234 at 234.

them, or feel connected to them spiritually, historically or emotionally. This project specifically considers whether and how the narratives that dominate in legal processes transform the land as the outcomes of land use decisions are enacted on real places and the people connected with them. In particular, I consider the role narratives of ownership play in shaping the landscape to create and uphold private places, as well as the ways in which other stories about relations with place are deemed irrelevant, outside the boundaries of the land use decision-making process.

John Creswell explains the data analysis process of qualitative sources as a “spiral”, with the researcher engaging “in the process of analytic circles rather than using a fixed linear approach.”<sup>52</sup> His “data analysis spiral” includes the following steps: (1) organizing the data; (2) reading and memoing; (3) describing, classifying and interpreting data into codes and themes; (4) interpreting the data; and then (5) presenting the data. In my research, several themes emerged from the literature review to guide the documentary review: (1) the relationship between private property and land use planning; (2) the role of place in land use planning law and land use politics; (3) planning law as environmental governance; and (4) environmental justice and land use planning. These themes were revised as I undertook the documentary analysis and then again as I designed the interview guide and read and re-read the interview transcripts. A revised set of themes informed the development of a coding guide for the interview data, which is attached as Appendix C. The guide was then used to code the data from the interviews using NVIVO qualitative data analysis software. The coding was an iterative process and the themes were subject to ongoing revision, including the identification of key sub-themes within the major themes and relationships between the themes. As Creswell recommends, I remained open to the emergence of new codes throughout the process.<sup>53</sup> In the process of interpreting the data, I continually went back to the literature review to relate the findings from the data analysis to the secondary literature.<sup>54</sup> This process resulted in the production of new theoretical insights while simultaneously exposing the gaps and tensions that required returning to the literature or returning to the data, or both.

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<sup>52</sup> Creswell, *supra* note 27 at 182.

<sup>53</sup> *Ibid* at 185.

<sup>54</sup> *Ibid* at 187.

## A. Validity and Generalisability

Concerns about the validity and generalisability of qualitative research are often raised when contrasted with quantitative approaches that have results that can be easily replicated and measured for accuracy.<sup>55</sup> While qualitative research is distinct from quantitative research and the notions of accuracy and reliability cannot necessarily be applied in the same way, it remains essential that researchers ensure the quality of data collection and analysis when applying qualitative methods.<sup>56</sup> Egon Guba and Yvonna Lincoln propose “trustworthiness” as a concept better suited to qualitative approaches that acknowledge social construction and the multiplicity of perspectives.<sup>57</sup> Gibson and Brown adopt trustworthiness as a useful way to address concerns about validity in qualitative research.<sup>58</sup> Trustworthiness focuses the examination on the context of data collection and data generation methods involved in the research process and shifts away from notions of inherent truth in any particular account.

Max Travers puts it this way:

One methodological principle employed in ethnomethodological research is to focus on concrete examples and to stay close to our practical experience of doing everyday things and making sense of everyday cultural objects, documented so that no one can object to the findings, rather than engaging in loose, wide-ranging and usually value-laden commentary about the modern world.<sup>59</sup>

Marie Campbell and Ann Manicom argue, “While Truth may be an illusion, it is nonetheless possible – and urgent – to investigate and describe the relations that put our lives in place.”<sup>60</sup> Here I am concerned with how and why people articulate claims about particular places, specifically land that is privately owned by others; and, the capacity of the legal frameworks and decision makers involved to hear, acknowledge, and meaningfully account for such claims as part of the decision-making process. Therefore, the research objective is not to assess or determine the ‘truth’ or ‘validity’ of these articulations, or of the decisions, against an external standard. Rather, the goal of the data-based component of this study is to first pay close attention to multiple and varied constructions of relationship with place articulated by a

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<sup>55</sup> Graham R Gibbs, *Analysing Qualitative Data* (Thousand Oaks, CA: SAGE, 2008) at 91.

<sup>56</sup> *Ibid.*

<sup>57</sup> Egon G Guba & Yvonna S Lincoln, “Epistemological and methodological bases of naturalistic inquiry” (1982) 30 *Educational Communication and Technology* 4 233.

<sup>58</sup> Gibson & Brown, *supra* note 673 at 59.

<sup>59</sup> Max Travers, “New methods, old problems: A sceptical view of innovation in qualitative research” (2009) 9 *Qualitative Research* 2 161 at 165.

<sup>60</sup> Marie Campbell & Ann Manicom, *Knowledge, Experience, and Ruling: Studies in the Social Organization of Knowledge* (Toronto: University of Toronto Press, 2015) at 5.

variety of actors and structured by various legal and policy instruments; and, as a result, to provide a detailed account of how these are both included and excluded in the decision-making processes about the use of privately-owned land, as well as to examine the consequences for the people-place relations at stake. The research findings also inform my conclusions and proposals for both further research and law reform. In particular, the data provides crucial insights into the potential to restructure land use and natural resource law to uphold a much wider range of people-place relations and the need to reorient legal constructions of property away from ownership and towards reciprocal relations with place.

Graham Gibbs summarizes several techniques developed to address concerns about validity in qualitative research and several are adopted here. Triangulation refers to the need to get different views on a subject to reveal possible mistakes or limitations, and to expose inconsistencies and new dimensions of social reality.<sup>61</sup> Here, research participants have been drawn from different social and economic groups and geographical locations and have been involved in different disputes. Respondent validation refers to the process of checking transcription accuracy with the respondents themselves.<sup>62</sup> Respondents were advised of this process in the letter of request when initial contact was made, which was reviewed and approved by the Ethics Committee at York University. The presentation of evidence through the inclusion of concise, contextualized quotations grounds the analysis in the data in order to ensure accuracy.<sup>63</sup>

## B. Limitations

As noted above, for ethical and methodological reasons, the empirical component of this study does not include First Nations perspectives nor does it examine any Indigenous legal orders as sources of law governing aggregate mineral extraction. Given the legal and political importance of recognizing Indigenous jurisdiction over land use issues and the practical pressing need to address the impact of aggregate mining on Indigenous land, this is a significant limitation. My intention to address this through future work designed in order to do the required relational work is outlined above. In addition, the participants were almost entirely white, had citizenship status, and, most were property owners. As a result, the perspectives and experiences of persons from other racial groups are not included here. While

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<sup>61</sup> Gibbs, *supra* note 727 at 94.

<sup>62</sup> *Ibid* at 95.

<sup>63</sup> *Ibid* at 97.

this may accurately represent those engaging in aggregate extraction disputes, it has the potential to reinforce dominant constructions of environmentalism and rurality that centre white perspectives. This makes the environmental justice lens applied in Chapter Eight essential to this study. The limited sample size is also a significant limitation on the generalizability of the research and I acknowledge that it therefore does not allow for “the estimation of the distribution of the phenomenon in the population as a whole.”<sup>64</sup> However, this was not the goal of the interviews conducted in this research. Rather, my intention was to uncover the wide range of people-place relations engaged by aggregate extraction disputes and to develop in-depth understanding how these shape and are shaped by the land use planning processes and legal frameworks. Keeping these limitations in mind, the in-depth nature of the interviews and enthusiastic participation of the interviewees is a strength of this study. The rapport between myself and the interviewees resulted in a high quality of data, including meaningful narratives and reflections about what is at stake and how the legal process and instruments might better reflect this. Further, the distinct place-based approach to the research is an original contribution that has led to unique insights and the development of new theoretical concepts.

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<sup>64</sup> Webley, *supra* note 7 at 943.



## Chapter Four: Legal and Policy Framework for Aggregate Extraction in Ontario

### 1. Introduction

According to the Ministry of Natural Resources, over 90% of aggregate extraction in Ontario occurs on private land.<sup>1</sup> This makes aggregate mineral resource extraction a uniquely fitting case study to understand the relationship between private property and planning. This chapter provides a detailed overview of the relevant legal and policy framework. In Ontario, the use of private land is regulated by multiple complex and overlapping regimes, including both statutory<sup>2</sup> and common law<sup>3</sup> sources of property law, a range of land use planning statutes and policies, environmental regulation, and extra-legal norms and rules that emerge through networks of economic and civil society actors.<sup>4</sup>

Aggregate mineral mines are primarily regulated through provincial land use planning law and policy. However, as noted below, a much broader network of law and policy is potentially engaged by particular proposals for mineral extraction. Detailed and specific attention to the role that law plays in the land use processes through which “wicked problems”, such as aggregate extraction siting, are defined and contested, and inclusions and exclusions are negotiated, enforced and disrupted, is essential to resolving the research questions at the heart of this project.<sup>5</sup> Part I provides a brief historical overview

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<sup>1</sup> Ontario, Legislative Assembly, Standing Committee on General Government, *Aggregate Resources Act Review* (7 May 2012) [*Aggregate Resources Act Review*] at G145.

<sup>2</sup> The Conveyancing and Law of Property Act, RSO 1990, c C.34; Trespass to Property Act, RSO 1990, c T.21.

<sup>3</sup> Mary Jane Mossman & Philip Girard, *Property law: Cases and Commentary* (Toronto: Emond Montgomery Publications, 2014).

<sup>4</sup> See for example the Cornerstone Standards Council voluntary aggregate certification process, <http://www.cornerstonestandards.ca/>.

<sup>5</sup> Paul R Lachapelle & Stephen F McCool, “Exploring the Concept of ‘Ownership’ in Natural Resource Planning” (2005) 18:3 *Society & Natural Resources* 279 at 279. Wicked problems are defined as complex situations involving “multiple and competing values and goals, little scientific agreement on cause-effect relationships, limited time and resources, incomplete information, and structural inequities in access to information and the distribution of political power.”

of the provincial regulation of aggregate extraction in Ontario. Part II then sets out the current regulatory framework at the time of writing, including the primary legislation and policy documents and reviews the role of the Ontario Municipal Board.<sup>6</sup> Part III provides a brief introduction to the aggregate planning reform process started in 2012, as well as relevant aspects of the coordinated land use plan review currently underway.

In 2012, Ontario's Environmental Commissioner noted that aggregate extraction has become one of the most contentious land use issues in the Province.<sup>7</sup> While aggregate mineral resources are widely acknowledged as essential to the built environment and as the foundation of necessary infrastructure developments from roads to subways to housing and sewer mains, quarries have long been a source of local conflict about land use.<sup>8</sup> This paradox of a spatially fixed, non-renewable, essential resource and legitimate community concerns about direct and cumulative social, health, and environmental impacts exemplifies the 'wicked' nature of the problems that land use law and policy aim to resolve. Multiple and overlapping goals and values in relation to land come into conflict. Experts, landowners and more-than-owner parties provide vastly different views on the impacts of extraction. Parties and decision makers all work with limited time and resources in the context of uncertainty and incomplete information. Perhaps most importantly for this project, the legal framework plays a key role in producing structural inequities in access to information and power. Since 2005, conflicts over large-scale quarry developments in the urban-rural fringe of Southwestern Ontario have resulted in

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<sup>6</sup> The 2012 legislative review process, the 2013 government response, and the 2017 changes to the Act are discussed in the final section of this chapter. While changes to the regulatory framework are noted throughout, the research for this dissertation was undertaken while before the 2017 amendments were proposed or had come into force.

<sup>7</sup> Environmental Commissioner of Ontario, *Land Use Planning In Ontario: A Primer and Summary of Recommendations of the Environmental Commissioner of Ontario* (Toronto: Environmental Commissioner of Ontario, 2012); L Anders Sandberg & Lisa Wallace, "Leave the Sand in the Land, Let the Stone Alone: Pits, Quarries and Climate Change." (2013) 12 ACME: An International E-Journal for Critical Geographies 1; Sandra Patano & L Anders Sandberg, "Winning back more than words? Power, discourse and quarrying on the Niagara Escarpment" (2005) 49 The Canadian Geographer/Le Géographe canadien 1 25.

<sup>8</sup> Matt Binnstock & Maureen Carter-Whitney, *Aggregate Extraction in Ontario: A strategy for the Future* (Toronto: Canadian Institute for Environmental Law and Policy, 2011) at 1; Glen R Miller et al, *Between a Rock and a Hard Place: Understanding the foundations of Ontario's Built Future* (Toronto: Canadian Urban Institute, 2009); Policy Division, Ministry of Natural Resources, *State of the Aggregate Resource in Ontario Study: Consolidated Report* (Toronto: Queens Printer, 2010).

major community mobilizations,<sup>9</sup> complex multi-year litigation,<sup>10</sup> a foreign investment protection claim against the federal and provincial governments,<sup>11</sup> a legislative review of the governing legislation in 2012,<sup>12</sup> and a subsequent reform Bill that received Royal Assent in the final stages of this project.<sup>13</sup> Participants in quarry disputes have raised issues ranging from Indigenous sovereignty,<sup>14</sup> to food security, the right to water and public health<sup>15</sup>; and, from regional economic development to international trade.<sup>16</sup>

As open-pit mines with transformative impacts, quarries have long been a potentially controversial use of private land in Ontario and other jurisdictions. However, formal oversight of aggregate extraction in Ontario was limited until the 1970s with landowners having presumptive power to determine the appropriate use of their land without regard to surrounding land uses or the environment.<sup>17</sup> As the scale of extraction increased and

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<sup>9</sup> “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)>.

<sup>10</sup> Joanna Bull, ““Nelson Aggregate Hearing Explained” (17 November 2010), online: Lake Ontario Waterkeeper <<http://www.waterkeeper.ca/2010/11/17/nelson-aggregates-hearing-explained/>>; Mary Bull, “Joint Board Decision re Walker Aggregates Duntroon Quarry Expansion Upheld by Divisional Court”, (12 July 2013), online: Wood Bull Blog <<http://www.woodbull.ca/resources/wood-bull-blog/2013/07/12/joint-board-decision-re-walker-aggregates-duntroon-quarry-expansion-upheld-by-divisional-court>>; “Nelson Quarry expansion denied”, *InsideHalton.com* (11 October 2012), online: <<https://www.insidehalton.com/community-story/2904589-nelson-quarry-expansion-denied/>>; Michael Gennings, “NEC asks for review of quarry decision”, *Barrie Advance* (20 August 2012), online: <<http://aware-simcoe.ca/2012/08/aggregate-132/>>.

<sup>11</sup> Halton Region, “St. Mary’s Cement Group – Update January 2013”, (2013), online: *Applications Under Current Review*; *St Marys VCNA, LLC v Government of Canada*, 2013 (available on [http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/diff/st\\_marys\\_vcna.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/diff/st_marys_vcna.aspx?lang=eng)).

<sup>12</sup> Ontario, Legislative Assembly, Standing Committee on General Government, *Report on the Review of the Aggregate Resources Act* (2013).

<sup>13</sup> Aggregate Resources and Mining Modernization Act, SO 2017 C.6.

<sup>14</sup> Jeremiah Raining Bird, “Ontario’s Review of Quarry Legislation Fails to Address First Nations Concerns”, (29 November 2013), online: *OKT Law* <<http://www.oktlaw.com/blog/ontarios-review-of-quarry-legislation-fails-to-address-first-nations-concerns/>>; *Aggregate Resources Act Review*, *supra* note 1, 14 May 2012 (Canadian Environmental Law Association, Joseph Castrilli & Ramani Nadarajah); (16 May 2012) (United Chiefs and Councils of Mnidoo Mnising).

<sup>15</sup> “Food and Water First Pledge”, online: *foodandwaterfirst.com* <<http://foodandwaterfirst.com/pledge/>>.

<sup>16</sup> A representative range of objections from non-owner parties are available on the North Dufferin Agricultural and Community Task Force (“NDACT”) website: <http://ndact.com/index.php/letters-a-reports/letters-general>.

<sup>17</sup> David Estrin & John Swaigen, *Environment on trial: a guide to Ontario environmental law and policy* (Toronto: Emond Montgomery Publications, 1993) at 745.

growth of suburban development led to increasing demand, aggregate extraction emerged as a site of conflict about land use in the province.<sup>18</sup> Since that time, aggregate regulation in Ontario has shifted from a primarily municipally controlled land use to a provincially led, and an increasingly proponent-driven, activity.<sup>19</sup> Like other land use regulation, aggregate extraction initially occurred under the *Planning Act* and the *Municipal Act* which empowered local governments to use zoning by-laws to control where pits and quarries could be established and to impose operational requirements through their Official Plans.<sup>20</sup> As will be described below, while the current regime retains this role for municipal governments, decision-making power has been “upscaled”<sup>21</sup> to the provincial level, which Valiante notes has a particularly closed policy process.<sup>22</sup> As discussed in Chapter Six, the result is an inversion of the planning inquiry – the question of how we will proceed with a particular development precedes or subsumes deliberation about whether the development should proceed at all. Further, as planning scholars in the UK have noted, this kind of recentralization of decision-making power can have significant consequences for participation in planning decisions.<sup>23</sup>

#### A. From Municipal to Provincial Regulation

A key shift occurred during the 1970s when, according to Baker et al., aggregate developers successfully lobbied the province to centralize control over the process to avoid a predicted shortage in resources.<sup>24</sup> As will be described below, this narrative of scarcity has continued to inform aggregate policy since that time. The Mineral Resources

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<sup>18</sup> J B Cullingworth, *Urban and Regional Planning in Canada* (New Brunswick, NJ, Transaction Publishers, 1987) at 229; Anders Sandberg & Wallace, *supra* note 7.

<sup>19</sup> Douglas Baker, Christine Slam & Tracy Summerville, “An Evolving Policy Network in Action: The Case of Construction Aggregate Policy in Ontario” (2001) 44 *Canadian Public Administration* 4 463 at 466.

<sup>20</sup> *Ibid* at 468.

<sup>21</sup> Richard Cowell & Susan Owens, “Governing space: planning reform and the politics of sustainability” (2006) 24 *Environment and Planning C* 403 at 549.

<sup>22</sup> Marcia Valiante, “In Search of the ‘Public Interest’ in Ontario Planning Decisions” in Marcia Valiante & Anneke Smit, eds, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2015) at 113.

<sup>23</sup> Christopher Groves, Max Munday & Natalia Yakovleva, “Fighting the Pipe: Neoliberal Governance and Barriers to Effective Community Participation in Energy Infrastructure Planning” (2013) 31 *Environment and Planning C: Government and Policy* 2 340 at 341; Cowell & Owens, *supra* note 21 at 409.

<sup>24</sup> Baker, Slam & Summerville, *supra* note 19.

Committee, appointed by the Province, was established with members from both the provincial government and industry but lacking representation from municipal government or the emerging environmental movement.<sup>25</sup> While a supplementary report attempted to deal with local concerns, this lack of involvement remained a concern and was later deemed a “significant and major omission.”<sup>26</sup> The resulting *Pits and Quarries Control Act 1971* established a provincial licensing system, primarily controlled by the Ministry of Natural Resources. The regime applied to a limited area of “major aggregate production areas” in Southern Ontario, Sudbury and Sault Ste. Marie. This limited geographic application has persisted until very recently.<sup>27</sup> Arguably, the early “pro-industry stance” has also persisted despite decades of opposition from local governments, communities and the environmental movement.<sup>28</sup>

According to Cullingworth, the limitations of the 1971 Act quickly became clear and little progress was made with respect to rehabilitation of pit and quarry sites. In 1976, the government formed the Mineral Aggregate Working Party with members from government, industry, municipal government and the public.<sup>29</sup> They conducted a one-year study that rejected the regime’s prioritization of “maximum utilization of available resources” and emphasized the need to prioritize the interests and concerns of local communities in order to make extraction feasible.<sup>30</sup> In fact, they recommended a shared control system between the province and municipalities. The study also concluded the government faced a lack of credibility due to a lack of enforcement and the weakness of the Act as well as limited results of rehabilitation requirements.<sup>31</sup>

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<sup>25</sup> Cullingworth, *supra* note 18 at 230.

<sup>26</sup> S. Yundt, “Legislation and Policy Mineral Aggregate Resource Management in Ontario, Canada” (1979) 1 *Minerals and the Environment* 3 101 at 103.

<sup>27</sup> SO 1971, c 96.

<sup>28</sup> Cullingworth, *supra* note 18 at 231.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*; Ontario Mineral Aggregate Working Party, *A Policy for Mineral Aggregate Resource Management in Ontario: Report of the Ontario Mineral Aggregate Working Party to Leo Bernier, Minister of Natural Resources* (Toronto: Queen’s Printer, 1977).

<sup>31</sup> Mineral Aggregate Working Party, *supra* note 30 at 3.

Notwithstanding the recommendations, the Ministry subsequently adopted the “Mineral Aggregate Resource Planning Policy” which received cabinet approval in 1982 and was incorporated into Section 3 of the *Planning Act* in 1986 as the “Mineral Aggregate Resources Policy Statement.”<sup>32</sup> As a case study on environmental assessment and aggregate extraction in Ontario notes, of the 64 recommendations of the Working Party the Policy Statement incorporated just 12.<sup>33</sup> It was in this policy statement that aggregate resources were first declared a ‘matter of provincial interest’ and municipalities were formally required to preserve as much of the existing aggregate resources as “realistically possible.” In this way the planning framework was structured to “enrol” private land in the preservation of aggregate minerals and their production as a resource for a specific version of the public interest, one emphasizing growth and economically productive uses of land.<sup>34</sup> The Policy Statement included a statement that other land uses *may* in “specific instances” take precedence over aggregate extraction. In other words, the norm would be that aggregate extraction would take precedence over other land uses. As will be outlined in section 3 below, this prioritization of aggregate resource protection has been maintained in current planning law and policy in Ontario, particularly the Provincial Policy Statement.<sup>35</sup>

The current *Aggregate Resources Act* came into force in 1990, thus replacing the *Pits and Quarries Act 1971*.<sup>36</sup> In the interim some land use protection had been imposed, “at least symbolically,” under the landmark land use plan, *Niagara Escarpment Development Plan Act*.<sup>37</sup> As Baker et al. note, the aggregate industry lobbied against the passage of the

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<sup>32</sup> Ontario Ministry of Municipal Affairs and Housing & Ontario Ministry of Natural Resources, *Mineral Aggregate Resource Planning Policy: A Provincial Policy on Planning for Mineral Aggregate Resources* (Toronto: Queen’s Printer, 1982).

<sup>33</sup> Douglas Baker & Darryl Shoemaker, *Environmental Assessment and Aggregate Extraction in Southern Ontario: The Puslinch Case*, The Environmental Assessment and Planning in Ontario Project 3 (Waterloo, ON: Department of Environment and Resource Studies, University of Waterloo, 1995) at 6.

<sup>34</sup> Nicholas Blomley, “Land use, planning, and the ‘difficult character of property’” (2016) *Planning Theory & Practice* 1 at 3; Wayne J Caldwell, *Rediscovering Thomas Adams: Rural planning and development in Canada* (Vancouver: UBC Press, 2011) at 336.

<sup>35</sup> Binnstock & Carter-Whitney, *supra* note 8.

<sup>36</sup> R.S.O. 1990, c. A. 8 [the “Act”].

<sup>37</sup> R.S.O. 1990, c.N.2 [the *Niagara Escarpment Act*]; Cullingworth, *supra* note 18 at 230.

current Act, and against the Niagara Escarpment planning protections. Bill 170, *The Aggregate Resources Act* was introduced by a Conservative provincial government and received first and second readings in 1979 but was later withdrawn.<sup>38</sup> While it did respond to some of the concerns raised by the Working Party and brought in a more detailed set of requirements for site planning and rehabilitation of quarries and pits, debates in the legislature revealed serious and ongoing concerns. At second reading Jim Foulds, a New Democratic Party Member of the Provincial Parliament noted his party's "serious reservations," calling the environmental provisions "woefully inadequate," the appeal mechanism "lopsided" in favour of aggregate developers, and noting the lack of protection for municipalities.<sup>39</sup> He concluded, "[T]he minister's authority to override the municipality zoning bylaws is enormous."<sup>40</sup> Several members expressed concerns about the centralization of discretionary power in the Minister of Natural Resources and the lack of local control. Liberal Party member Robert Nixon pointed to the potentially conflicting roles the minister was assigned, being responsible for both development and protection of the resource at the same time as controlling the impacts of the industry:

He is seen not to be a controller of the aggregate industry but really the developer himself. It is his responsibility to search out the resources and see that the amounts are properly sealed so they are made available to industry in a fair and equitable way. It almost seems that the Minister of Natural Resources and his advisers become really the operators of the overall provincial industry. Of course at the same time they have the responsibility to control it.<sup>41</sup>

Mel Swart, another New Democratic member also pointed to the "weak, bare bones" nature of the bill and criticized the government for placing the substantive policy in a discretionary policy document approved by Cabinet with no debate in the legislature and no input from municipalities.<sup>42</sup> He pointed to a letter sent from the Ministry to the Ontario Municipal Board during a hearing on the Durham Official Plan containing an early iteration of the Policy Statement entitled the "Mineral Aggregate Policy for Official

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<sup>38</sup> Bill 170, *Aggregate Resources Act*, 3<sup>rd</sup> Sess, 31<sup>st</sup> Parl, Ontario, 1979.

<sup>39</sup> Ontario, Legislative Assembly, Official Report of Debates (*Hansard*), 31<sup>st</sup> Parl, 3<sup>rd</sup> Sess, (18 December 1979) at 5:45.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at 3:45.

<sup>42</sup> *Ibid* at 4:30.

Plans”: “I say to you, Mr. Speaker, that is the policy of this province, not what's in this bill... I say it's deliberate that they don't set out the principles in this bill, because they want to retain unto themselves the principles and the policy.”<sup>43</sup> These concerns about the reliance on ministerial discretion and a closed-policy process to guide aggregate extraction decisions foreshadow Valiante’s findings about the closed nature of Ontario’s planning policy process that contains debate within site specific processes and leaves “the logic of the prevailing approach to growth and development” and “underlying assumptions about the benefits” unquestioned.<sup>44</sup> The development-focused legal and policy orientation and enrolment of private land in the provincial interest through planning predates the current neoliberal approach to environmental governance in Ontario. As described below, the emergence of neoliberal environmental governance in the late 1980s both upheld and reinforced the role of land owners as planning decision makers and the managerial emphasis on technical and scientific expertise in aggregate planning.

The present Act was not introduced until 1988 and was proclaimed in 1990.<sup>45</sup> During this period the extraction rate in the province rose from 131 million tonnes to 197 million tonnes, resulting in “heightened awareness of the overall costs of the industry and weaknesses in the policy framework.”<sup>46</sup> A Liberal Party government in 1988 reintroduced Bill 170. On second reading Ruth Grier, a former New Democratic Environment Minister, noted that while it may be an improvement on the former regime, the new Act remained unsatisfactory: “We would all like to see the environment protected and the aggregates industry controlled. Obviously the crux of it is, is the weapon that is being used adequate to do the job? I regret that it is not.” Pointing to the inadequate protection of the environment she stated, “Aggregates extraction is not sustainable. It is a non-renewable resource. Surely, in developing legislation to deal with

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<sup>43</sup> *Ibid* at 4:15.

<sup>44</sup> Valiante, *supra* note 22 at 124–125.

<sup>45</sup> Baker, Slam & Summerville, *supra* note 19 at 471.

<sup>46</sup> Ontario, Ministry of Natural Resources, *Aggregate Resources Program: Statistical Update Aggregate Resources Section* (Toronto: Queen’s Printer, 1990).



aggregates, if one believes in sustainable development, that legislation ought to put the environment not just first, but before everything.”<sup>47</sup>

With Bill 52, the *Aggregate and Petroleum Resources Statute Law Amendment Act, 1996*, the Conservative government of Mike Harris amended the Act in 1997.<sup>48</sup> The amendments aimed to increase industry accountability through the introduction of requirements for public notice and circulation of applications and mandatory public consultation. However, a central objective of the Bill was also to reduce the government’s role in the regulation of aggregate licensing and operations by shifting towards a self-monitoring system and the creation of an industry-led Aggregate Resources Trust that would be responsible for the rehabilitation of abandoned pits and quarries, research activity and fee collection as well as distribution.<sup>49</sup> During legislative debate upon second reading, Liberal opposition member Jim Bradley succinctly characterized the effect of the bill: “In this case, we have the industry being put in charge of itself.”<sup>50</sup> At third reading Bradley also noted the privileged position of the aggregate industry in the legislative development process: “They consulted the industries first, got their input, drew up their proposals and then consulted somebody else after, which is not the proper way to go.”<sup>51</sup> The New Democratic critic for natural resources and former Minister of Northern Development and Mines Shelley Martel noted that even other sectors involved in the government’s own aggregates working group had not been involved: “Municipalities had no input, environmental groups had no input, consultants who work with operators around these issues had no input. The only group that the minister consulted with were the aggregate producers.”<sup>52</sup> As described below, this

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<sup>47</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35<sup>th</sup> Leg, 1<sup>st</sup> Sess, (27 February 1989), at 1610 (Ruth Grier).

<sup>48</sup> 1<sup>st</sup> Sess, 36<sup>th</sup> Leg, Ontario, 1996 (assented to December 19, 1996).

<sup>49</sup> *Bill 52*, ss. 4, 12, 36.

<sup>50</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36 Parl, Sess 1, (19 June 1996), at 16:40.

<sup>51</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36<sup>th</sup> Leg, 1<sup>st</sup> Sess, (19 December 1996), at 1610 (Jim Bradley).

<sup>52</sup> *Ibid* at 15:50.

industry-led policymaking and proponent-driven approach has persisted, and arguably increased, to today.

As with Bill 170, the proposed Act was enabling legislation that left much of the substance to regulation or policy. This lack of substance was criticized by opposition members who noted that they would not get the chance to debate and influence the regulations which had yet to be developed and would not come before the Legislature.<sup>53</sup> Further, even in this context of deregulation, Bradley and other members raised concerns about the ability of the Ministry to enforce the amended Act. Liberal member Michael Brown stated, “[E]ven if we get a set of regulations that look reasonable to us, protect the environment, are workable by the industry, we have no assurance whatever that this ministry has any chance of actually administering this piece of legislation.”<sup>54</sup> Both Bradley and Brown linked their concerns with the Conservative government’s move to deregulate environmental and natural resource sectors and recent budgetary and staffing reductions at the Ministry of Natural Resources and the Ministry of the Environment and Energy. Bradley lamented job losses for staff “who used to undertake supervisory activities, inspection activities and monitoring activities” at the Ministries. He went on, “[I] think this Bill really is necessitated by the fact that the government is annihilating those ministries by removing so many of the staff and taking away so many of the resources.”<sup>55</sup> Martel pointed out that 20% of the public service job reductions across government were slated to be from the Ministry of Natural Resources.<sup>56</sup> She linked her concerns about the Bill with a fundamental shift in the role of government with respect to natural resource and the environment:

I think what the government forgets at the end of the day -- and this is a most important point -- is that the resources in the province, be they timber or wildlife or fish or parks or aggregates, don't just belong to this government. They don't just belong to the Minister of Natural Resources. They are not his to give away. The crown acts as the steward and provides

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<sup>53</sup> *Ibid* at 15:10, 15:50.

<sup>54</sup> *Hansard* (19 June 1996), *supra* note 50 at 16:40.

<sup>55</sup> *Ibid* at 17:00.

<sup>56</sup> *Hansard*, (19 December 1996), *supra* note 51 at 1540.

the standards and provides the compliance and monitors that compliance and provides fines as necessary to ensure that the resources which belong to all the people are used in an environmentally sound way to benefit the greatest number of people in the province.<sup>57</sup>

The current regime, as amended by Bill 42, not only maintains limitations on public involvement beyond site-specific objections, it is part of a deliberate and sustained effort across Canada to weaken regulatory capacity, reduce scientific knowledge within the state, and increase the role of non-state actors in knowledge production, risk assessment and compliance.<sup>58</sup> As the discussion below and the chapters that follow demonstrate, many of these concerns are echoed by the experiences of the participants in this project. Whether these will be resolved by the proposed amendments remains to be seen as the process is ongoing. The Act continues to be enabling legislation with much of the substance left to policy and regulation, little of which has been developed or made available. Historically, planning and aggregate policy and regulations have not been developed in a transparent or participatory manner. As will be discussed in Part II and Chapter Nine, in my view, none of the changes represent a significant shift in aggregate planning policy and nothing in the reforms provides the basis for the transformative change that would be required to realize an eco-relational approach to aggregate mineral planning in the province.

#### B. Research and Commentary

The Ministry of Natural Resources has commissioned two studies on provincial aggregate resources, one in 1992 and the 2010 *State of the Aggregate Resource in Ontario Study* [SAROS]. The 2010 consolidated SAROS report summarized the findings of six individual reports authored by expert consultants:<sup>59</sup> Aggregate Consumption and

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<sup>57</sup> *Hansard*, (19 June 1996), *supra* note 50 at 17:30.

<sup>58</sup> Angela V Carter, Gail S Fraser & Anna Zalik, “Environmental Policy Convergence in Canada’s Fossil Fuel Provinces? Regulatory Streamlining, Impediments, and Drift” (2017) 43 *Canadian Public Policy* 1 61 at 70.

<sup>59</sup> Ministry of Natural Resources, *supra* note 8.

Demand;<sup>60</sup> Future Aggregate Availability and Alternatives Analysis;<sup>61</sup> The Value of Aggregates;<sup>62</sup> Reuse and Recycling;<sup>63</sup> Aggregate Reserves in Existing Operations;<sup>64</sup> and, Rehabilitation.<sup>65</sup>

Following the release of the SAROS report, the provincial Aggregate Resource Advisory Committee, which includes stakeholder representatives from industry, environmental interests and municipal governments, released a set of consensus recommendations and priorities to the Minister.<sup>66</sup> There was no public consultation about the review in advance or subsequently despite the contentious history of aggregate resource development. The SAROS recommendations included the need for a provincial “Strategic Aggregate Roadmap” based on a lifecycle management approach and an emphasis on improved rehabilitation as well as the protection of aggregate resources and simplification of the approval process. It is critical to assess the recommendations as partial and limited, as they report only those issues about which there was consensus. Environmental considerations are absent from the report as no consensus recommendations were reached regarding the environmental impact of aggregate extraction. While a review of SAROS technical data is beyond the scope of this project (and my expertise), it is critical to acknowledge that a range of stakeholders agreed about the importance of knowledge production and data collection, and that the SAROS process and report have been criticized as “aggregate-centric” and as emphasizing the benefits of extraction for the

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<sup>60</sup> Altus Group Economic Consulting, *State of the Aggregate Resource in Ontario Study: Paper 1- Aggregate Consumption and Demand* (Toronto: Queen’s Printer, 2010).

<sup>61</sup> MHBC Planning, *State of the Aggregate Resource in Ontario Study: Paper2-Future Availability & Alternatives* (Toronto: Queen’s Printer, 2010).

<sup>62</sup> AECOM, *State of the Aggregate Resource in Ontario Study: Paper3-Value of Aggregates* (Toronto: Queen’s Printer, 2010).

<sup>63</sup> LVM Jegel, *State of the Aggregate Resource in Ontario Study: Paper 4-Reuse & Recycling* (Toronto: Queen’s Printer, 2010).

<sup>64</sup> Golder Associates, *State of the Aggregate Resource in Ontario Study: Paper 5-Aggregate Reserves* (Toronto: Queen’s Printer, 2010).

<sup>65</sup> Skelton Brumwell & Associates Inc. and Savanta Inc., *State of the Aggregate Resource in Ontario Study: Paper 6-Rehabilitation* (Toronto: Queen’s Printer, 2010).

<sup>66</sup> Aggregate Resource Advisory Committee, *Aggregate Resource Advisory Committee Consensus Recommendations to the Minister of Natural Resources* (Ministry of Natural Resources, 2010), online: <[http://files.ontario.ca/environment-and-energy/aggregates/aggregate-resource-in-ontario-study/stdprod\\_067787.pdf](http://files.ontario.ca/environment-and-energy/aggregates/aggregate-resource-in-ontario-study/stdprod_067787.pdf)>

economy while minimizing social and environmental impacts and the potential to reduce demand.<sup>67</sup>

There have been other reports evaluating the aggregate industry in Ontario, such as the Canadian Urban Institute's *Between a Rock and a Hard Place: Understanding the Foundations of Ontario's Built Future*, prepared for Dufferin Aggregates prior to the SAROS report in anticipation of an application for a quarry licence.<sup>68</sup> The Report is presented as an "independent assessment by a neutral party" but acknowledges its reliance on a combination of publicly available data and industry provided data. In 2005, the Pembina Institute released a study on Ontario's aggregate policy.<sup>69</sup> The authors concluded that the provincial approach did not manage the resource sustainability and did not promote the appropriate balance between aggregate extraction and other land uses.<sup>70</sup> They called for a comprehensive provincial strategy to manage aggregate resources and reduce demand.<sup>71</sup> The Canadian Institute for Environmental Law and Policy evaluated the SAROS report in their 2001 report *Aggregate Extraction in Ontario: A Strategy for the Future*, which attempts to inform the development of a provincial aggregates strategy based on stakeholder interviews, publicly available data, Environmental Commissioner reports and policies and practices from other jurisdictions.<sup>72</sup> Aggregate mineral extraction has also been the subject of commentary in a number of the Environmental Commissioner's Annual Reports and Comments since 2000 and a key issue addressed in the 2012 report *Land Use Planning in Ontario: Primer and Summary of Recommendations of the Environmental Commissioner of Ontario*.<sup>73</sup> The Commissioner

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<sup>67</sup> See for example the comments made on behalf of Gravel Watch Ontario: Mark L Dorfman, *A Review of "The State of the Aggregate Resource in Ontario Study"* and the "Aggregate Resource Advisory Committee" Consensus Recommendations (Toronto, Gravel Watch Ontario, 2011).

<sup>68</sup> Miller et al, *supra* note 8; Environmental Commissioner of Ontario, "ECOIssues: Aggregate Resources Act", (7 May 2012), online: *Ecoissues.ca* <[http://www.ecoissues.ca/index.php/Category:Aggregate\\_Resources\\_Act](http://www.ecoissues.ca/index.php/Category:Aggregate_Resources_Act)>.

<sup>69</sup> Mark Winfield & Amy Taylor. *Rebalancing the Load: The Need for an Aggregate Conservation Strategy for Ontario* (Toronto: Pembina Institute, 2005).

<sup>70</sup> *Ibid* at 3.

<sup>71</sup> *Ibid* at 3–4.

<sup>72</sup> Binnstock & Carter-Whitney, *supra* note 8.

<sup>73</sup> Environmental Commissioner of Ontario, *supra* note 7.

has pointed to a range of issues, including, the limited capacity of the Ministry to manage the aggregate licensing program and enforce compliance, the siting of operations near sensitive land uses and natural areas, problems with industry compliance and rehabilitation, and the lack of a long-term and comprehensive approach to aggregate planning.<sup>74</sup>

#### **4. Part II: The Aggregate Mineral Extraction Legislative and Policy Framework**

With this historical context in mind, this section provides an overview of current legal and policy framework. As mentioned above, the vast majority of aggregate extraction occurs on private land in Ontario.<sup>75</sup> This makes private ownership a key category in the legal governance of aggregate minerals and a starting point for an inquiry into aggregate mineral extraction. Under the Canadian constitutional division of powers, planning and natural resource governance on private and public lands fall within provincial jurisdiction over municipal institutions and property and civil rights and the management of public lands.<sup>76</sup> Across Canada private land ownership varies in terms of the separation of surface and sub-surface rights. In Ontario, as in other provinces and territories, private land may have separate or unified surface and sub-surface rights depending on the terms of the grant.<sup>77</sup> While gold and silver had been reserved to the Crown in English domestic and colonial territories since the *Case of Mines* in 1567,<sup>78</sup> the common law rule that all other minerals are part of the land itself was reflected in early fee simple land grants in Ontario, which included both surface rights and sub-surface rights to non-precious minerals. The

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<sup>74</sup> Environmental Commissioner of Ontario, *supra* note 68.

<sup>75</sup> Aggregate Resources Act Review, *supra* note 1 at G145.

<sup>76</sup> *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, ss 92 (5), (13), 92A. Section 92(5) confers the power to manage and sell public lands and timber and wood thereon to the provinces. Section 92(13) confers the power to legislate in relation to property and civil rights. Section 92A, the natural resources amendment explicitly confers the exclusive power to make laws in relation to non-renewable resource exploration, development, conservation and management.

<sup>77</sup> The Conveyancing and Law of Property Act, *supra* note 2, defines “mining rights” as the conveyance or reservation of “the ores, mines and minerals on or under the land, together with such right of access for the purpose of winning the ores, mines and minerals as is incidental to a grant of ores, mines and minerals”, s 16. It defines “surface rights” as the conveyance or reservation of “the land therein described with the exception of the ores, mines and minerals on or under the land and such right of access for the purpose of winning the ores, mines and minerals as is incidental to a grant of ores, mines and minerals”, s 17.

<sup>78</sup> 1 Plowd. 310.

1869 *General Mining Act*<sup>79</sup> voided the Crown reservation of precious metals and unified surface and subsurface ownership. The 1913 *Public Lands Act*<sup>80</sup> revoked past mineral reservations and future reservations had to be expressly set out in the letters patent.<sup>81</sup> The current *Public Lands Act* carried these provisions forward such that the Crown has no interest in mineral rights for lands originally granted before 1913 despite reservations.<sup>82</sup> Notable exceptions include Crown land sold for Agricultural purposes as of April 1<sup>st</sup>, 1957, and sales or dispositions for summer resort locations, both of which include reservations of all mines and minerals to the Crown.<sup>83</sup> Recent statutory reforms to provincial mining law have further unified land rights,<sup>84</sup> particularly in Southern Ontario where the majority of aggregate extraction takes place.<sup>85</sup>

While statutory and common law property regimes are central to the legal construction and protection of land ownership, planning law is the primary tool employed to manage the intersection between private land use and development and the “multiple public interests at play” in the province.<sup>86</sup> Planning law in Ontario operates through a complex web of legislation and policy. In Ontario, the province provides broad guidance and maintains considerable power to constrain local government action through both the *Planning Act* and the Provincial Policy Statement, a policy document that “sets the policy foundation for regulating the development and use of land.”<sup>87</sup> The bulk of day-to-day

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<sup>79</sup> 32 Vict, c34, s 4.

<sup>80</sup> SO 1913, c6, ss 41-54.

<sup>81</sup> Barry Barton, *Canadian law of mining* (Calgary: Canadian Institute of Resources Law, 1993) at 68–69.

<sup>82</sup> RSO 1990, c P.43, ss 61(1), (3).

<sup>83</sup> *Ibid*, s 60, 15(6).

<sup>84</sup> Bill 173, the *Mining Amendment Act, 2009*, SO 2009, Ch 21, (assented to October 21, 2009). The Bill amended the *Mining Act*, RSO 1990, c M.14 and enacted the *Far North Act 2010*, SO 2010, c 18.

<sup>85</sup> Bruce Pardy & Annette Stoehr, “The Failed Reform of Ontario’s Mining Laws” (2012) 23 *Journal of Environmental Law and Practice* 1 at 6.

<sup>86</sup> Valiante, *supra* note 22 at 106.

<sup>87</sup> R.S.O. 1990, c. P. 13, s.22 [the “*Planning Act*”]; Ministry of Municipal Affairs and Housing. Natural Resources Management Division, “Aggregate Resources Provincial Standards” (Toronto: Ministry of Natural Resources, 1997) (the “Standards”); Ontario, Ministry of Municipal Affairs and Housing, *Provincial Policy Statement* (Toronto: Queen’s Printer, 2005) [the “2005 Policy Statement” referred to as PPS in the footnotes]. At the time of writing all decisions have been made under the 2005 Policy Statement; however, in April 2014 the Ministry of Municipal Affairs and Housing released the 2014 Policy Statement, which took effect on April 30, 2014, *Provincial Policy Statement* (Toronto: Queen’s Printer, 2014), [the “2014 Policy Statement”]

planning powers and responsibilities are devolved to local municipalities.<sup>88</sup> However, formal public participation requirements for local planning and development decisions, such as the development, revision or amendment of a municipality's Official Plan, are statutory and set out in the *Planning Act*. These include the provision of information and material, public open houses where the public can review this material and ask questions, public meetings, and, rights to make oral or written submissions.<sup>89</sup> Similar provisions for by-laws are also set out in the *Planning Act*.<sup>90</sup>

The review of planning decisions in Ontario is divided between the Ontario Municipal Board and the Environmental Review Tribunal, ostensibly dividing "land use" from "environmental" decisions despite the environmentally-focused nature of many objections to planning decisions.<sup>91</sup> Notably the two quasi-judicial administrative bodies have recently been formally linked as part of the Environment and Land Tribunals cluster but it is not yet clear what, if any, substantive outcomes the restructuring has brought about.<sup>92</sup> For certain appeals, particularly where hearings may be required from both tribunals, a joint-board is formed under the *Consolidated Hearings Act*.<sup>93</sup> However, one of the unique features of Ontario's planning system remains the powerful role of the Ontario Municipal Board, which serves as the primary appeal body for planning and development decisions, including those with clear environmental implications such as amendments to Official Plans affecting public space, protected green space and agricultural lands and the often-contentious applications for aggregate development

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<sup>88</sup> Hoi Kong, "Something to Talk About: Regulation and Justification in Canadian Municipal Law" (2010) 48 Osgoode Hall LJ 499; Stanley M Makuch, Neil Craik & B Leisk Signe, *Canadian Municipal and Planning Law* (Toronto: Thomson Carswell, 2004).

<sup>89</sup> *Planning Act*, *supra* note 87, ss 17, 22 and 26.2.

<sup>90</sup> *Ibid*, s 34.

<sup>91</sup> L Anders Sandberg, Gerda R Wekerle & Liette Gilbert, *The Oak Ridges Moraine Battles: Development, Sprawl, and Nature Conservation in the Toronto Region* (Toronto: University of Toronto Press, 2013); Estair Van Wagner, "Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning" (2013) 43 *Revue générale de droit* 275.

<sup>92</sup> Lorne Sossin & Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-full or Half-empty for Administrative Justice?" (2012) 12 *Oxford University Commonwealth Law Journal* 1 157.

<sup>93</sup> RSO 1990, c C.29. See for example, *Nelson Aggregate Co., Re*, 2012 CLB 29642, [Nelson], *Re Walker Aggregates Inc. (Re)*, 2012 CLB 16274 [Walker], *aff'd Niagara Escarpment Commission v Ontario (Joint Board)*, 2013 ONSC 2496, 12 MPLR (5<sup>th</sup>) 51 [Walker Appeal].



considered here.<sup>94</sup> The Board has jurisdiction to deal with issues and disputes under more than 100 statutes, including the *Aggregate Resources Act*.<sup>95</sup> The role of the Board and its powers are discussed in more detail below in this Chapter.

In the context of aggregate extraction, the key legal frameworks municipal powers and centralized provincial planning policy under the *Planning Act*, the *Provincial Policy Statement*, provincial planning regimes, particularly the *Niagara Escarpment Development Plan Act* and the *Aggregate Resources Act* as well as the associated Ministry of Natural Resources guidelines and standards. The constitutional and/or treaty rights of First Nations and Metis communities and the applicable Indigenous legal orders are also part of these key legal frameworks. While this chapter is focused on a detailed review of these primary legal and policy regimes, quarry disputes can engage a much broader range of municipal, provincial, federal and international law. The following overview begins by examining the role of the Crown's Duty to Consult and Accommodate Aboriginal rights and title under Section 35 of the *Constitution Act*.

#### A. The Duty to Consult and Accommodate – Aboriginal Rights, Title and Crown Constitutional Obligations

Indigenous legal orders, Aboriginal rights and title, as well as treaty rights and obligations, have largely been neglected in debates about the regulation of private land use in Ontario. However, the Supreme Court of Canada has made it clear that the Crown has a constitutional duty to consult and accommodate in respect of Aboriginal rights, claims and treaty rights, where “the Crown has knowledge, real or constructive, of the

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<sup>94</sup> After this research was undertaken, the Ontario Liberal government launched a review of the role of the Ontario Municipal Board, including the scope of the Board's jurisdiction and its operation. After a province-wide consultation process, the government introduced a reform Bill in May 2017: Bill 139, *Building Better Communities and Conserving Watersheds Act*, 2<sup>nd</sup> Sess, 41<sup>st</sup> Leg, Ontario, 2017 (first reading May 30<sup>th</sup>, 2017). The Act would replace the OMB with a Local Planning Appeal Tribunal, establish a Local Planning Appeal Support Centre to provide free legal and planning advice, as well as representation. These proposals are outside the scope of this project and remain under consideration.

<sup>95</sup> John George Chipman, *A Law Unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002) at 12.

potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it” in accordance with Section 35 of the *Constitution Act*.<sup>96</sup> Following from *Delgamuukw v. British Columbia*, the landmark cases in *Haida Nation v. British Columbia (Minister of Forests)*, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, and *Taku River Tlingit First Nations v. British Columbia (Project Assessment Director)*, demonstrate that the scope and content of the duty will vary along a spectrum from a minor “duty to discuss” to “deep consultation,” proportionate to a preliminary assessment of the claim and the seriousness of the effects.<sup>97</sup> Regardless of where the circumstances of a particular case may fall on the spectrum, the consultation must always be “meaningful,” undertaken in “good faith” and with the “intention of substantially addressing the concerns” of the affected community.<sup>98</sup>

Much of Ontario is covered by historic treaties rather than subject to Aboriginal title claims. Therefore, in large parts of the province, the relevant duty to consult analysis is likely to be the Supreme Court’s decision in the *Mikisew*, which dealt with the duty to consult in the context of a historic treaty with a “lands taken up” clause. However, it should be noted that there are important areas of unceded land subject to current and ongoing land claims and claims of rights that survived treaty.<sup>99</sup> Indeed, a highly

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<sup>96</sup> *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at para. 168 [*Delgamuukw*]; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] SCR 511 [*Haida*], at para. 35; *Taku River Tlingit First Nations v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 (Canlii), 259 DLR (4<sup>th</sup>) 610, [2006] 1 CNLR 78 [*Mikisew*]. See also the Supreme Court’s first finding of Aboriginal title See also the Supreme Court’s first finding of Aboriginal title in *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot’in*].

<sup>97</sup> *Haida*, *supra* note 96, at para. 40, citing *Delgamuukw*, at para. 168.

<sup>98</sup> *Ibid.*

<sup>99</sup> See for example, the Algonquin land claim covering a territory of 36,000 square kilometres in eastern Ontario currently being negotiated: <https://www.ontario.ca/aboriginal/algonquin-land-claim>. The Saugeen Ojibway Nation Territories have also filed claims related to the lake and lakebeds surrounding their Treaty and traditional territories: *Chippewas of Nawash Unceded First Nation and Saugeen First Nation v. The Attorney General of Canada and the Queen in right of Ontario*, Statement of Claim, Ontario Superior Court of Justice, Court File No. 03-CV-261134CM1, (January 5, 2004). A motion to strike those portions of the above pleadings dealing with Aboriginal title to the Great Lakes and their connecting waterways was dismissed by Carnwath J. of the Ontario Superior Court: *Walpole Island First Nation et al. v. Canada (Attorney General)*, 2004 CanLII 7793 (ON SC), [2004] 3 CNLR 351.

(leave to appeal refused (15 September 2004) Matlow J. (Ont Div Ct).

controversial historic aggregate licence for lands claimed by the Tyendinaga Mohawks under the federal Specific Claims process for unsettled Indigenous land claims was the subject of protests, blockades and violent confrontations in 2006-2007 when an assertion of Indigenous jurisdiction was rejected by the proponent and government agencies.<sup>100</sup>

In 2014, the Court reaffirmed Ontario's obligations to Aboriginal parties to historic treaties, including the duty to consult and accommodate, in the *Grassy Narrows First Nation v. Ontario (Natural Resources)* case.<sup>101</sup> Earlier in the 2006 *Mikisew* decision, the Court emphasized the importance of the duty to both First Nations and non-Aboriginal governments: "[T]he principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples."<sup>102</sup> Justice Binnie articulated the appropriate test as the determination of the "degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult," noting that the trigger is a low threshold and the variation would be in the content of the duty.<sup>103</sup> He concluded that the Crown has a positive duty - "an obligation to inform itself of the impact" on treaty rights and must follow up with a meaningful, "good-faith" process that includes the possibility of accommodation that "substantially addresses" the impacts.<sup>104</sup> In fact, Justice Binnie contemplated that finding the process is not compatible with the honour of the Crown may result in the setting aside of a government order "whether or not the facts of the case would otherwise support a finding of infringement" of the rights.<sup>105</sup> In that

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J. of the Ontario Divisional Court September 15,2004).

<sup>100</sup> Shiri Pasternak, Sue Collis & Tia Dafnos, "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims" (2013) 28 Canadian Journal of Law & Society/La Revue Canadienne Droit et Société 65 1 at 75-76.

<sup>101</sup> 2014 SCC 48 [*Grassy Narrows*].

<sup>102</sup> *Mikisew*, supra note 96, at 3.

<sup>103</sup> *Ibid*, at para 34.

<sup>104</sup> *Ibid* at para 54-55. Aff'd in *Grassy Narrows*, supra note 101, at para. 52. See also, *Halway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 DLR (4<sup>th</sup>) 666, 1999 BCCA 470, at paras. 159-60.

<sup>105</sup> *Ibid* at para 59.

case, despite finding that the duty was at the lower end of the spectrum, Binnie found that it had not been fulfilled and described what ought to have occurred:

This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights.<sup>106</sup>

Should the impact result in “no meaningful right” in relation to the traditional territory of a Treaty First Nation, both *Mikisew* and *Grassy Narrows* impose the treaty infringement analysis, including the *R v Sparrow* justification test, recently reaffirmed in *Tsilhqot’in Nation v British Columbia*.<sup>107</sup> The *Tsilhqot’in* case restated the *Sparrow* test for legislative infringement of protected s. 35 rights as follows: 1) the government must show that it fulfilled the procedural duty to consult and accommodate; 2) demonstrate a “compelling and substantial” objective for the government actions; and, 3) establish that the government’s actions are consistent with the Crown’s fiduciary duty to Aboriginal peoples.<sup>108</sup>

A full examination of the relationship between land use planning, Indigenous land use laws, and the duty to consult and accommodate is a complex subject and beyond the scope of this more broadly focused project. It is an area that requires much more detailed scholarly examination than can be offered in the introductory section below. However, this overview will provide a general summary of the Canadian legal framework that should be considered by all parties in dealing with aggregate extraction proposals in Ontario. Specific Indigenous legal frameworks will be applicable and should be considered by all parties as appropriate in a particular location.

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<sup>106</sup> *Ibid.*, at para. 64.

<sup>107</sup> [1990] 1 S.C.R. 1075 [*Sparrow*].

<sup>108</sup> *Supra* note 96, at para 77.

*i. The Duty to Consult and Accommodate: Who is Responsible and for What?*

One of the complexities in understanding how the duty to consult and accommodate operates in the context of land use planning is a lack of clarity about roles of the various actors, including the proponents and a range of actors that may be created and empowered by the provincial or federal Crown. These bodies play critical and often leading roles in land use planning, but are not themselves the Crown. For example, regional and municipal governments, as well as agencies and administrative bodies, such as the Niagara Escarpment Commission, the Ontario Municipal Board and the Environmental Review Tribunal may all play a role in planning decisions.<sup>109</sup> In the context of land use planning and environmental decision-making, including aggregate extraction licensing, these bodies play very significant roles and cannot be ignored as key actors in ensuring that legal duties to Indigenous communities are met. In particular, municipalities are often uniquely positioned to understand the local context of the impacts of extractive development and may be experienced in conducting certain types of consultations.

As described below, while the aggregate licensing process is formally regulated by provincial law and administered by the Ontario Ministry of Natural Resources, conflicts about aggregate extraction are often rooted in the municipal zoning and official plan amendments required prior to provincial approval. Indeed, the exclusion of the majority of private land in Northern Ontario from regulation under the *Aggregate Resources Act* licensing process means that municipal *Planning Act* approvals are the only mechanism for review in large parts of the province where First Nations lands and rights may be impacted. Further, public consultation has largely been delegated to the proponent under the provincial aggregate policies, making the municipality and the proponent the leading bodies with respect to public consultation in the aggregate context. The Ministry, one or more municipal and regional governments, and the Ontario Municipal Board often play

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<sup>109</sup> Nancy Kleer, Lorraine Land & Judith Rae, “Bearing and Sharing the Duty to Consult and Accommodate in the Grey Areas in Consultation: Municipalities, Crown Corporations and Agents, Commissions, and the Like” (Paper, delivered at the Canadian Institute Conference, 24 February 2011), at 3. Available online at: < <http://oktlaw.com/drive/uploads/2016/10/njkGreyAreas.pdf> > [Kleer et al.]

significant roles at various stages of the licensing process. As well, the Ministry of the Environment, the Environmental Review Tribunal, the Niagara Escarpment Commission and the local conservation authorities may play critical roles in a particular case.

It should be noted that there are real concerns about the consequences of any delegation of the Crown's duty to consult that should be considered in the development of the legal and regulatory framework governing aggregate extraction and land use planning more generally.<sup>110</sup> Kaitlin Ritchie argues that the costs may include the following: 1) the loss of critical opportunities to advance reconciliation between the Crown and Aboriginal people through nation-to-nation negotiations; 2) the potential that the “scope and range of accommodations” that can result from consultations will be limited by the statutory powers of non-Crown bodies, such as municipalities and tribunals;<sup>111</sup> and, 3) the potential to create confusion about who has the duty to consult that may result in a failure to fulfill the duty.<sup>112</sup> However, as Imai and Stacey recently pointed out, the failure to engage other public bodies and private proponents in the fulfillment of the duty may have important and negative consequences for the protection of Aboriginal interests and for the goal of reconciliation between the Crown and First Nations.<sup>113</sup> In the words of the Court of Appeal of Yukon, “[T]he Duty to Consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims.”<sup>114</sup>

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<sup>110</sup> Kaitlin Ritchie, “Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation” (2013) 46 UBC L Rev 397 at 408.

<sup>111</sup> See *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 CNLR 74 [*Huu-Ay-Aht*] where the Court of Appeal noted that those negotiating for the Crown had limited authority under the applicable legislation and found that a single accommodation option was not meaningful consultation; and *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247 at para 106, [2011] 33 DLR (4<sup>th</sup>) 31 [*West Moberly*] in which the Court of Appeal found that the duty is not properly limited by statutory mandate as it “lies upstream of the statutory mandate of decision makers” at para 106.

<sup>112</sup> Ritchie, *supra* note 113 at 416–418.

<sup>113</sup> Shin Imai & Ashley Stacey, “Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v Salmon Arm (City)*” (2014) 47 UBCL Rev 293.

<sup>114</sup> *Ross River Dena Council v Government of Yukon*, 2012 YKCA 37 at para 56, 358 DLR (4<sup>th</sup>) 100; leave to appeal dismissed in [2013] SCCA no 106 [*Ross River Dena*].

The Court in *Haida* found that the Crown cannot delegate the legal responsibility for the duty to consult and accommodate, a power that flows from the “assumption of sovereignty over lands and resources formerly held by the Aboriginal group” and the “honour of the Crown.”<sup>115</sup> However, the Court specifically allowed for the Crown to delegate “procedural aspects” of the consultations, in that case to industry proponents.<sup>116</sup> As Kler et al. point out, this leaves the complex question of exactly *what* has been delegated to a case-specific analysis. In *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, the Court contemplated delegation to public bodies where their decision-making roles may affect Aboriginal rights and interests, in that case administrative tribunals.<sup>117</sup> *Carrier Sekani* did provide some guidance about how to undertake this inquiry, including the importance of examining the specific duties and powers conferred on the body by the legislature, particularly the nature of the delegation expressed or implied in the enabling legislation.<sup>118</sup> Kler et al. point to the Court’s division of the duty into two separate roles in the context of delegation: a) the “consulting” role whereby a body is delegated the role of engaging with an Indigenous community and examining the potential impacts and possible accommodations *and* has the “remedial powers” necessary to effect changes and to accommodate in response to the consultation outcomes; and, b) a “reviewing” role through which a body is legally empowered to consider *whether* there is a duty in the circumstances and *if so*, if the duty has been met.<sup>119</sup>

The law on how this specifically impacts municipalities has been limited and the results of judicial consideration have been mixed. In Ontario, the regulatory framework has been silent on the duty to consult and accommodate in the land use planning context until 2014. The Ontario *Planning Act*, *Provincial Policy Statement* and *Aggregate Resources Act* provided very little guidance in the context of aggregate extraction. The 2014 revised Provincial Policy Statement

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<sup>115</sup> *Haida*, *supra* note 96, at para. 53.

<sup>116</sup> *Ibid.*

<sup>117</sup> 2010 SCC 43, 325 DLR (4<sup>th</sup>) 1 [*Carrier Sekani*].

<sup>118</sup> *Ibid* at paras. 56, 60.

<sup>119</sup> *Ibid* at paras, 58-60; Kler et al., *supra* note 109.

included, for the first time, explicit acknowledgement of the “rights and interests” of Aboriginal communities and mandatory language requiring the Policy Statement “shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights.”<sup>120</sup> Given the powerful role of the Provincial Policy Statement in decision-making by both municipal governments and the Ontario Municipal Board, this serves as the first explicit provincial delegation of at least some aspects of the duty to consult and accommodate municipalities in Canada.<sup>121</sup> A 2009 report provides that the position of the Ministry of Municipal Affairs and Housing is that “municipalities do have a duty to consult in some circumstances” and notes that in practice many municipalities are already engaged in consultation with neighbouring First Nations and Metis communities.<sup>122</sup> However, the extent of the delegation and the implications are as of yet unclear. The *Aggregate Resources Act* has been silent on the duty to consult on Aboriginal rights until the 2017 amendments. Section 3.1 of the amended Act now provides Ministerial oversight to determine “whether adequate consultation with Aboriginal communities has been carried out”.<sup>123</sup> Not only does this leave “adequate consultation” as an undefined and discretionary standard, it presupposes the delegation of the duty to the proponent in the context of aggregate extraction. Several members raised concerns about leaving the duty of consult to be defined at the discretion of the minister. New Democratic Member Gilles Bisson criticized the consultation process on the Bill,

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<sup>120</sup> Policy Statement 2014, *supra* note 87, see Part IV and ss 1.2.2, 2.6.5, 4.3.

<sup>121</sup> Edward LaRusic, “Municipalities also have duty to consult: Ontario”, *Anishinabek News* (10 March 2014), online: <<http://anishinabeknews.ca/2014/03/10/municipalities-also-have-duty-to-consult-ontario/>>; Barbara Carss, “Aboriginal Interests Gain Ground in Land Use Planning: Duty to Consult Delegated to Ontario Municipalities”, *GTA & Beyond* (March 2014) 24; “Aboriginal interests gain ground in land use planning - REMI Network”, online: *REMINET* <<http://www.reminetwork.com/articles/aboriginal-interests-gain-ground-in-land-use-planning/>>.

<sup>122</sup> Ministry of Municipal Affairs and Housing, *Municipal-Aboriginal Relationships: Case Studies* (Toronto, Ontario: Queen’s Printer, 2009).

<sup>123</sup> The Act, *supra* note 36 s 2, as amended by *Aggregate Resources and Mining Modernization Act*, *supra* note 13, s 3.1. Despite deputations from First Nations and Metis communities and governments, the Report from the Legislative Review made no mention of these legal rights, duties and obligations, though the government Response and subsequent consultation document did so.



which amends both the Act and the Mining Act, based on submissions made by Six Nations Chief Ava Hill:

What they were left with was that somebody came and knocked at the door of the First Nation and said, “By the way, here’s what we’d like to do,” and walked away. The next thing they know, they’ve got the legislation. The Chief is pretty clear. She’s saying, “I cannot support this legislation as a First Nations leader because it stops well short of what the UN declaration calls for.”<sup>124</sup>

Bisson attempted to amend this clause at Committee and raised the issue at second reading, citing Chief Hill’s concerns about compliance with the UN Declaration on the Rights of Indigenous People:

It leaves us with a conundrum in this Legislature: If we truly do believe—as we said we did when we brought the First Nations leadership to this Legislature to talk about reconciliation and to reaffirm our intent to work with First Nations in order to make sure that they are full partners with Ontario and that we respect their right when it comes to the issues of the duty to consult and the UN declaration. We at that point voted in an affirmation of those principles, and we find ourselves with legislation now that falls short of it.<sup>125</sup>

While there is minimal case law in Ontario, the question is unresolved with some decisions assuming a municipal responsibility<sup>126</sup> and others determining the opposite, finding that municipalities are not “the Crown.” Prior to the 2014 revision of the Policy Statement, the Ontario Municipal Board in *Sifton v Brantford* found the municipality in that case did not have “a clear duty to consult resulting from the obligations to consult of higher levels of government.”<sup>127</sup> In 2015, the Board acknowledged the 2014 duty to consult provision in an appeal of a rezoning application for a redevelopment project on

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<sup>124</sup> Ontario, Legislative Assembly, Official Report of Debates (*Hansard*), 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, (13 April 2017) at 9:00.

<sup>125</sup> *Ibid.*

<sup>126</sup> *John Voortman & Associates v. Haudenosaunee Confederacy Chiefs Council*, 2009 CanLii 1497 (ON SC). In that case the judge found that the duty was “at the low end of the spectrum” and was fulfilled by the county planner having provided a draft plan of subdivision for comment. He also noted ongoing consultations regarding the Haldimand Tract, see paras. 68-71.

<sup>127</sup> *City of Brantford v Montour et al.*, 2010 ONSC 6253, at para. 58; *Sifton Properties Ltd v Brantford (City)*, [2014] OMBD No 472, 81 OMBR 1.

unceded Algonquin territory on the Ottawa River or Kichi Zibi.<sup>128</sup> The Board found that a consultation process incorporating “elements and features within the overall development that will recognize and celebrate Algonquin history and culture as well as the overall significance of the islands to the Algonquin in particular” was “in line with” the consultation contemplated by the Policy Statement and the Official Plan.<sup>129</sup> Notably the Board characterised the City consultation process as “a number of well attended public meetings occurring, where public input was sought from both the public at large as well as with the Aboriginal community.”<sup>130</sup> The proponent rather than the city undertook specific consultation with the Algonquins of Ontario.<sup>131</sup> Rather than viewing this as a failure of the City to fulfill the duty to consult, the Board invoked the private ownership of the land to shield the City and the developers from further obligations, noting that the proponent had engaged in consultation “notwithstanding” the private nature of the development.<sup>132</sup> The decision acknowledges the land as unceded Algonquin territory but then immediately limits the significance of this finding:

“[T]here is no land claim agreement in place and the Board notes that the negotiations between the Federal Government, Provincial Government and the Algonquins are focused on lands that are under federal jurisdiction/ownership and do not include lands that are privately held or owned at this time. *The subject lands have been held in private ownership for over 100 years with small areas still owned by PWGSC subject to perpetual lease agreements for perpetual use by private interests.*<sup>133</sup>

The decision was upheld on appeal in 2016.<sup>134</sup>

Outside of Ontario, further case law has developed. A 2012 decision of the British Columbia Court of Appeal in *Neskonlith Indian Band v. Salmon Arm (City)*<sup>135</sup> accepted

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<sup>128</sup> *Jackman v Ottawa (City)*, 2015 CanLII 77336 (ON OMB).

<sup>129</sup> *Ibid*, at 37.

<sup>130</sup> *Ibid*, at 36.

<sup>131</sup> *Ibid*, at 46.

<sup>132</sup> *Ibid*, at 46, emphasis added.

<sup>133</sup> *Ibid*, at 42.

<sup>134</sup> *Cardinal v Windmill Green Fund LPV*, 2016 ONSC 3456.

<sup>135</sup> 2012 BCCA 370, 354 DLR (4<sup>th</sup>) 696 [Neskonlith BCCA], aff'g 2012 BCSC 499, [2012] 3 CNLR 196 [Neskonlith BCSC]. This reasoning has been followed in *Saskatchewan Smerek v. Areva Resources Canada Inc.*, 2014 SKQB 282, [2014] S.J. No. 536.

the “powerful arguments, both legal and practical” against “automatically” imposing the duty on a municipality, resulting in a confusing situation where the duty to consult remained, presumably to be fulfilled by the provincial Crown. The project was allowed to proceed as only municipal approval was required.<sup>136</sup> As Imai and Stacey argue, the Court arrived at this result by asking the wrong question – *who* has the duty to consult rather than *whether* consultation is required before proceeding - resulting in a problematic result.<sup>137</sup> The Court held that without the express delegation of the duty, municipal authorities do not owe a duty to consult, concluding that “local governments lack the authority to engage in the nuanced and complex constitutional process involving ‘facts, law, policy and compromise.’”<sup>138</sup> While acknowledging, “that First Nations may experience difficulty in seeking appropriate remedies in the courts in cases like this one,” the Court concluded that the law from *Haida* and *Carrier Sekani*, combined with the municipal “lack of practical resources to consult and accommodate” countered the arguments for an implied delegation of the duty put forward by the First Nation.<sup>139</sup>

Imai and Stacey critique the result in *Neskonlith* on both legal and practical grounds, arguing the constitutional nature of rights recognized and protected by Section 35 does not allow for a “sphere of activity by non-government actors that is beyond” their reach and to the problematic “implementation issues” of the result.<sup>140</sup> The importance of the Crown-First Nations relationship and the distinct role of other public or private parties cannot result in such parties being in a better position than the Crown to pursue activities that adversely impact Aboriginal rights and interests.<sup>141</sup> They note that *Haida* must be read alongside *R v. Sparrow*, in which the Supreme Court set out the test for the Crown to justify an infringement on s. 35 rights, including the need to demonstrate a proper

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<sup>136</sup> *Ibid*, at para. 66.

<sup>137</sup> Shin Imai & Ashley Stacey, “Moving Backwards: Does the Lack of Duty to Consult Create the Right to Infringe Aboriginal and Treaty Rights?” (2013) *Comparative Research in Law & Political Economy*, online: <<http://digitalcommons.osgoode.yorku.ca/clpe/262/>>.

<sup>138</sup> *Neskonlith BCCA*, *supra* note 135, at paras. 66-68.

<sup>139</sup> *Ibid* at paras. 70-71, emphasis in original.

<sup>140</sup> Imai & Stacey, *supra* note 116.

<sup>141</sup> *Ibid*.

legislative objective, that the action infringed on the right as little as possible, and engaging in consultation and possibly providing compensation.<sup>142</sup> They argue that the decision could result in increased conflict, directly counter to the goal of reconciliation set out in *Haida*, where a municipality was permitted to proceed with a project prior to the completion of the separate consultations with the Crown and regardless of the conclusions about adverse impact, alternatives and accommodation.<sup>143</sup> Similarly, Janna Promislow argues that the *Neskonlith* decision may result in less pressure for legislative clarity about Indigenous rights in the context of land use planning as it “appears to reverse the direction set in *Haida Nation*...for a broadly distributed dialogue in relation to development on lands subject to Aboriginal rights and title claims, leaving it open to legislatures to provide further structure for this dialogue.”<sup>144</sup>

Promislow also notes that the Court of Appeal decision fails to address the finality of some municipal decisions, such as the permit at issue in *Neskonlith* or the rezoning application in *Jackman*, and the possibility to reduce the potential for claims to limit or stop impactful development where proof of Aboriginal rights is pending that was opened up by *Haida*.<sup>145</sup> Further, and of particular concern with extractive activities in Ontario, the decision has problematic implications with respect to the role of private proponents and landowners in relation to the Crown-First Nation relationship. The Supreme Court in *Tsilhqot'in* makes clear that while Ontario can exercise its jurisdiction over land and natural resources, this Crown power is “burdened by the Crown obligations toward aboriginal people,” in including respect for harvesting rights of Treaty First Nations.<sup>146</sup> The duty to consult and accommodate and the requirement to justify treaty infringements cannot be fulfilled by a land use planning system that simply delegates decision-making powers that trigger the duty to non-Crown bodies. As Promislaw argues, “courts should avoid interpreting statutory mandates as excluding the duty to consult unless legislation

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<sup>142</sup> [1990], 1 SCR 1075, 70 DLR (4<sup>th</sup>) 385.

<sup>143</sup> Imai & Stacey, *supra* note 116 at para 15.

<sup>144</sup> Janna Promislow, “Irreconcilable? The Duty to Consult and Administrative Decision Makers” (2013) 22 Constitutional Forum constitutionnel 73.

<sup>145</sup> *Ibid.*, 74.

<sup>146</sup> *Grassy Narrows*, *supra* note 101 at para 50-52.

makes those exclusions express.”<sup>147</sup> Despite the finding in *Jackman*, nothing in the 2014 Policy Statement expressly provides for delegation of the duty to private parties.

Litigation surrounding aggregate extraction has rarely dealt with issues related to the duty to consult and accommodate. This is likely due, at least in part, to the failure of the regulatory framework to recognize the role of First Nations and Metis claims in land use planning in the Province and to institute an appropriate process, which has resulted in limiting participation by affected First Nations and Metis governments to the general ‘stakeholder’ processes related. Such general processes are not seen by First Nations governments as fulfilling the duty and some communities have asserted the right to be consulted independently and directly by the Crown and all decision-making bodies involved in the licensing process, a position consistent with *Mikisew*.<sup>148</sup> In submissions to the legislative review Committee, Saugeen Ojibway Nation representative Veronica Smith pointed to the “lack of any consultation process on how the establishment of quarries and pits is affecting our traditional territory, our constitutional rights, and our Treaty 72 and aboriginal title claims.”<sup>149</sup> Chief Hill rejected the 2017 amendment regarding consultation and instead proposed the following consultation clause:

3.1 Consultation with First Nations communities shall be governed by the principle of free, prior and informed consent in the extraction of aggregate resources from any area within Ontario. If it is found that the extraction will be from the treaty area of a First Nation, then that First Nation should be entitled to a royalty payment based upon the amount of aggregate extracted.<sup>150</sup>

In addition, communities facing complex and sometimes multiple consultations have pointed to the need for financial support for staffing and technical expertise for

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<sup>147</sup> Promislaw, “Irreconcilable”, *supra* note 144.

<sup>148</sup> See for example, the positions taken by the Saugeen Ojibway Nation before the Legislative Review Committee: Ontario, Committee on General Government, *Aggregate Resources Act Review*, *supra* note 1 (27 June 2012) (Veronica Smith, Saugeen Ojibway Nation), at 1550; and, the submissions by Six Nations of the Grand River on the 2017 amendments, Standing Committee on Justice Policy, *Bill 39, Aggregate Resources and Mining Modernization Act, 2017* (23 February, 2017) (Chief Ava Hill, Six Nations of Grand River) at 0950. See also, the Appellant’s argument in *Neskonlith* *supra* note 135.

<sup>149</sup> *Ibid*, Smith, Saugeen Ojibway Nation.

<sup>150</sup> *Ibid*, Hill, Six Nations of Grand River.

consultation. Smith noted the “enormous burden on SON, both in terms of staff time, political representative time, and consultant and technician time, to ensure that SON’s aboriginal and treaty rights are protected.”<sup>151</sup> The human resource and financial challenges faced by First Nations in connection with consultation have been recognized by the courts in a range of contexts; however, there is, as of yet, no legal duty for the Crown to provide or arrange for such assistance. This remains a significant challenge facing First Nations involved with quarry licensing processes, which similar to other types of mining, involve the review and interpretation of complex technical reports including planning, natural heritage, hydrology, geology, hydrogeology, archeology and cultural heritage and often air quality, as well as retaining independent expertise to provide advice and expert evidence in any legal proceedings.<sup>152</sup> It also compounds the lack of revenue sharing, as noted by Chief Hill.<sup>153</sup>

While the concerns expressed by the British Columbia Court of Appeal in *Neskonlith* shed some doubt on when an implied delegation would be found, an explicit delegation to a municipality is a clear possibility following from both *Haida* and *Carrier Sekani* and in light of the 2014 Policy Statement. Indeed, Imai and Stacey argue, “municipalities should be required to work with the provincial Crown.”<sup>154</sup> In *Ross River Dena*, the Court of Appeal of Yukon emphasized that the Crown has a proactive responsibility to establish a consultation regime for activities that may interfere with Aboriginal rights and title, in that case quartz mineral mining.<sup>155</sup> The prospective nature of this obligation, described in *Ross River Dena* as requiring accommodation to take place, where required, *before* Aboriginal rights, title and interests are affected, is consistent with the nature and process of land use planning. It should, therefore, be possible to design and establish such a regime for aggregate licensing (and other land use matters) that compliments, and improves upon, the established role for consultation and prospective decision-making at

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<sup>151</sup> *Ibid*, Smith, Saugeen Ojibway Nation.

<sup>152</sup> See also the discussion of challenges faced by the Saugeen Ojibway Nation in Ritchie, *supra* note 113 at 427–428.

<sup>153</sup> Hill, *supra* note 148.

<sup>154</sup> Imai & Stacey, *supra* note 116, para 19.

<sup>155</sup> *Supra*, note 114 at para 56.

the municipal level. As was emphasized by the decision in *Mikisew*, a general process of public consultation does not satisfy this obligation; it is specific to the obligations to, and impact on, Aboriginal Peoples and their rights. A decision by a First Nation not to engage in a general public planning process does not relieve the government of its duty to consult and engage directly with Aboriginal Peoples.<sup>156</sup> Further, the extent of delegation to a private actor in the proponent-led system described below is problematic in the context of the Crown's duty, even where some aspects of consultation can be legally delegated.

At the time of writing, it remains to be seen how Ontario, Indigenous communities, municipalities, proponents and the Ontario Municipal Board will interpret the changes to the Policy Statement and define "adequate consultation" under the amended Act. For example, Grey County planning staff noted, "It is unclear what the Province is expecting of municipalities when making decisions that are consistent" with the new Policy Statement. Staff advised the County Planning and Community Development Committee that they are "interpreting these policies to indicate that municipalities are *encouraged* to consult Aboriginal communities as part of the planning process and ensuring that the conservation of cultural heritage and archaeological resources considers the interests of Aboriginal communities."<sup>157</sup> Arguably this interpretation minimizes the significance of the mandatory language introduced in the 2014 Policy Statement. More likely, the new Policy points towards the collaborative approach recommended by Shin and Stacey, whereby the Crown retains primary responsibility, ensuring the centralization of expertise and resources, but delegates appropriate parts of the consultation and accommodation to municipalities, which are likely in better position to assess the effects of a decision in the local context.<sup>158</sup>

Concerns about the capacity of municipalities to properly engage in consultation activities, particularly small and rural communities often involved in aggregate development and other extractive activities, should not be minimized. However, the

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<sup>156</sup> *Supra*, note 97 at 64-66.

<sup>157</sup> Randy Cherzer, *First Nations/Six Nations - Land Claims and Consultation Protocol*, Committee Report PDR-PCD-22-14 (Grey County Planning and Community Development Committee, 2014) at 3.

<sup>158</sup> Imai & Stacey, *supra* note 116 at paras. 28-29.

primary role of the Crown should include support for both municipal governments and First Nations parties to ensure that consultation proceeds consistent with the dual *Haida* goals of “meaningful” consultation and reconciliation. As Justice Binnie concluded in *Mikisew*: “The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.” Several Indigenous communities across Ontario have taken steps to assert jurisdiction over their territory and the right to Free Prior and Informed Consent under the United Nations Declaration on the Rights of Indigenous Peoples through the development of consultation protocols based on Indigenous law to applied to all decisions impacting their lands and communities.<sup>159</sup> Implementing meaningful consultation between aggregate decision makers and Indigenous nations would require recognition and implementation of such protocols alongside municipal and provincial practices and frameworks used to define the content of the Duty to Consult and Accommodate. Indeed, decision-making would be enhanced by consultation and partnerships informed by these instruments as they clarify the role Indigenous communities want to play in land use decisions, the support they require from governments and proponents to make informed decisions in accordance with their laws and protocols, and the legal principles that will be applied when making decisions about their territory and rights. The aggregate extraction decision-making framework should therefore explicitly recognize the UN Declaration as well as the role of these Indigenous planning instruments and decision makers. Any delegation to municipal and proponent actors should clearly identify the jurisdiction of Indigenous decision makers and legal orders and require that aggregate extraction decisions are made in accordance with these instruments.

Ontario has a duty to ensure any procedural delegation upholds the Crown’s non-delegable obligations to Indigenous communities. However, the 2017 incorporation of

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<sup>159</sup> See for example, *Nishnawbe Aski Nation: A Handbook on Consultation in Natural Resource Development*, 3rd ed. (2007), online: <http://www.nan.on.ca/upload/documents/pub---nan-handbook-on-consultation---3rd.pdf>; *Curve Lake First Nation: Consultation and Accommodation Standards*, available online: <http://www.curvelakefirstnation.ca/documents/CLFN%20Consultation%20and%20Accommodation%20Standards%202016.pdf>; *Walpole Island First Nation Consultation and Accommodation Protocol* (2009), available online: <[http://www.uoguelph.ca/~ks2015ca/pdfs/2009\\_Walpole\\_Island\\_First\\_Nation.pdf](http://www.uoguelph.ca/~ks2015ca/pdfs/2009_Walpole_Island_First_Nation.pdf)>.



Aboriginal consultation in the amended Act still falls short of this standard by failing to clearly define adequate consultation or acknowledge the Declaration and the right to Free Prior and Informed consent, and by upholding the proponent-driven nature of the process. The amendments do nothing to ameliorate the burden of responding to and engaging in consultation on Indigenous communities, nor do they support municipalities to build meaningful relationships with Indigenous partners and to accommodate section 35 rights in the planning process. Further, they fail to acknowledge the role of Indigenous law, such as the Indigenous consultation protocols noted above, in defining the Duty to Consult and Accommodate in Ontario's land use framework.

### B. The *Aggregate Resources Act*

This section provides a detailed overview of the Act as it existed at the time this research was undertaken. While amendments following the recent passage of Bill 39 *Aggregate Resources and Mining Modernization Act*<sup>160</sup> are discussed within this section, Part III provides a more detailed overview. Notably, the amended Act remains enabling legislation and many of the changes proposed during the consultation process discussed in Part III require the development of future regulations and are therefore not discussed here. Aggregate resources, defined by the Act as, “gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock or other prescribed material”,<sup>161</sup> are regulated separately from other minerals under the *Aggregate Resources Act* [the “Act”]. The Act sets out 4 purposes:

- (a) to provide for the management of the aggregate resources of Ontario;
- (b) to control and regulate aggregate operations on Crown and private lands;
- (c) to require the rehabilitation of land from which aggregate has been excavated; and
- (d) to minimize adverse impact on the environment in respect of aggregate operations.<sup>162</sup>

“Management” is defined as the “identification, orderly development and protection of the aggregate resources of Ontario,” clearly establishing the development-focus of the

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<sup>160</sup> Ontario, *Aggregate Resources and Mining Modernization Act*, S.O. 2017. C.6. The Amendment Act received Royal Assent on May 10, 2017 [Aggregate Resources and Mining Modernization Act].

<sup>161</sup> *Aggregate Resources Act*, *supra* note 36.

<sup>162</sup> *Ibid.*, at s 2.

Act.<sup>163</sup> This emphasis on development is consistent with the historical emphasis in provincial planning on utilitarian conceptions of improvement and development that center around human benefits and economic productivity.<sup>164</sup>

The Act provides for several categories of aggregate, which are referred to as “pits” or “quarries”.<sup>165</sup> Depending on the amount, depth and nature of the material to be extracted, a pit or a quarry on private land will require either a “Class A” or “Class B” licence under S.7(2) of the *Aggregate Resources Act*. A “pit” refers to the extraction of unconsolidated bedrock – stone, sand or gravel.<sup>166</sup> A “quarry” involves the extraction of consolidated bedrock, for example, shale, limestone or dolostone.<sup>167</sup> Extraction on private land can also be allowed through a Wayside Permit only for use by a public authority for temporary road construction or maintenance.<sup>168</sup> Extraction on Crown lands or lands under water requires an Aggregate Permit.<sup>169</sup> For the purposes of this study, I am focused on aggregate licences as outlined above as these have been the focus of recent and ongoing conflicts in Ontario. As outlined in Table 2 below, licence applications are further classified into eight categories depending on whether extraction below the water table is

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<sup>163</sup> *Ibid*, at s 1(1).

<sup>164</sup> Blomley, *supra* note 34 at 9, 11; Caldwell, *supra* note 34 at 452.

<sup>165</sup> *Supra* note 36, at ss.7, 23, 34. Currently, an application for a new aggregate quarry on private land requires a series of approvals under both the *Aggregate Resources Act* and the *Planning Act*. Depending on the nature of the proposed extraction, a pit or a quarry on private land will require either a “Class A” or “Class B” licence under S.7(2) of the *Aggregate Resources Act*. A “Class A” licence is required where the Applicant proposes to remove *more than* 20,000 tonnes of aggregate annually from a pit or quarry. A class B licence is required for removal of 20,000 tonnes or less. Extraction on private land can also be allowed through a Wayside Permit, however, this only applies to extraction for use by a public authority for temporary road construction or maintenance. Extraction on Crown lands, or lands under water, requires an Aggregate Permit. Licence applications are further classified into eight categories depending on whether extraction below the water table is proposed. For Class “A” licences there are four categories of application: Category 1: Class “A” Pit Below Water; Category 2: Class “A” Quarry Below Water; Category 3: Class “A” Pit Above Water; Category 4: Class “A” Quarry Above Water.

<sup>166</sup> *Ibid* at s 1(1): “pit” means land or land under water from which unconsolidated aggregate is being or has been excavated, and that has not been rehabilitated, but does not mean land or land under water excavated for a building or structure on the excavation site or in relation to which an order has been made under subsection (3).

<sup>167</sup> *Ibid*: “quarry” means land or land under water from which consolidated aggregate is being or has been excavated, and that has not been rehabilitated, but does not mean land or land under water excavated for a building or structure on the excavation site or in relation to which an order has been made under subsection (3).

<sup>168</sup> *Ibid*, Part III.

<sup>169</sup> *Ibid*, at Part V.

proposed. The 2017 amendments introduced exceptions to the requirements for licences and permits for persons meeting “qualifications that may be prescribed” to “operate a pit or quarry” under certain terms or conditions.<sup>170</sup> The Bill provided no justification for this exemption and provides no detail on the qualifications or terms and conditions. The Act also provides for the minister to waive fees associated with licences and permits.<sup>171</sup>

Class ‘A’: <i>Removal of over 20,000 tonnes/annually</i>	Class ‘B’: <i>Removal of 20,000 tonnes or less annually</i>
Category 1: Pit Below the Water Table	Category 5: Pit Below the Water Table
Category 2: Quarry Below the Water Table	Category 6: Quarry Below the Water Table
Category 3: Pit Above the Water Table	Category 7: Pit Above the Water Table
Category 4: Quarry Above the Water Table	Category 8: Quarry Above the Water Table

**Table 2: Classifications**

This project primarily considers large scale, below the water table aggregate quarries, requiring a Class ‘A’ Quarry Below Water licence.<sup>172</sup> However, some Class ‘B’ cases are considered in both the case law analysis and the empirical case studies where they raise unique or significant issues. Environmental lawyers David Estrin and John Swaigen have questioned the distinction, noting that it is based on the “questionable assumption” that the volume of extraction is determinative of the harm that will be caused by a mine.<sup>173</sup> As noted above, the Act has a limited geographic application that is established by regulation, which excludes private land in most of northern Ontario and only *Planning Act* approvals govern the establishment of aggregate extraction operations on private land in these areas of the province.<sup>174</sup> As discussed in Chapter Eight, the exclusion of the vast majority of private land in Northern Ontario from the Act reflects a perception of emptiness that fails to reflect the complexity of both Indigenous and non-Indigenous people-place relations in the north and presumes that there is nothing and no one to be harmed by industrial extraction.<sup>175</sup> Further, it reinforces the legal construction of the

<sup>170</sup> *Ibid*, ss 7(1.1), 34 (1.1).

<sup>171</sup> *Ibid*, ss 14(5), 21(2), 39(31).

<sup>172</sup> *Ibid*, at s.7(2)(a).

<sup>173</sup> Estrin & Swaigen, *supra* note 17.

<sup>174</sup> O. Reg. 244/97, s 6.

<sup>175</sup> Lisa Pruitt, “The Rural Landscape: Space Tames Law Tames Space”, Irus Braverman et al. eds., *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014) at 197.

north as the appropriate place for resource development that has been recently reinscribed through the *Far North Act*'s privileging of extractive rights.<sup>176</sup>

*i. Administration of the Act*

Under the current process the primary responsibility for an aggregate licensing application lies with the Ministry of Natural Resources and Forestry (the “ministry”) and a landowner who must make an application directly thereto. Local municipalities, Conservation Authorities and Regional or County authorities have notice rights under the Provincial Standards.<sup>177</sup> As well, the Ministry of Environment and the Ministry of Energy and local offices of the Ministry of Natural Resources must be notified. The Ministry of Agriculture, Food and Rural Affairs must be notified if prime agricultural land is not being restored to the same average soil quality and the Niagara Escarpment Commission must be notified if the area is within their jurisdiction.<sup>178</sup> As discussed in detail below, associated Official Plan and zoning amendment applications are primarily the responsibility of the local municipal authorities; however, the Ministry of Municipal Affairs and Housing and the Ministry of Natural Resources have some statutory notice and review requirements.

While the Act contemplates statutory guidance for application requirements, guidance is contained in two Ministry policy documents, the *Aggregate Resources Provincial Standards* and the *Aggregate Resources Policy and Internal Procedures Manual*.<sup>179</sup> Application and operation in accordance with the Standards is required by regulation, arguably strengthening their enforceability, but the 700-plus-page Manual is not similarly

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<sup>176</sup> Holly L Gardner et al, “The Far North Act (2010) Consultative Process: A New Beginning or the Reinforcement of an Unacceptable Relationship in Northern Ontario, Canada?” (2012) 3 *The International Indigenous Policy Journal* 2 7; Christopher J A Wilkinson & Tyler Schulz, “Planning the Far North in Ontario, Canada: An Examination of the ‘Far North Act, 2010’” (2012) 32 *Natural Areas Journal* 3 310.

<sup>177</sup> Ontario, Ministry of Natural Resources, “Provincial Standards of Ontario – Category 2 – Class A Quarry Below Water” (1997), 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), at 10-11, s. 4.1.3.

<sup>178</sup> *Ibid.*

<sup>179</sup> The Standards *supra* note 87; Ministry of Natural Resources, Land and Water Branch, Aggregate and Petroleum Resources Section, “Aggregate Resources Policy and Internal Procedures Manual” (1996), [the “Manual”].

[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).

incorporated into the regulations.<sup>180</sup> Together these documents specify the technical information and reports required during the application process, including expert hydrogeologic report(s), natural environment report(s) and cultural heritage report(s), which must be prepared by a “qualified” professional as defined in the Act.<sup>181</sup> Notably, the detailed Manual was not initially available to the public except by individual request, which was the subject of specific criticism by the Environmental Commissioner in his 2006/2007 Annual Report to the Legislature.<sup>182</sup> Table 3 outlines the mandatory, conditional, and routinely prepared documents associated with a Class “A” Below the Water Table quarry, based on both the Standards and the Manual. The Standards require the Ministry to provide a determination that an application is complete before the process proceeds. The Act also provides for additional information to be required by the Minister.<sup>183</sup> The amended Act provides for a new “custom plan” category for which the Minister can approve custom consultation and notification procedures and requirements for surveys or studies for a particular application.<sup>184</sup> As discussed in Part III, a number of commentators raise concerns about this highly discretionary power, as well as the lack of detail about regulatory content in general. A more widely supported amendment provides for future regulations enabling the Ministry to have “technical or specialized studies or reports” included in an application undergo external peer review.<sup>185</sup> However, no such regulation is yet proposed. Similarly, a widely supported proposal to have enhanced information requirements, including Agricultural Impact Assessments for development on prime agricultural land and plain language summaries for all application documents, have been left to future regulatory or policy development.<sup>186</sup>

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<sup>180</sup> O Reg 244/97 s7.

<sup>181</sup> *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.”

<sup>182</sup> Environmental Commissioner of Ontario. 2007. “MNR’s Aggregate Resources Program Manual.” *Reconciling Our Priorities, ECO Annual Report, 2006-2007* (Toronto, ON: Environmental Commissioner of Ontario) 113-118. See also, “Aggregate Procedures Manual” ECO Notes: [http://www.ecoissues.ca/index.php/Aggregates\\_Procedures\\_Manual](http://www.ecoissues.ca/index.php/Aggregates_Procedures_Manual).

<sup>183</sup> *Supra* note 36, s 7(5), 23(5), 36(2).

<sup>184</sup> *Aggregate Resources and Mining Modernization Act*, *supra* note 160

<sup>185</sup> *Ibid.*, s 45.

<sup>186</sup> Ministry of Natural Resources and Forestry Ontario, *A Blueprint for Change: A proposal to modernize and strengthen the Aggregate Resources Act policy framework* (Ontario: Queen’s Printer, 2015) at 36.

Document (Required, Required in Some Circumstances, Routine)	Description: Key Content	Prepared by
<b>Site Plan</b>	<p>Primarily a descriptive document, including drawings:</p> <ul style="list-style-type: none"> <li>• Existing site features and surrounding area</li> <li>• Operations: including shape, heights, area of excavation, water diversions, buildings, set-backs/berms, hours, equipment, monitoring</li> <li>• Rehabilitation: progressive and final, including vegetation, groundwater elevation, water drainage, buildings</li> <li>• Cross-sections of existing conditions, rehabilitation, final groundwater table, typical berm, slope gradients</li> </ul>	<p>A qualified professional: ARA, s. 8(1), (4). The Site Plan may be prepared by a certified professional engineer, land surveyor, landscape architect or “any other qualified person approved, in writing, by the Minister.” The policy and procedure for approval to prepare a site plan is contained in the Manual, s. 2.00.01.</p>
<b>Summary Statement</b>	<ul style="list-style-type: none"> <li>• Any planning and land use considerations (<i>planning report</i>);</li> <li>• Agricultural classification per Canada Land Inventory for current land and post-rehabilitation;</li> <li>• Quality and quantity of aggregate on the site;</li> <li>• Main haulage routes, proposed truck traffic and necessary entrance permits (<i>traffic study</i>);</li> <li>• Municipal traffic agreements/approvals;</li> <li>• Progressive and final rehabilitation</li> </ul>	<p>Majority can be prepared by the Applicant. <i>Groundwater portion must be prepared by a Professional Geoscientist or a Professional Engineer.</i></p>

	<ul style="list-style-type: none"> <li>○ Details of agricultural rehabilitation</li> <li>○ Description of “fill”</li> <li>● Required water approvals (PTTW or COA)</li> <li>● <i>Suggested by manual: information on both surface and groundwater</i></li> </ul>	
<b>Hydrogeologic Report</b>	<ul style="list-style-type: none"> <li>a. Level 1: preliminary evaluation to determine final extraction depth relative to established groundwater table(s), and potential for adverse effects to ground and surface water;</li> <li>b. Level 2: impact assessment required where Level 1 Report identifies potential adverse effect to determine significance of effect(s) and feasibility of mitigation</li> </ul>	Professional Geoscientist or Engineer
<b>Natural Environment Report</b>	<ul style="list-style-type: none"> <li>a. Level 1: determines whether any of following exist on and within 120 metres of site: <b>significant</b> wetland, habitat of endangered or threatened species, woodlands, valley lands, wildlife habitat, areas of natural and scientific interest; or, fish habitat.</li> <li>b. Level 2: <i>If</i> any features identified in Level 1 report, provides impact assessment for <b>negative impacts</b> on natural features or <b>ecological functions</b> and proposed preventative, mitigative or remedial measures.</li> </ul> <p>(Terms in <b>bold</b> are defined in the Policy Statement)</p>	<p>Person with appropriate training and/or experience in identification of fish habitat and significant natural heritage features.</p> <p>With reference to the <i>Natural Heritage Reference Manual</i> for off-site features.</p>
<b>Cultural Heritage</b>	<ul style="list-style-type: none"> <li>a. Stage 1: any known significant archaeological</li> </ul>	Stage 1: person with appropriate training and/or

<p><b>Resource Report</b></p> <p><b>Purpose:</b> “to ensure that archaeological resources are identified, assessed for their significance, and protected...”</p>	<p>resources on subject property <i>and</i> potential for site to have heritage resources;</p> <p>b. Stage 2: <i>If</i> known resources or medium to high potential, survey and any recommended mitigation</p> <p>c. Stage 3: where recommended by stage 2, detailed site investigation</p> <p>d. Stage 4: outlines any recommended mitigation through excavation, documentation, avoidance</p> <p>e. Assessment of impacts to built and cultural heritage landscapes <i>may be required</i> separate and independently carried out</p>	<p>licence – may consist of sign-off letter from Ministry of Culture, Heritage &amp; Libraries Branch</p> <p>Stages 2-4: licensed Archaeologist</p> <p>Qualified Heritage Consultant</p>
<p><b>Noise Assessment Report</b></p>	<p>Required <i>if</i> extraction/processing within 500 metres of sensitive receptor to determine whether provincial guidelines can be satisfied</p>	
<p><b>Blast Design Report</b></p>	<p>Required <i>if</i> limits of extraction within 500 metres of sensitive receptor to demonstrate provincial guidelines can be satisfied</p>	
<p><b>Adaptive Management Plan</b></p>	<p>Not required by the Standards or the Manual; however, increasingly standard and accepted by the Board. May be the subject of a stand-alone report <i>or</i> incorporated into larger discussion of rehabilitation etc.</p>	

**Table 3: Required Documents**

Until the 2017 amendments, an approved site plan was required for any aggregate licence and the proponent had to operate in accordance with that plan.<sup>187</sup> The Act now provides for regulatory exemptions from site plan requirements but provides no further guidance on the circumstances in which such an exemption would be appropriate. The site plan is

<sup>187</sup> *Ibid*, s 8, 15. Under the amended Act the site plan is required under s 8.



the primary mechanism for the regulation of any particular operation by the Ministry, therefore an exemption provides for substantially less oversight and monitoring. The Minister can attach conditions to the licence and add or vary conditions at any time.<sup>188</sup> The amended Act will also empower the Minister to require amendments to the site plan or submission of a new site plan at any time.<sup>189</sup> The amended Act also provides for the Minister to require licensees to submit operational information and to conduct inventories, studies, surveys or tests, though the licensee can request reconsideration.<sup>190</sup> In the case of a failure to comply with a direction to conduct the requested inventory or study, the Minister will be able to have it conducted at the costs of the licensee.<sup>191</sup>

The Act provides for enforcement powers to ensure compliance. For example, under Section 63, which provides for compliance orders, including the power to “order that the operation of the pit or quarry cease and that the site be rehabilitated to a safe condition in accordance with the order.”<sup>192</sup> Section 48 provides for rehabilitation orders, including imposing time requirements, where it is found that the operator is “not performing or did not perform adequate progressive rehabilitation or final rehabilitation on the site in accordance with subsection.” The amended Act will also require rehabilitation reports; however the substance and timing of such reports is subject to future regulations.<sup>193</sup> The Act also requires the Minister’s acceptance of licence surrender upon satisfaction of the rehabilitation requirements under the Act, the licence and the site plan.<sup>194</sup> A licence can also be suspended pending fulfillment of specific requirements under Section 22, or revoked for contravention of the Act.<sup>195</sup> Revocation orders are appealable to the Ontario

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<sup>188</sup> *Ibid*, s 13 (1).

<sup>189</sup> *Ibid*, s 13(1), as amended by *Aggregate Resources and Mining Modernization Act*, *supra* note 160 s 13(1).

<sup>190</sup> *Ibid*, s 62.3, 62.4. as amended by *Aggregate Resources and Mining Modernization Act*, *supra* note 160 s 45.

<sup>191</sup> *Ibid*, s 62.4. as amended by *Aggregate Resources and Mining Modernization Act*, *supra* note 160 s 45 (7)-(8).

<sup>192</sup> *Ibid*, s 63. The amended Act changes the wording to substitute “the land on which the pit or quarry was operated” for “the site”.

<sup>193</sup> *Ibid*, s 48 (1.1), as amended by *Aggregate Resources and Mining Modernization Act*, *supra* note 160, s 39.

<sup>194</sup> *Ibid*, s 19.

<sup>195</sup> *Ibid*, s 20.

Municipal Board and the licensee is entitled to a hearing within 30 days if notice is served.<sup>196</sup> Fines can be imposed for failure to comply with Section 63 compliance orders.<sup>197</sup> The amended Act will provides no minimum fine, but will raise the maximum to \$1,000,000 with an additional \$100,000 per day for the continuation of an offence.<sup>198</sup> Notably the amended Act will also specify that the provision of false or misleading information in any report or in information required is an offence.<sup>199</sup>

The substantive impact of these enforcement powers depends on the identification of compliance issues and the capacity to meaningfully enforce them. Until 1997, inspectors were required to conduct annual inspections. As noted above, the Act has moved to a system of self-monitoring and reporting with the Ministry serving only an auditing function. While this project did not include investigation of enforcement decisions, longstanding concerns about enforcement have been noted by legislators,<sup>200</sup> researchers,<sup>201</sup> the Environmental Commissioner,<sup>202</sup> the Board,<sup>203</sup> and by participants in this project. Estrin and Swaigen noted in 1993, “[B]etween 1973 and 1989, the Ministry initiated 154 prosecutions and obtained 81 convictions. The total fines levied amounted to about \$72,000.” Comparing this to the enforcement record of the Minister of Environment and Energy, they point out that the Ministry of Natural Resources had therefore undertaken “fewer prosecutions over a 17-year period than the Ministry of

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<sup>196</sup> *Ibid*, s 20 (4).

<sup>197</sup> *Ibid*, s 57, 58.

<sup>198</sup> *Ibid*, s 58 (1). as amended by *Aggregate Resources and Mining Modernization Act*, *supra* note 160, s 42.

<sup>199</sup> *Ibid*, s 57 (5), as amended by *Aggregate Resources and Mining Modernization Act*, *supra* note 160, s 41(2).

<sup>200</sup> See discussion accompanying footnotes 44 to 53 above.

<sup>201</sup> Estrin & Swaigen, *supra* note 17 at 760.

<sup>202</sup> Environmental Commissioner of Ontario, *Doing Less with Less: A special report to the Legislative Assembly of Ontario* (Toronto: Environmental Commissioner of Ontario, 2007); Environmental Commissioner of Ontario, *Choosing Our Legacy: Annual Report 2003-2004* (Toronto: Environmental Commissioner of Ontario, 2007); Ministry of Natural Resources, *Environmental Bill of Rights File No. R2003008 - Review of the Aggregate Resources Act With Respect to Rehabilitation From Which Aggregate Has Been Excavated*. (Ontario, Ministry of Natural Resources, 2006).

<sup>203</sup> *James Dick Construction Ltd. v Caledon (Town)*, (2010) 66 OMBR 263 [Rockfort]. See also the dissenting opinion in *Re Walker Aggregates Inc.* *supra* note 93, but see the majority at p 86.

Environment and Energy undertakes in a single year.” They also note that as of 1993 the Ministry had not revoked any aggregate licences.

Prompted by the Environmental Commissioner, the Ministry reviewed the self-reporting compliance system in 2002.<sup>204</sup> The Commissioner reported the Ministry’s findings that the quality of the self-compliance reports were “lacking,” both with deficient information and sometimes incomplete or inaccurate reporting.<sup>205</sup> The review had also revealed that while staff were not always able to meet the 20% field audit target, the visits were “frequently identifying additional violations” not reported by the proponent.<sup>206</sup> In 2004 the Commissioner reported the Ministry’s update on compliance had found that the field-audit targets were actually declining.<sup>207</sup> The Commissioner’s annual report did note some administrative changes had been implemented to improve compliance, including invoking the suspension and revocation powers for failure to submit compliance reports.<sup>208</sup> However, it concluded, “[T]he Ministry’s continuing inability to fulfill this obligation is perpetuating conflicts at existing operations, and is also undermining the public’s confidence in the regulatory system...”<sup>209</sup> In 2003, an Application for Review under s 61 of the *Environmental Bill of Rights* by Gravel Watch, an NGO dedicated to aggregate mineral issues, prompted another review of the aggregates program, particularly regarding the rehabilitation requirements.<sup>210</sup> The Environmental Bill of Rights provides for discretion for the Minister to turn down applications for review and the Ministry turned down two other Section 61 applications for review of the aggregate minerals regime in 2005.<sup>211</sup> The Environmental Commissioner reported on the findings of the resulting 2006 report and notes that it confirmed long term issues of inadequate

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<sup>204</sup> The Ministry review is not a public document. However, the findings were reported by the Environmental Commissioner in the 2001-2002 Annual Report, *Developing Sustainability: Annual Report 2001-2002* (Toronto: Office of the Environmental Commissioner of Ontario, 2002).

<sup>205</sup> *Ibid* at 143.

<sup>206</sup> *Ibid*.

<sup>207</sup> Environmental Commissioner of Ontario, *supra* note 204 at 63.

<sup>208</sup> *Ibid*.

<sup>209</sup> *Ibid* at 64.

<sup>210</sup> Ministry of Natural Resources, *supra* note 205.

<sup>211</sup> Environmental Commissioner of Ontario, *2005/06 Annual Report - Neglecting our Obligations* (Toronto: Environmental Commissioner of Ontario, 2006) at 43.

staffing, budget and expertise.<sup>212</sup> In particular, Ministry findings confirmed a more than 50% reduction of inspectors, with some responsible for as many as 600 operations, who were therefore unable to meet Ministry targets for audits of self-compliance.<sup>213</sup> A sample compliance survey found that 100 of 121 sites had compliance issues.<sup>214</sup> Further, they noted that they were unable to adequately evaluate rehabilitation of aggregate sites.<sup>215</sup> In addition to issues with implementation, the Commissioner's report notes internal concerns about lacking technical expertise, including the loss of "much of its hydro-geological [sic] knowledge and this in turn makes it difficult to assess potential impacts extraction operations could have on water resources."<sup>216</sup> The Commissioner's report does note some improvements underway, including new power for inspectors and plans to hire new inspectors and concludes, "much more will be needed to rebuild the Ministry's capacity in this area and to restore public confidence." There is little evidence to demonstrate that this has occurred. One policy analyst reported that while attempts were made to follow up on compliance and enforcement issues, "...eventually they just said we are not checking anymore because the numbers are not so flattering."<sup>217</sup>

The capacity issues and lack of enforcement is of particular concern where applications propose complex and evolving "adaptive management plans" to address uncertainties and leave significant decisions about how impacts will be monitored and managed to future arrangements between the proponent and the Ministry. Under cross-examination, a Ministry Aggregate Technical Specialist who gave evidence in the Rockfort quarry case discussed in Chapter Five, stated that her District met the Ministry's 20% "field-checking target" and that she "tries to visit most active aggregate sites once per year".<sup>218</sup> In the context of significant potential effects and a complex and ongoing management plan that left much to be decided and monitored by the Ministry after approval, the Board

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<sup>212</sup> Environmental Commissioner of Ontario, *supra* note 205 at 47.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid* at 48.

<sup>215</sup> *Ibid* at 47.

<sup>216</sup> *Ibid* at 48.

<sup>217</sup> Interview, May 9, 2014.

<sup>218</sup> Rockfort, *supra* note 203 at 270.

concluded it would “not approve an aggregate proposal which leaves an issue like the protection of the natural environment to be dealt with by a third party with demonstrably inadequate resources, like MNR.”<sup>219</sup> One planner I spoke with noted the lack of public trust in the Ministry’s enforcement role: “There is a sense in the public mind that nobody is minding the store.”<sup>220</sup> The result in her view is an enforcement process driven by individual complaints: “A retired engineer who lives near the quarry goes out with his binoculars and looks from the Bruce Trail and says ‘ah ha, what is that being dumped there on the site?’”<sup>221</sup> Not only does this raise environmental justice issues about which individuals and communities will have the resources and institutional access to raise concerns that will lead to enforcement, even where concerns are successfully raised it is difficult to overcome complex causality and evidentiary issues. As one more-than-owner participant noted, “The onus is on us to prove that it was them and it is impossible. They will say it was a natural disaster that caused it even after a huge blast that caused our water not to come clean. It will always come down to you can’t prove it definitively.”<sup>222</sup>

The Act creates a proponent-driven, self-monitoring system that exemplifies the neoliberal reconfiguration of the state towards market-based governance mechanisms and privatised modes of regulation aimed at minimizing bureaucracy.<sup>223</sup> As Gunningham argues, this does not necessarily reflect a reduced role for the state, but rather a “hybridity” of governance networks where non-state actors are enrolled in governance networks and power and responsibility are diffuse.<sup>224</sup> Here the Act retains the role of the state in guiding and coordinating aggregate mineral development while non-state actors are enrolled to operate “in the shadow of the state.”<sup>225</sup> The Provincial Standards and Manual demonstrate how this shift in the balance between public and private power

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<sup>219</sup> *Ibid.* at 271.

<sup>220</sup> Interview, September 3, 2014.

<sup>221</sup> Interview, September 3, 2014.

<sup>222</sup> Interview, February 19, 2014.

<sup>223</sup> Jamie Peck, Nik Theodore & Neil Brenner, “Postneoliberalism and its Malcontents” (2010) 41 *Antipode* 1 94 at 104.

<sup>224</sup> N Gunningham, “Environment Law, Regulation and Governance: Shifting Architectures” (2009) 21 *Journal of Environmental Law* 2 179 at 209.

<sup>225</sup> *Ibid* at 181, 208.

operates in practice through the Applicant's control of the knowledge base upon which the technical, legal and factual decisions are made.<sup>226</sup> The application is based on the proponent's site selection, which is usually linked to ownership of the land in question, reinforcing the power of private owners to determine land use regardless of the impacts. The production of the owner as "efficient, profit-seeking, 'rational' individuals" is central to the enrollment of private property mechanisms in the "re-making of nature-society relations".<sup>227</sup> As discussed above, this has a long history in Ontario's mining law and policy and planning frameworks.<sup>228</sup> However, in the context of aggregate mineral extraction, neoliberal modes of environmental governance have reinscribed and purified the ownership model of property and linked it with scientific and managerial approaches to land use conflicts.

As discussed below in Chapters Five through Eight, the licensing process is informed and driven by the information and expertise provided by the proponent, with the express purpose of having the application approved. While the role of technical and scientific expertise in Canadian planning was historically linked to the desire to separate planning and politics,<sup>229</sup> planning scholars have long pointed to the political nature of planning.<sup>230</sup> In Ontario, Moore notes that removing planning from formal politics historically served the interests of the business elite.<sup>231</sup> Any litigation following from an application relies on the knowledge base provided by the proponent, subject to any independent technical or legal expertise and documentation that may be provided by Indigenous governments,

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<sup>226</sup> Brenda Cossman & Judy Fudge, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 4.

<sup>227</sup> Becky Mansfield, "Privatization: Property and the Remaking of Nature-Society Relations Introduction to the Special Issue" (2007) 39 *Antipode* 393-3 at 393-394.

<sup>228</sup> Blomley, *supra* note 34 at 11.

<sup>229</sup> Caldwell, *supra* note 34 at 336; Walter Van Nus, "Towards the City Efficient: The Theory and Practice of Zoning, 1919-1939" Alan F. J. Artibise and Gilbert A. Stelter, eds., *The Usable Urban Past: Planning and Politics in the Modern Canadian City* (Toronto: Macmillan, 1979) 226 at 226; Peter W Moore, "Zoning and Planning: The Toronto Experience, 1904-1970" (1979) Alan F. J. Artibise and Gilbert A. Stelter, eds., *The Usable Urban Past: Planning and Politics in the Modern Canadian City* (Toronto: Macmillan, 1979) 320 at 325-326.

<sup>230</sup> Bent Flyvbjerg, *Rationality And Power: Democracy In Practice* (Chicago: University of Chicago Press, 1998) at 2; Valiante, *supra* note 22 at 106.

<sup>231</sup> Moore, *supra* note 232 at 326.

municipal actors or planning authorities, and third party groups or individuals, likely at their own expense. In the context of aggregate extraction applications, independent expert evidence and review of the Applicant’s documentation is both logistically and financially onerous, particularly for Indigenous and small local governments and community groups, particularly given that they may or may not be accepted by the Board at a hearing and that access to the proponent’s land may not be granted for direct investigation and data review.<sup>232</sup> Chapters Five, Six and Seven further demonstrate that other sources of knowledge, including participants’ experiential knowledge, are often deemed irrelevant or critiqued by proponents and decision makers as lacking objectivity or relevant expertise. In this way, the aggregate licensing process actively shapes and reshapes the people-place relations engaged by a particular proposal.<sup>233</sup> The crisis in enforcement capacity that followed from the 1997 amendments exemplifies the neoliberal technique of restraining “state-based regulatory power” through the “extension of corporate private property rights”.<sup>234</sup> The complaints-driven enforcement process facilitates a shift from “collective, public responsibility” for safeguarding the ecosystems and communities impacted by aggregate extraction to “private individual responsibility” to enforce the industry-driven compliance regime.<sup>235</sup> In these ways, private property is “enrolled”<sup>236</sup> by land use planning in specific ways through the Act and associated policy and regulation to achieve the desired end of the development and protection of aggregate mineral resources.

### C. The Provincial Policy Statement

As the guiding document for planning in the province of Ontario, the Provincial Policy Statement requires specific and detailed attention in understanding the legal framework for aggregate mineral extraction. The Policy Statement is a detailed and prescriptive

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<sup>232</sup> See for example the Board’s comments in *Re Town of Richmond Hill*, PL990303, r’vd by Ontario (Ministry of Municipal Affairs and Housing) v Ontario (Municipal Board) 2001, 41 OMBR 257, 20 MPLR (3d) 93.

<sup>233</sup> Maria Carmen Lemos & Arun Agrawal, “Environmental Governance” (2006) 31 *Annual Review of Environment and Resources* 1 297 at 304.

<sup>234</sup> Cossman & Fudge, *supra* note 229 at 373.

<sup>235</sup> *Ibid* at 3–5, 33.

<sup>236</sup> Blomley, *supra* note 34 at 3.

document setting out the provincial vision for “improved land use planning and management, which contributes to a more effective and efficient land use planning system.”<sup>237</sup> The preamble states, “The Provincial Policy Statement provides for appropriate development while protecting resources of provincial interest, public health and safety, and the quality of the natural and built environment.”<sup>238</sup> While the Policy is reviewed every five years, it cannot be challenged in a planning or aggregate licensing process. Therefore, the assumptions and underlying values remain unchallenged once a Policy is put in place.<sup>239</sup> The Policy is approved by Cabinet and despite significant public consultation, the policy making process is neither deliberative nor participatory.<sup>240</sup> Aggregate resource policies are set out in s 2.5 a dedicated subsection of the Policy Statement’s section on the “Wise Use and Management of Resources”.

This section provides a detailed introduction to three key aspects of the policy direction provided to the Ministry, municipalities and to the Board in decision-making: 1) The presumptive needs analysis; 2) the close to market requirement; 3) the public interest and social and environmental impacts. These three areas demonstrate the specific ways in which “[a]ggregate resources are given a privileged position” in provincial planning policy and practice.<sup>241</sup>

#### *i. Presumptive Need and Demand Analysis*

Following the report of the Commission on Planning Development Reform in the 1990s, provincial planning policy evolved into the *Provincial Policy Statement*. Since the first version was approved, the Policy Statement has consistently prioritized aggregate

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<sup>237</sup> *Policy Statement 2014*, *supra* note 87, Part 1.

<sup>238</sup> *Ibid.*

<sup>239</sup> Valiante, *supra* note 22 at 113.

<sup>240</sup> *Ibid.*

<sup>241</sup> Mary Bull & Cory Estrela, “Recent Trends and Issues in Aggregate Approvals” (Paper delivered at the Ontario Bar Association Conference, Toronto, 10 February 2012) [unpublished]. See *Capital Paving Inc v. Wellington (County)*, 2010 CarswellOnt 697, OMB Case No: PL080489, January 19, 2010, at para 16 [*Capital Paving*].



resource “protection” and development.<sup>242</sup> This prioritization has been maintained through to the recently revised 2014 policy. However, until 2005 it maintained that “mineral resource needs” should be considered, providing a policy basis for supply and demand analysis as central to aggregate licensing decisions: “As much of the mineral aggregate resources as is realistically possible will be made available to supply mineral resource needs, as close to markets as possible.”<sup>243</sup> Opposing parties and governments used this version of the policy to argue that the material to be extracted was not currently required and therefore the site should not be approved.<sup>244</sup> In 2005, the *Provincial Policy Statement* was revised to explicitly eliminate consideration of need in Policy 2.5.2.1:

As much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible.

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.

In this way the need for the resource must be presumed in the analysis of any decision maker regardless of the context of supply or demand, locally or provincially. This presumptive need analysis remains controversial and stakeholders have argued that supply/demand analysis should be reintroduced in aggregate licensing decisions during the most recent five-year-review of the *Provincial Policy Statement*.<sup>245</sup> This was also raised by a number of deputants at the all-party review of the Act before the Standing Committee on General Government described below and by commentators during the Policy Statement review,<sup>246</sup> and the consultation on the 2017 amendments.<sup>247</sup> While the Board has concluded that a needs analysis is not required, it has nonetheless also been a

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<sup>242</sup> See policy 2.5.2 in the 2005 *Policy Statement*, *supra* note 87.

<sup>243</sup> Policy 2.2.3.1, 1996 *Provincial Policy Statement*, available online: <http://www.mah.gov.on.ca/Page1498.aspx>.

<sup>244</sup> Bull & Estrela, *supra* note 241 at 24.

<sup>245</sup> See for example, Niagara Escarpment Commission, *Re: Five Year Review of the Provincial Policy Statement* (Toronto: Queen’s Printer for Ontario, 2005). See also the discussion below about the recently completed review of the Niagara Escarpment Plan, discussed in the final section of this Chapter.

<sup>246</sup> For example, the Environmental Commissioner and Gravel Watch, transcripts can be accessed online, *supra* note 541. 111 of 166 comments on the Provincial Policy Statement Review can be accessed on the Environmental Registry, Registry Number 011-7070.

<sup>247</sup> Halton Area Planning Partnership, *Aggregate Resources Act Review Joint Submission* (Halton, Ontario: Halton Area Planning Partnership, 2015).

live issue in several cases.<sup>248</sup> As noted by the Board, “[a]ggregate extraction is the only use in the wide ranging Policy Statement where need is not required.”<sup>249</sup> A lawyer who participated in this study noted, “[t]he underlying rationale for giving aggregates this very special status within the Provincial Policy Statement has never really been fully explained or rationalized from the perspective of government.”<sup>250</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>251</sup> In fact, this protection continues even where an operation or a licence “ceases to exist,”<sup>252</sup> resulting in 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. Thus, consistent with the utilitarian development focus of planning in Ontario, the resource is severed from its material relations to be ‘conserved’ only for specific forms of human use.<sup>253</sup> Other forms of relation, and even uses that fall outside of the dominant conception of productivity, are seen as “constraints”<sup>254</sup> or as “resource sterilization”.<sup>255</sup>

Planning and urban studies scholars have drawn attention to the operation and control of specific discursive frames that influence land use and environmental governance. Patano and Sandberg specifically note the ‘need’ or ‘demand’ narrative as a frame used by the aggregate industry to appeal to decision makers, including provincial and local

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<sup>248</sup> *OMB Case No: PL101197* decision issued 16 December 2011, 2011 CarswellOnt 14192, at para 136 [“*Jennison Construction*”], at paras 117, 118, but see also Rockfort, *supra* note 205, and the dissenting opinion in *Walker*, *supra* note 93.

<sup>249</sup> *Capital Paving*, *supra* note 241, at para 16.

<sup>250</sup> Interview, July 15, 2014.

<sup>251</sup> *Policy Statement 2014*, *supra* note 87, ss. 2.5.2.4, 2.5.2.5.

<sup>252</sup> *Ibid.*, s. 2.5.2.4.

<sup>253</sup> Caldwell, *supra* note 34 at 584.

<sup>254</sup> Policy Division, Ministry of Natural Resources, *supra* note 8 at 18.

<sup>255</sup> Anna Zalik, “Resource sterilization: reserve replacement, financial risk, and environmental review in Canada’s tar sands” (2015) 47 *Environment and Planning A* 12 2446.

governments and adjudicators.<sup>256</sup> In the context of energy infrastructure planning in the United Kingdom, Groves et al. similarly argue that discourses of risk “shape the distribution of power.”<sup>257</sup> In particular, they point to the growing role of quasi-state and non-state actors as “centres of calculation” controlling the production, organization and distribution of information about risks related to resource demand and supply.<sup>258</sup> The resulting “narratives of necessity” place conceptual limits on the terms of debate about specific land use decisions with important implications for attempts to assert relations with place.<sup>259</sup> Therefore, while the SAROS report commissioned by the province confirmed long-term needs identified by the aggregate industry, in weighing the impact of these findings on planning policy it is important to critically consider the role of industry in shaping these conclusions. As noted above, the report has been criticized for both substantive and procedural shortcomings and an overall “industry-centered” approach. In particular, it has been noted that the planning consultants hired to conduct the study for the province are closely linked to the aggregate industry.<sup>260</sup> Indeed, a majority of those involved were simultaneously retained as experts for the controversial Melancthon Mega Quarry proposal submitted for provincial review in 2011. In addition, the CIELAP report noted the MNR had themselves identified significant gaps in the information provided by the SAROS papers, most notably about recycling and rehabilitation.<sup>261</sup>

## *ii. Close to Market Requirement*

The Policy Statement also requires that “as much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible.”<sup>262</sup> The

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<sup>256</sup> Patano & Sandberg, *supra* note 6; See also, Douglas Young & Roger Keil, “Urinetown or Morainetown? Debates on the Reregulation of the Urban Water Regime in Toronto” (2005) 16 *Capitalism Nature Socialism* 2 61 at 33 for a discussion of discourses of scarcity and vulnerability in regional water planning.

<sup>257</sup> Groves, Munday & Yakovleva, *supra* note 23.

<sup>258</sup> *Ibid* at 343.

<sup>259</sup> Cowell & Owens, *supra* note 21.

<sup>260</sup> Tanya I. Markvart, “Review of SAROS: A Sustainability-Based Review of the Ministry of Natural Resources 2009 *State of the Aggregate Resource in Ontario Study*” Prepared for Gravel Watch Ontario (2010): <http://www.gravelwatch.org/orig-gw/saros/100716-Master-Final-SAROS-Review-GWO-TM.pdf>.

<sup>261</sup> Binnstock & Carter-Whitney, *supra* note 8 at 5.

<sup>262</sup> *Policy Statement 2014*, *supra* note 87 s.2.5.2.1.

majority of aggregate is used within the Greater Toronto Area and the surrounding Greater Golden Horseshoe region. This implicitly places the burden of aggregate resource protection and development on a specific geographic area within the province, within and adjacent to these areas, which is also highly valued for agricultural land, recreational use and ecological significance. While some concentration of extraction is inevitable with a fixed resource like aggregate, the clustering of this type of transformative land use makes a cumulative impact assessment relevant, particularly where exacerbated by policy requirements.<sup>263</sup> A recent Ontario Bar Association presentation by a leading proponent council summarized the justification for this policy as follows:

Transporting aggregates longer distances increases the cost to the user and the cost of the final products that use aggregate as inputs, such as public infrastructure projects and housing. Therefore, there is a public interest in ensuring that aggregate resources are extracted as close to market as possible in order to support the Provincial economy.<sup>264</sup>

The aggregate industry has also emphasized the environmental benefits of this requirement in reducing production-related emissions and contribution to climate change.<sup>265</sup>

Neither the process under the Act, the Policy Statement, nor the municipal amendment processes, require a cumulative impacts analysis.<sup>266</sup> Arguably, the Ministry Statement of Environmental Values, which is discussed below, should require at least consideration of cumulative impacts; however, as noted above, the Ministry does not undertake a distinct consideration process and the Environmental Commissioner has expressed concern about the lack of cumulative impact analysis in aggregate applications.<sup>267</sup> The 2014 Policy

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<sup>263</sup> Office of Environmental Commissioner of Ontario, personal communication, on file with author, May 9, 2014. See also, Environmental Commissioner of Ontario. 2009. “The Swiss Cheese Syndrome: Pits and Quarries Come In Clusters”: [http://www.ecoissues.ca/index.php/The\\_Swiss\\_Cheese\\_Syndrome:\\_Pits\\_and\\_Quarries\\_Come\\_in\\_Clusters](http://www.ecoissues.ca/index.php/The_Swiss_Cheese_Syndrome:_Pits_and_Quarries_Come_in_Clusters) [ECO, “Swiss Cheese”].

<sup>264</sup> Bull & Estrela, *supra* note 244 at 22.

<sup>265</sup> Bull & Estrela, *supra* note 244; Anders Sandberg & Wallace, *supra* note 7 at 71.

<sup>266</sup> ECO, Swiss Cheese, *supra* note 263.

<sup>267</sup> Environmental Commissioner of Ontario, *Losing Touch: Annual Report 2011/2012 Part 1* (Toronto: Environmental Commissioner, 2012) at 24–25.

Statement does allow for (but not require) cumulative impact considerations with respect to impacts on water quality and quantity through the requirement for planning authorities to use the watershed scale.<sup>268</sup> Cumulative impacts are of particular importance for communities in areas that fall outside of special planning regimes, which are facing increasing pressure for aggregate development as proponents view the regulatory requirements of more protected areas as prohibitive, for example, the Carden Plain area and parts of Dufferin, Grey and Bruce Counties adjacent to, but excluded from the NEPA, and First Nations territories in Southern Ontario and Manitoulin Island. One lawyer described the effect as “offloading to adjacent municipalities” through the protection of the areas that achieve special designations.<sup>269</sup>

The close to market requirement is subject to the “realistically possible” limitation and the Ministry has taken the position that this should be assessed on a case-by-case basis and include examination of other Policy Statement policies and “other considerations.”<sup>270</sup> There has been limited analysis of the section by the Board; however, one case did point to social and environmental impacts as part of the “realistically possible test,” finding that the proposal was, “not realistic given that the possible environmental impacts have not been minimized.”<sup>271</sup> Bull and Estrela point out that this is consistent with the purposes of the Act to minimize adverse impacts. However, they also note that the close to market analysis also suggests that some impacts are acceptable.<sup>272</sup> Therefore, the analysis has been focused on which impacts and at what threshold in pursuit of the purported economic benefits of close to market extraction.<sup>273</sup> One planner commented, “To the aggregate industry that means all else aside, everything else is diminished this is number one. We are going no, the [Policy Statement] says quite clearly you balance all of the

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<sup>268</sup> PPS 2014, *supra* note 87, s 2.2.1 a)

<sup>269</sup> Interview, July 25, 2014.

<sup>270</sup> “Protocol for Ministry of Natural Resources (MNR) Responses to Niagara Escarpment Plan (NEP) Amendment Applications Circulated by the Niagara Escarpment Commission (NEC) to Create or Expand Mineral Aggregate Operations.” Note that the Protocol has now expired.

<sup>271</sup> *Capital Paving*, *supra* note 241, at para 30.

<sup>272</sup> Bull & Estrela, *supra* note 244 at 24.

<sup>273</sup> See *Capital Paving*, *supra* note 241 and *Jennison Construction*, *supra* note 248.

policies equally... We argue about that at every single hearing and we are so tired of it.”<sup>274</sup>

### *iii. Environmental Impacts*

Natural and cultural heritage, as well as water, agriculture and mineral aggregate resources are discussed in Section 2 of the Policy Statement, “Wise Use and Management of Resources.” The “balancing” of social and environmental impacts of extraction must be considered in light of the Policy Statement’s protective stance for mineral aggregate resources and operations from “incompatible” development.<sup>275</sup> Section 2.5.2.5 requires municipalities to protect known deposits, areas adjacent to known deposits, strictly limiting development that would “preclude or hinder” access and extraction. Mineral aggregate operations must be protected from incompatible development, even where they “cease to exist.”<sup>276</sup>

As the CIELAP report notes, there has never been an attempt to comprehensively study the environmental impacts of aggregate extraction in Ontario.<sup>277</sup> At first glance, social and cultural features are given a high level of protection by the Policy Statement, as they “shall be conserved.”<sup>278</sup> However, a close examination reveals that protection of natural and social-cultural features is largely limited to features formally deemed “significant” by provincial policy and is subject to important exemptions.<sup>279</sup> 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>280</sup> This despite s.2.1.1, which states, “[n]atural features and areas shall be protected for the long

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<sup>274</sup> Interview September 3, 2014.

<sup>275</sup> This section focuses on “natural heritage” as these tend to be the focus of hearings and decisions rather than cultural heritage. Relevant cultural heritage considerations and requirements will be considered in detail in the context of specific cases in Chapters 3 and 4.

<sup>276</sup> PPS 2014, *supra* note 87, at s 2.5.4.2.

<sup>277</sup> Binnstock & Carter-Whitney, *supra* note 8 at 10. The OSSGA industry-group and the MNR did cooperate to obtain a study of cumulative impacts on local water systems in a specific geographic area in 2012, this however, would not be considered a comprehensive study of water or environmental impacts: [http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@aggregates/documents/document/mnr\\_e000024.pdf](http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@aggregates/documents/document/mnr_e000024.pdf).

<sup>278</sup> *Policy Statement 2014*, *supra* note 87, s. 2.6.1.

<sup>279</sup> *Ibid*, s. 6.0

<sup>280</sup> *Ibid*, s. 2.5.2.2.

term,” s.2.2.1, which states, “[p]lanning authorities shall protect, improve or restore the *quality and quantity of water*,” and s.2.6.1, which states that *significant built heritage resources* and *significant cultural heritage landscapes* shall be conserved. The 2014 Policy Statement now draws attention to and explicitly distinguishes between “positive directives” such as *shall* and “limitations or prohibitions” such as *shall not* which do not allow for discretion and “enabling or supportive language” such as *should*, *promote*, *encourage* which, they state, allows for “some discretion,” making the close-examination of such language essential to decision-making at the application and adjudicative stages.

The 2005 Policy Statement imposed a prohibition on development and site alteration in *significant* habitat of *endangered species* and *threatened species*, defined as habitat approved by the Ministry of Natural Resources as “necessary for the maintenance, survival, and/or recovery of naturally occurring or reintroduced populations of *endangered species* or *threatened species*.”<sup>281</sup> The new 2014 Policy Statement eliminated the prohibition, now allowing for development and site alteration in accordance with provincial and federal law.<sup>282</sup> Lands adjacent to *endangered species* or *threatened species* habitat are now also exempted from the “no negative impacts” test for development and site alteration.<sup>283</sup> This is consistent with, and facilitates, the 2013 amendments to the Ontario *Endangered Species Act* noted above, which specifically exempt pits and quarries from the requirements to obtain a permit for activities that would otherwise be prohibited, including damaging or destroying species habitat, instead requiring only mitigation measures and registration of activities with the Ministry without independent monitoring requirements and enforcement capacity.<sup>284</sup> Exemptions for aggregate extraction, such as those newly introduced under the ESA, have been the subject of strong criticism from the provincial Environmental Commissioner.<sup>285</sup> Further, the requirement to maintain, restore

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<sup>281</sup> *Policy Statement 2005*, *supra* note 87, s 6.0.

<sup>282</sup> *Ibid*, s. 2.1.7. See s. 2.1.3

<sup>283</sup> *Ibid*, *supra* note 87, s 2.1.8.

<sup>284</sup> 2007, S.O. 2007, c.6. O. Reg. 242/08, s. 23.14 (1).

<sup>285</sup> Environmental Commissioner of Ontario, “Laying Siege to the Last Line of Defence: A Review of Ontario’s Weakened Protections for Species at Risk” (Toronto: Environmental Commissioner, 2013) [http://www.eco.on.ca/index.php/en\\_US/pubs/special-reports/2013-special-report](http://www.eco.on.ca/index.php/en_US/pubs/special-reports/2013-special-report) [Laying Siege].

or, where possible, improve “the diversity and connectivity of natural features” and “long term ecological function and biodiversity” uses the enabling rather than directive language used to protect aggregate deposits and operations.<sup>286</sup> Recent Board consideration of the Ministry’s *Natural Heritage Reference Manual* in interpreting the Policy Statement introduced the consideration of mitigation measures and rehabilitation plans in determining the impact on natural features, including controversial concepts such as “replacement and enhancement.”<sup>287</sup> The Manual is a Ministry guidance document providing “recommended technical criteria” for consistency with the Policy Statement.<sup>288</sup>

While the precautionary principle is incorporated into the Ministry’s Statement of Environmental Values, and arguably therefore a required consideration in the licensing process, the adoption of a precautionary approach to aggregate extraction has been limited and highly contested by industry.<sup>289</sup> Aggregate industry proponents have instead focused on the adoption of “adaptive management plans” and this has been endorsed by the Board, municipal authorities and the Ministry in particular cases. In another context, the Federal Court of Appeal endorsed the approach as an alternative to the precautionary principle: “It counters the potentially paralyzing effects of the precautionary principle on otherwise socially and economically useful projects.”<sup>290</sup> However, the adaptive management approach remains highly controversial; and, as Armitage et al. have noted, “[e]xamples of the successful application of adaptive management are few, and it remains more of an idealized concept than an empirically tested strategy”. Australian commentator Alan Randall has argued, “adaptive management is essentially reactive. It is

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<sup>286</sup> *Policy Statement 2014*, *supra* note 87, s. 2.1.2.

<sup>287</sup> *Jennison Construction*, *supra* note 248 at para 70.

<sup>288</sup> *Natural Heritage Reference Manual for Natural Heritage Policies of the Provincial Policy Statement*, 2005, Second Ed. March 18, 2010, available online: <<http://www.ontario.ca/environment-and-energy/natural-heritage-reference-manual>>

<sup>289</sup> See Rockfort, *supra* note 203, and Walker and Nelson, *supra* note 93.

<sup>290</sup> *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] 4 F.C. 672, at para 24. See also, Halton Region, *Joint Agency Review Team Reports for Nelson Aggregates and Dufferin Action Quarries*, available here:

[http://www.halton.ca/planning\\_sustainability/planning\\_applications/applications\\_under\\_review/dufferin\\_aggregates\\_acton/](http://www.halton.ca/planning_sustainability/planning_applications/applications_under_review/dufferin_aggregates_acton/) and here:

[http://www.halton.ca/planning\\_sustainability/planning\\_applications/applications\\_under\\_review/nelson\\_aggregate\\_quarry/](http://www.halton.ca/planning_sustainability/planning_applications/applications_under_review/nelson_aggregate_quarry/).



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>291</sup> In contrast, he describes the precautionary approach as “driven by big risks” and the prospective prevention of “plausible but uncertain threats of harm.” 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>292</sup> Further, there is no regulatory or policy requirement for such a plan, nor are there standards. Notably, Westgate et al. have cautioned about over-use of the term and noted that few projects labelled ‘adaptive management’ are accurately characterized as such.<sup>293</sup> Arguably, in the context of aggregate extraction, this voluntary and industry-led approach to managing ecological impacts compounds the proponent-driven nature of the licensing process. While adaptive management plans have been incorporated into site plans and licensing conditions and proposed as “an additional layer of oversight,”<sup>294</sup> their enforceability has been questioned, as has the potentially improper delegation of the Board’s authority to the Ministry.<sup>295</sup> Indeed, the lack of institutional support for adaptive management has been found to be a key constraint on the success of adaptive management arrangements.

Aggregate extraction operations are also exempt from other environmental legislation, including any regulations of a local conservation authority under the *Conservation Authorities Act*.<sup>296</sup> Such agencies are empowered to regulate development impacts on wetlands, shorelines and watercourses.<sup>297</sup> Conservation authorities are provided with

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<sup>291</sup> Alan Randall, “Coal Seam Gas - Toward A Risk Management Framework for a Novel Intervention” (2012) 29 Environment and Planning LJ 2 152 at 159.

<sup>292</sup> *Ibid.*

<sup>293</sup> Martin J Westgate, Gene E Likens & David B Lindenmayer, “Adaptive management of biological systems: a review” (2013) 158 Biological Conservation 128.

<sup>294</sup> Bull & Estrela, *supra* note 244 at 29.

<sup>295</sup> See for example, James Dick Construction, *supra* note 203 and the dissent in *Walker*, *supra* note 93. But, see also, *Jennison Construction*, *supra* note 248.

<sup>296</sup> RSO 1990, c C.27, 22(11).

<sup>297</sup> *Ibid.*, s 28(1); Specific regulations are based on O. Reg 97/04 Content of Conservation Authority Regulations Under Subsection 28(1) of the Act: Development, Interference With Wetlands and Alternations to Shorelines and Watercourses.

notice of *Planning Act* and *Aggregate Resources Act* applications.<sup>298</sup> They may also play an advisory role to municipalities on issues related to natural heritage and water.

The 2014 Policy Statement introduced the notion of land use compatibility with respect to resource extraction by encouraging the separation of *major facilities*, which would include aggregate operations, and *sensitive land uses*, which include features of the natural or built environment that could be adversely affected by a facility.<sup>299</sup> However, the wording of the section arguably protects the development of facilities by ensuring their “long-term viability” *despite* adverse impacts and risks to public health and safety which should be prevented *or* “minimized or mitigated. In the case of aggregate extraction, this compounds their priority land use status and could serve to limit the protection of environmentally and culturally significant features to avoid future land use incompatibility in areas identified as having aggregate mineral resources.

The Policy Statement attempts to resolve the apparent conflict between the protection of natural features and cultural heritage by classifying aggregate extraction as an “interim” activity.<sup>300</sup> A lawyer recalled a discussion with a Ministry official who explained the interim nature of extraction, “you peel back the cover and you dig out the aggregate and then you put it back and it is like doing your bed covers in the morning.”<sup>301</sup> The policy does require rehabilitation to “accommodate subsequent land use”,<sup>302</sup> and the 2014 Policy Statement now *encourages* “comprehensive rehabilitation” in areas with a concentration of mineral aggregate operations, defined as “coordinated and complementary, to the extent possible, the rehabilitation of other sites in the area.”<sup>303</sup> However, the standards for rehabilitation are limited to the promotion of “land use compatibility” obscuring the specific and unique relationships that adjacent ecological and human communities may

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<sup>298</sup> For example, O Reg 543/06 Official Plans and Plan Amendments, s.3(9).

<sup>299</sup> *Ibid*, s. 1.2.6.1.

<sup>300</sup> PPS 2014, s. 2.5.3.1. *Jennison Construction*, *supra* note 248, at para 129.

<sup>301</sup> Interview, July 25, 2014.

<sup>302</sup> PPS 2014, s. 2.5.3.1.

<sup>303</sup> *Ibid*, s. 2.5.3.2

have with the land and its current use. 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>304</sup> Rehabilitation was the subject of a successful *Environmental Bill of Rights* application for review in 2006 that identified problems with both monitoring and compliance.<sup>305</sup> The Canadian Urban Institute Report documented a number of successful cases of rehabilitation.<sup>306</sup> However, monitoring, enforcement and the pace of rehabilitation remain significant issues. The Canadian Environmental Law Association has estimated that at the current rate it would take between 234 and 335 years to rehabilitate the 6,900 abandoned pit and quarry sites in Ontario.<sup>307</sup>

Of particular concern to a number of stakeholders involved in recent aggregate disputes, despite mandatory protection of “prime agricultural land,” aggregate extraction is permitted as an interim use on all classes of farmland, including specialty crop areas.<sup>308</sup> Enhanced requirements for rehabilitation to an “agricultural condition” on prime farmland and specialty crop areas explicitly exempt the most potentially harmful class of below the water table quarry 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.”<sup>309</sup> The Policy Statement does require that the applicant also demonstrate that alternative locations have been considered and found unsuitable and that agricultural rehabilitation is maximized in remaining areas.<sup>310</sup> While some commentators have characterized these types of alternative considerations as functioning as an early screening mechanism,<sup>311</sup> it is difficult to see how this occurs in practice given that

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<sup>304</sup> Environmental Commissioner of Ontario, “Our Cratered Landscape: Can Pits and Quarries be Rehabilitated?” in *Reconciling Our Priorities*, ECO Annual Report, 2006-2007 (Toronto: Environmental Commissioner, 2007) at 139-144.

<sup>305</sup> Ministry of Natural Resources, *supra* note 205.

<sup>306</sup> Miller et al, *supra* note 8.

<sup>307</sup> Castrilli and Nadarajah, *Aggregate Resources Act Review*, *supra* note 14 (May 14, 2012): <http://s.cela.ca/files/839Aggregates.pdf>.

<sup>308</sup> *Policy Statement 2014*, *supra* note 87 ss 2.3.6.1, 2.5.4.

<sup>309</sup> *Ibid*, s. 2.5.4.1.

<sup>310</sup> *Ibid*, s. 2.5.4.

<sup>311</sup> Miller et al, *supra* note 8.

aggregate producers assemble the parcel through gradual purchases of adjacent land and expensive exploration making the relative suitability of the owned parcel largely inevitable. The aggregate planning process contrasts with the types of siting decisions dealt with under the environmental assessment process, through which public entities' assessment of potential sites *prior* to selection and the notion of an alternative location, is, at least arguably, on the table.<sup>312</sup> The consideration and assessment of alternatives has not been the subject of detailed examination before the Board.

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 clearly prioritized by the Policy Statement. Aggregate sites are material places with complex eco-social relations, but for the purposes of the licensing decision, they are divided into agricultural fields, 'natural' heritage features, recreational sites, and subsurface and groundwater resources. The policy is currently constructed in such a way that while recognized, other relations to place are trumped by the protection of the mineral resource value and economic relations.<sup>313</sup> These issues will be discussed in the context of specific conflicts and decisions below in Chapters Five through Eight.

#### D. Municipal Plans and Bylaws

While the decision-making process flows from the Act, most hearings in quarry conflicts include consideration of the local municipality's Official Plan and zoning by-laws. These are the primary tools through which "land use" is governed and organized in Ontario. The Official Plan is a comprehensive document reflecting a municipality's distinct collective vision about how to "manage and direct" the effects of physical change on the "social, economic, built and natural environment" of a particular area.<sup>314</sup> Municipalities also regulate land use through zoning bylaws, which implement the Plan and control

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<sup>312</sup> Interview, July 25, 2014; Interview, July 9, 2014.

<sup>313</sup> Interview, July 25, 2014.

<sup>314</sup> *Planning Act*, *supra* note 87, s 16.

individual parcels of land with a great deal of specificity, such as controlling building height or lot size.<sup>315</sup> Planning scholar Eran Kaplinsky points to zoning as one of the most important tools in the North American planning tradition.<sup>316</sup> Zoning has been defined as “simply the restriction of land use; however, it is important to acknowledge its roots in the law of nuisance and police power for the protection of property.”<sup>317</sup> Other definitions emphasize that zoning is aimed at the separation of land uses, “to prevent negative external effects associated with the proximity of incompatible activities.”<sup>318</sup> Indeed, as Valverde argues, “use” is a distinct legal tool because it achieves its work of ordering people and things indirectly, by acting on “uses” rather than persons or property directly. As with the Act described above, municipal planning tools enroll private property “to achieve desired ends.”<sup>319</sup> Valverde points to the notion of “incompatibility” as central to the logic of zoning and its power as a legal tool.<sup>320</sup> The 2014 Policy Statement emphasizes this notion of (in)compatibility through a revised standalone section entitled “Land Use Compatibility” dealing with the conflict between “major facilities,” including resource extraction, and “sensitive land uses,” which include both the ecological and social features. While the former subsection 1.7.1e) stated that planning *should* separate such land uses to “prevent” adverse effects, the new section 1.2.6 states that planning *should* “prevent *or* mitigate” adverse effects and adds consideration for ensuring the “long-term viability of *major facilities*.”<sup>321</sup>

The Policy Statement recognizes the role of the local official plan as “the most important vehicle for implementation” noting that provincial policies “represent minimum

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<sup>315</sup> *Ibid*, s 34(1).

<sup>316</sup> Eran Kaplinsky, “The Zoroastrian Temple in Toronto: A Case Study in Land Use Regulation, Canadian-Style” in Eric Tucker, James Muir & Bruce Ziff, eds., *Property on Trial: Canadian Cases in Context* (Toronto: The Osgoode Society for Legal History, 2012) 223 at 223.

<sup>317</sup> Cullsworth, *supra* note 18 at 461.

<sup>318</sup> Tore Sager, “Neo-Liberal Urban Planning Policies: A Literature Survey 1990–2010” (2011) 76 *Progress in Planning* 4 147 at 170.

<sup>319</sup> Blomley, *supra* note 34 at 3.

<sup>320</sup> Mariana Valverde, “Taking Land Use Seriously: Toward an Ontology of Municipal Law” (2005) 9 *Law Text Culture* 34.

<sup>321</sup> Emphasis added.

standards” that local authorities may go beyond.<sup>322</sup> Indeed, the people I spoke with often assumed at the outset that the municipality was the primary decision maker about aggregate extraction and other land use issues.<sup>323</sup> However, as Valiante notes, Ontario’s planning framework has become increasingly prescriptive through the specification of areas of “provincial interest” and the development of provincial policy, particularly the Policy Statement.<sup>324</sup> As she notes, the planning statutes, provincial plans, and policies, can collectively “be seen as the Ontario government’s view of the collective interests to be pursued through the planning system.”<sup>325</sup> Technically, in the context of aggregate extraction, if the land for which a quarry is proposed 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>326</sup> Under the Act no licence can be issued if extraction is prohibited by an applicable zoning by-law.<sup>327</sup> However, the Policy Statement serves as the guiding document for all land use decisions in the province. The *Planning Act* stipulates that all policy and decisions of municipal governments and land use tribunals, including the Ontario Municipal Board and the Environmental Review Tribunal, *shall* be consistent with the Policy Statement.<sup>328</sup> The Policy Statement also limits the municipal ability to impose higher standards where they would conflict with its policies.<sup>329</sup>

Official plans are required to identify and protect provincial interests in their land use designations and policies, particularly by directing development to “suitable areas.”<sup>330</sup>

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<sup>322</sup> *Policy Statement 2014*, *supra* note 87, ss 4.7, 4.9.

<sup>323</sup> Interview, February 12, 2014; Interview, July 18, 2014; Interview, February 19, 2014; Interview August 29, 2014.

<sup>324</sup> Valiante, *supra* note 22 at 105.

<sup>325</sup> *Ibid* at 111.

<sup>326</sup> *The Act*, *supra* note 36, s. 34(1); *Planning Act*, *supra* note 87, s.22.

<sup>327</sup> *Supra* note 36, s. 12.1(1).

<sup>328</sup> *Planning Act*, *supra*, note 87, s. 3. But, notably, s 66(1) of the Act limits municipal powers to regulate aggregate extraction: This Act, the regulations and the provisions of licences and site plans apply despite any municipal by-law, official plan or development agreement and, to the extent that a municipal by-law, official plan or development agreement deals with the same subject-matter as this Act, the regulations or the provisions of a licence or site plan, the by-law, official plan or development agreement is inoperative

<sup>329</sup> *Policy Statement 2014*, *supra* note 87, s 4.7.

<sup>330</sup> *Ibid*.

This includes the protection of the provincial interest in protection aggregate mineral resources. Where an Official Plan affects a matter of provincial interest, the *Planning Act* provides for residual ministerial power to amend the Plan.<sup>331</sup> As discussed in Chapter Six, despite the Act's recognition of the role of the Official Plan, the role of the Policy Statement inverts the inquiry such that development is presumptively allowed and the question of how to manage extraction replaces the question of whether aggregate extraction should occur at all. In the context of aggregate minerals, the effect is to limit the ability of local authorities to regulate exploration, extraction and operation, including the potential to prohibit extraction, to impose a needs-based analysis into the assessment of applications, and to impose protection on features not deemed provincially significant.<sup>332</sup> Therefore, aggregate disputes often turn on whether the decision of a local authority to amend or not to amend the Official Plan conforms to the Policy Statement. It is important to note that in areas of the province not regulated by the *Aggregate Resources Act*, municipal *Planning Act* approvals are the only licensing requirements for private land.

Some applications will also involve special provincial planning regimes, such as the *Niagara Escarpment Planning and Development Act*, the *Oak Ridges Moraine Conservation Act*<sup>333</sup>, the *Greenbelt Act*,<sup>334</sup> or the Growth Plan legislation and policy.<sup>335</sup> This may mean approvals for amendments will require additional planning authority approvals, such as the Niagara Escarpment Commission discussed in Chapter Eight, or may be subject to additional standards in certain areas. A detailed analysis of each of these regimes is outside the scope of this project; however, the following subsection summarizes the key elements of the *Niagara Escarpment Planning and Development Act* as the provincial plan most relevant to the conflicts examined in Chapters Five through

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<sup>331</sup> *Planning Act*, *supra* note 87, ss 23 (1), 23 (1.1).

<sup>332</sup> Bull & Estrela, *supra* note 244 at 28.

<sup>333</sup> 2001, SO 2001, c 31.

<sup>334</sup> 2005, SO 2005, c 1.

<sup>335</sup> 2005, SO 2005, c 13; Ontario, Ministry of Public Infrastructure Renewal. *Places to Grow: Growth Plan for the Greater Golden Horseshoe* (Toronto, Ministry of Public Infrastructure Renewal, 2006): [https://www.placestogrow.ca/content/ggh/GPGGH\\_2006\\_ENG.pdf](https://www.placestogrow.ca/content/ggh/GPGGH_2006_ENG.pdf).

Eight, and most considered in the case law examined therein.<sup>336</sup> The *Niagara Escarpment Planning and Development Act* represents a key example of legislative action that attempts to respond to the construction of specific landscapes as ‘valuable’ and worthy of protection while simultaneously promoting economic growth and development. Technically provincial development plans take priority over the Policy Statement in the event of a conflict.<sup>337</sup> However, the finding of a conflict is a matter for the Board to determine in the context of a particular case.<sup>338</sup> In a 2013 case, the Ontario Divisional Court accepted the Board’s parallel analysis approach and application of the “dual compliance test,” rejecting the need for the requirements of the *Niagara Escarpment Plan* to be considered separately and prior to the Policy Statement analysis.<sup>339</sup>

#### E. Provincial Land Use Plans: The Niagara Escarpment Planning and Development Act

In 1962, blasting from the Dufferin Aggregates Milton Quarry blew a hole in the Niagara Escarpment, one of Southern Ontario’s most prominent landscapes. The Escarpment is a major limestone outcrop running through a large part of southern Ontario from Niagara Falls to the Bruce Peninsula. It is simultaneously a site with unique ecological systems,<sup>340</sup> prime agricultural lands, high scenic and amenity value,<sup>341</sup> proximity to urban centres, and valuable aggregate mineral deposits, as well as being significant to local Indigenous communities as traditional territory and for legal, economic, spiritual and historic reasons.<sup>342</sup> The transformation of such a prominent landscape was a catalyst for an emerging environmental movement in the province and for the social and political

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<sup>336</sup> For a detailed review of the development and application of the Oak Ridges Moraine regime see: Sandberg, Wekerle & Gilbert, *supra* note 91.

<sup>337</sup> Policy Statement 2014, s 4.12.

<sup>338</sup> See for example the majority finding in *Walker*, *supra* note 93.

<sup>339</sup> *Ibid*, *Walker Appeal*, *supra* note 93 at paras 66-67.

<sup>340</sup> Peter E Kelly & Douglas W Larson, *The Last Stand: A Journey Through the Ancient Cliff-face Forest of the Niagara Escarpment* (Toronto: Dundurn, 2007); John L Riley, J V Jalava & Steve Varga, “Ecological Survey of the Niagara Escarpment Biosphere Reserve” (Toronto: Ontario Ministry of Natural Resources, Southcentral Region, 1996).

<sup>341</sup> Kelly & Larson, *supra* note 343.

<sup>342</sup> John Borrows, “Living between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47 U Toronto LJ 417; John Borrows, “Indian agency: forming First Nations law in Canada” (2001) 24 PoLAR 9.



construction of the Escarpment as a specific and valuable landscape.<sup>343</sup> A 1968 government-commissioned expert report mapped and documented the entire Niagara Escarpment area in response to growing public awareness about the unique features of the area and concern about the impact of the aggregate mineral industry.<sup>344</sup> In 1990, the area was designated as a UNESCO World biosphere reserve.<sup>345</sup>

The landmark *Niagara Escarpment Planning and Development Act* (the “*Niagara Escarpment Act*”) was passed in 1973 with the express purpose of maintaining the Niagara Escarpment as a “continuous natural environment” and allowing only for “compatible” development.<sup>346</sup> The *Niagara Escarpment Act* was significant both as establishing an environmentally-focused land use plan, but also because of the new provincial role in planning decisions previously made at the local level, shifting planning from a local to a regional scale.<sup>347</sup> It created the 17-member Niagara Escarpment Commission (the “Commission”), made up of 8 members from escarpment counties and regions and 9 members of the public, appointed by Order-in-Council. The Commission is responsible for the creation of the land use plan, the *Niagara Escarpment Plan*, and is now responsible for its implementation.<sup>348</sup> There are no appointments designated for Indigenous governments and representatives. The Commission is an arms-length regulatory agency, reporting to the Ministry of Natural Resources and Forestry. The *Niagara Escarpment Act* provides the scope for the policies in the *Niagara Escarpment Plan* (the “Plan”), including but not limited to, management of land and water resources,

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<sup>343</sup> Graham S Whitelaw et al, “Roles of environmental movement organisations in land-use planning: case studies of the Niagara Escarpment and Oak Ridges Moraine, Ontario, Canada” (2008) 51 *Journal of Environmental Planning and Management* 6 801 at 807.

<sup>344</sup> Niagara Escarpment Study Group, *Niagara Escarpment Study Conservation and Recreation Report*. (Treasury Department of Ontario, Queen’s Printer, 1968).

<sup>345</sup> See details online: <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/europe-north-america/canada/niagara-escarpment/>

<sup>346</sup> *Supra*, note 37 at s. 2.

<sup>347</sup> Whitelaw et al, *supra* note 343 at 806.

<sup>348</sup> *Supra*, note 37 at ss. 5. The 2005 Niagara Escarpment Plan [the “Escarpment Plan”] is available online: [http://www.escarpment.org/\\_files/file.php?fileid=fileuRdJDqEnAp&filename=file\\_NEP\\_Intro.pdf](http://www.escarpment.org/_files/file.php?fileid=fileuRdJDqEnAp&filename=file_NEP_Intro.pdf). An amended NEP was released in May 2017, effective as of June 1, 2017. This dissertation considers the earlier plan, which was in effect at the time of writing. The revised plan is available here: <https://escarpment.org/LandPlanning/NEP>.

location of industry and commerce, identification of major land use areas, provision of major parks and open space, control of pollution and the natural environment, and ensuring compatibility of private sector development.<sup>349</sup>

While the process through which the original Plan was developed was neither collaborative nor participatory, environmental groups, community organizations and the aggregate industry were involved in hearings on the proposed land use plan from 1980 to 1983. According to Whitelaw et al., critics of the new planning regime, including the aggregate industry, private land owners and residential developers, were successful in limiting the scope of the plan by over 60% and influencing the planning rules.<sup>350</sup> They describe the hearing process as “adversarial.”<sup>351</sup> The plan is reviewed regularly, and is now reviewed at the same time as the other provincial land use plans, as described below.<sup>352</sup>

The Commission’s responsibilities include assessment of applications for amendments to the Plan and development permits, including for new aggregate mineral extraction operations.<sup>353</sup> No other permit or licence, including those under the *Aggregate Resources Act*, can be approved before a development permit is issued.<sup>354</sup> The Plan provides for seven land use designations: *Escarpment Natural*, *Escarpment Protection*, *Escarpment Rural*, *Escarpment Recreation*, *Minor Urban*, *Urban and Mineral Resource Extraction*. Each designation is described in detail in the Plan, including the “Objectives,” “Criterion for Designation,” and “Permitted Uses” associated with such a designation.<sup>355</sup> Escarpment Natural and Escarpment Protection prohibit mineral resource extraction. An amendment to the Plan is required for extraction over 20,000 tonnes on Escarpment Rural

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<sup>349</sup> *Ibid*, at s. 9,

<sup>350</sup> Whitelaw et al, *supra* note 343 at 807.

<sup>351</sup> *Ibid* at 808.

<sup>352</sup> *Niagara Escarpment Act*, *supra* note 37, at s 17.

<sup>353</sup> *Ibid*, at ss. 6.1, 7, 8, 10, 24.

<sup>354</sup> *Ibid*, at s 24(3).

<sup>355</sup> Escarpment Plan, *supra* note 348 at ss 1.3-1.9. Section 1.9 describes the Mineral Resources Extraction Area designation.

lands, which are described as “essential” and as providing a “buffer to the more ecologically sensitive areas of the Escarpment.”<sup>356</sup> Extraction is specifically contemplated in such areas, although requiring an amendment to be granted, and these are therefore the subjects of applications before the Board.<sup>357</sup>

*i. Plan Amendments*

Section 8 of the *Niagara Escarpment Act* sets out seven “objectives” that are “to be sought in the consideration of amendments to the Plan”:

- a) to protect unique ecologic and historic areas;
- b) to maintain and enhance the quality and character of natural streams and water supplies;
- c) to provide adequate opportunities for outdoor recreation;
- d) to maintain and enhance the open landscape character of the Niagara Escarpment in so far as possible, by such means as compatible farming or forestry and by preserving the natural scenery;
- e) to ensure that all new development is compatible with the purpose of this Act as expressed in section 2;
- f) to provide for adequate public access to the Niagara Escarpment; and
- g) to support municipalities within the Niagara Escarpment Planning Area in their exercise of the planning functions conferred upon them by the *Planning Act*.

Amendments must be consistent with these objectives as well as the purpose of the *Niagara Escarpment Act*, as outlined above, and must be justified by the Applicant.<sup>358</sup>

Further, an applicant must demonstrate the purpose and objectives of the *Niagara Escarpment Act* will not be adversely affected.<sup>359</sup> Amendments to re-designate Escarpment Rural Areas to Mineral Resource Extraction areas require specific consideration of the following matters:

- a) Protection of the natural and cultural environment, namely:

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<sup>356</sup> *Ibid* at s 1.5.

<sup>357</sup> *Ibid*, The section sets out five Objectives for such areas:

- 1) To maintain scenic values of lands in the vicinity of the Escarpment corridor;
- 2) To maintain the open landscape character by encouraging the conservation of the traditional cultural landscape and cultural heritage features;
- 3) To encourage agriculture and forestry and to provide for compatible rural land uses;
- 4) To provide a buffer for more ecologically sensitive areas of the Escarpment;
- 5) To provide for the designation of new Mineral Resource Extraction Areas which can be accommodated by an amendment to the Niagara Escarpment Plan.

<sup>358</sup> *Ibid*, ss 6.1(2.1) and 10(6); Escarpment Plan, *supra* note 348, s 1.2.1.

<sup>359</sup> Escarpment Plan, *supra* note 348, s 1.2.1.

- i. Groundwater and surface water systems on a watershed basis;
  - ii. Habitat of endangered (regulated), endangered (not regulated), rare, special concern and threatened species;
  - iii. Adjacent Escarpment Protection and Escarpment Natural Areas;
  - iv. Adjacent Rural Area natural features;
  - v. Existing and optimum routes of the Bruce Trail;
  - vi. Provincially significant wetlands;
  - vii. Provincially significant ANSIs; and
  - viii. Significant cultural heritage features.
- b) Opportunities for achieving the objectives of Section 8 of the *Niagara Escarpment Planning and Development Act* through the final rehabilitation of the site;
- c) Maintenance and enhancement of the quality and character of natural systems, water supplies, including fish habitat; and
- d) Capability of the land for agricultural uses and its potential for rehabilitation for agricultural uses.<sup>360</sup>

The *Niagara Escarpment Act* requires the Commission to provide notice and copies of proposed Amendments to all NEPA municipalities, and any Commission advisory committees, as well as publishing a notice in local newspapers and provide for a comment period of a maximum of 60 days, with the possibility for extension when deemed necessary by the Commission.<sup>361</sup> It allows for, but does not require, the Commission to hold public meetings and it is their regular practice to do so.<sup>362</sup> The *Niagara Escarpment Act* also provides for the establishment of an “advisory committee”

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<sup>360</sup> Escarpment Plan, *supra* note 348, s 1.5. Notably the revised s 1.2.2. amends these criteria as follows:

- a) protection of the *Escarpment environment*;
  - b) opportunities for achieving the objectives of the *Niagara Escarpment Planning and Development Act* through the final rehabilitation of the site;
  - c) the protection of *prime agricultural areas*, the capability of the land for *agricultural uses*, and its potential for rehabilitation for *agricultural uses*; and
  - d) opportunities to include rehabilitated lands in the Niagara Escarpment Parks and Open Space System.
- This amendment is briefly discussed in Part III of this Chapter.

<sup>361</sup> *Ibid*, ss 10(1), (2).

<sup>362</sup> *Ibid*, s 10(1.1). Interview, September 3, 2014.

to “advise and make recommendations to the Minister, through the Commission, in respect of the amendment and implementation” of the Plan.<sup>363</sup>

If the Commission receives written objections they are required to appoint a hearing officer to conduct a hearing within the designated Niagara Escarpment Planning Area (the “Area”) “for the purpose of receiving representations respecting the proposed amendments by any person desiring to make representations.”<sup>364</sup> They may also choose to conduct a hearing where no objections are received. The *Niagara Escarpment Act* requires the Applicant to present the proposal and justification at the hearing and to make the Application materials available to the public. Subject to the hearing officer’s rules of procedure, “any interested person” may question the Applicant and other presenters.<sup>365</sup> Within 60 days of the hearings, the hearing officer is required to provide the Commission with a report summarizing the hearing representations and recommending whether the proposed amendment should be accepted, rejected or modified with reasons.<sup>366</sup> The Commission is required to consider both the written comments received and the hearing report and make recommendations to the Minister who can refuse or approve the amendment and has discretion to make any modifications.<sup>367</sup>

#### ***ii. Development Permits***

Section 22 of the *Niagara Escarpment Act* provides for the designation of areas within the Niagara Escarpment Act Area as “development control areas”. In such areas, development must be approved under a development permit or exempted by regulation.<sup>368</sup> The Area has been designated under Regulation 826. However, lands licensed continuously since 1975 under the *Pits and Quarries Control Act, 1971* are exempted from requirements for a development permit by regulation, which remains

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<sup>363</sup> *Ibid*, s 4. (1) and (2). Procedural Guidelines for the Committee on file with the author.

<sup>364</sup> *Ibid*, s 10(3).

<sup>365</sup> *Ibid*, s 10(6).

<sup>366</sup> *Ibid*, s 10 (8).

<sup>367</sup> *Ibid*, s 10(9), (11).

<sup>368</sup> *Ibid*.

significant since aggregate licences do not expire.<sup>369</sup> As well, exploratory excavation and testing are exempted, allowing landowners to undertake preliminary studies before making any applications.<sup>370</sup>

The Plan sets out both general and specific Development Criteria that must be considered in the permit application process; however, as the Plan notes, not all criteria are applicable to all situations.<sup>371</sup> The following general criteria under Section 1 are relevant to aggregate extraction applications:

1. Permitted uses may be allowed provided that:
  - a. The long term capacity of the site can support the use without a substantial negative impact on Escarpment environmental features such as contours, water quality, water quantity, natural vegetation, soil, wildlife, population, visual attractiveness and cultural heritage features.
  - b. The cumulative impact of development will not have serious detrimental effects on the Escarpment environment (e.g. water quality, vegetation, soil, wildlife, and landscape).
4. Any development permitted should be designed and located in such a manner as to preserve the natural, visual and cultural characteristics of the area.
5. Where development involves new roads, road improvements or service corridors, their designation and alignment should be in harmony with the Escarpment landscape.
8. Development permitted should be designed and located in such a manner as to provide for or protect access to the Niagara Escarpment including the Bruce Trail Corridor.

Section 2.11 specifically considers mineral resources, with the objective of minimizing the impact of new mineral extraction and accessory uses. The Plan requires that operations *shall not conflict* with the following criteria:

- a) The protection of sensitive ecological, geological, historic and archaeological sites or areas.
- b) The protection of surface and groundwater resources.

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<sup>369</sup> O Reg 828/90, s 19.

<sup>370</sup> *Ibid*, s 5.

<sup>371</sup> This was also emphasized by the majority of the Board in *Walker*, *supra* note 93.

- c) The maintenance of agricultural areas, in accordance with the Agricultural Policies of the Provincial Policy Statement (PPS).
- d) The minimization of the adverse impact of extractive and accessory operations on existing agricultural or residential development.
- e) The preservation of the natural and cultural landscapes as much as possible during extraction and after rehabilitation.
- f) The minimization of the adverse impact of extractive and accessory operations on parks, open space and the existing and optimum routes of the Bruce Trail.<sup>372</sup>

“Protection” is defined in the Plan as “ensuring that human activities are not allowed to occur which will result in the unacceptable degradation of the quality of an environment.”<sup>373</sup> The application process includes circulation of applications for comments to Ministries, municipal governments and Conservation Authorities, all of which are considered by a Commission staff planner who writes a report for the Commission recommending approval or refusal and may include conditions. The proponent, the consulted agencies and surrounding neighbours can appeal a decision to a Commission hearing officer within 14 days.<sup>374</sup>

The *Niagara Escarpment Act* requires the government to review the Plan regularly and now requires that it be reviewed at the same time as the Greenbelt Plan under the Greenbelt Act under s.17 (1). In 2015 the government undertook a coordinated review of these and other Provincial Plans, including the Oak Ridges Moraine Conservation Plan and the Greater Golden Horseshoe Growth Plan.<sup>375</sup> The review and proposed changes at the time of writing are discussed in Part III of this chapter.

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<sup>372</sup> Escarpment Plan, *supra* note 348. The Section also includes requirements for setbacks from the brow of the Escarpment, screening, progressive rehabilitation, the use of off-site material for rehabilitation, accessory uses, and restrictions on new adjacent development. The following specific criteria outlined in the Plan may also be applicable to an aggregate application: 2.5 New Development Affecting Steep Slopes and Ravines; 2.6 New Development Affecting Water Resources; 2.7 New Development Within Wooded Areas; 2.8 Wildlife Habitat; 2.9 Forest Management; 2.10 Agriculture; 2.12 Heritage; 2.13 Recreation; 2.14 Areas of Natural and Scientific Interest (ANSIs); 2.15 Transportation and Utilities; 2.16 The Bruce Trail.

<sup>373</sup> *Ibid*, Appendix 2, at 127.

<sup>374</sup> The process is outlined on the Commission website: <http://www.escarpment.org/applications/index.php>. The Appeal Form is available here: [http://www.escarpment.org/\\_files/file.php?fileid=fileyyyIXTxRV1&filename=file\\_NEC\\_Appeal\\_Form.pdf](http://www.escarpment.org/_files/file.php?fileid=fileyyyIXTxRV1&filename=file_NEC_Appeal_Form.pdf).

<sup>375</sup> More information about the coordinated review can be found on the Ontario Ministry of Municipal Affairs and Housing website: <http://www.mah.gov.on.ca/Page10882.aspx>. See, the guiding document for public consultation, (Our Region, Our Community, Our Home, 2014).

### **Participation: Notice, Consultation, Objections**

As noted in Chapter Two, opportunities for participation and contestation are key structural element of environmental governance regimes.<sup>376</sup> Legal scholars Eloise Scotford and Rachael Walsh argue that land use regimes are redefining property in the UK context, shifting from an emphasis on private property rights towards more democratic environmental decision-making. British geographers Richard Cowell and Susan Owens link the successful use of participatory opportunities by environmental interests and concerned communities with the integration of environmental concerns into the formal land use decision-making framework.<sup>377</sup> They specifically examined resistance to aggregate extraction in rural England and argue that it “reframed” both the problems and the solutions related to extraction by connecting the site specific struggles with broader issues of planning and environmental relations.<sup>378</sup> Not only can participation enhance the evidence base for decision-making and lead to better decisions and enhance access to justice, Groves et al. argue that participatory processes may also provide opportunities to examine and rethink assumptions built into planning law and policy.<sup>379</sup> In this sense, planning disputes can be opportunities for creative rethinking about how we relate to each other and the environment despite being grounded in seemingly narrow or site-specific issues of infrastructure siting or zoning. However, this potential for creativity and reflection is largely dependent on the nature of the process – whether the broad policy goals are realized through genuinely deliberative processes and genuine opportunities to influence outcomes.<sup>380</sup> Put another way, whether participation can “cross-scales” beyond engagement in site-specific applications to provide for

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<sup>376</sup> Karen Bakker, “The limits of ‘neoliberal natures’: Debating green neoliberalism” (2010) 34 *Progress in Human Geography* 6 715; James McCarthy, “Privatizing conditions of production: trade agreements as neoliberal environmental governance” 35 *Geoforum* 3 327; Thomas Perreault, “State Restructuring and the Scale Politics of Rural Water Governance in Bolivia” (2005) 37 *Environment and Planning A* 2 263; Eloise Scotford & Rachael Walsh, “The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context” (2013) 76 *The Modern Law Review* 6 1010; Valiante, *supra* note 22.

<sup>377</sup> Cowell & Owens, *supra* note 21 at 406; Susan Owens & Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (Routledge, 2002).

<sup>378</sup> Cowell & Owens, *supra* note 21 at 405–406, 417.

<sup>379</sup> Groves, Munday & Yakovleva, *supra* note 23 at 342.

<sup>380</sup> Scotford & Walsh, *supra* note 379.



opportunities to contest, debate and shape the underlying values and goals about planning and environmental governance.<sup>381</sup>

While much of the information about process and participation is in the Standards, prior to amendment the Act stated in s 11(3): “Any person may, during the prescribed consultation procedures, give the applicant and the Minister written notice stating that the person has an objection to the application and specifying the nature of the objection.” The amended Act repeals this subsection and moves all details of consultation and participation to future regulations.<sup>382</sup> The result is that the right to object is no longer embedded directly in the statute and is therefore subject to the discretion of Cabinet or the Minister. Further, the right to object is subtly narrowed by an amended s 11(5) which now instead of providing for “any objections” to be referred to the Board, provides that the Minister can refer “any objections arising out of the notification and consultation procedures that are prescribed or set out in a custom plan.”<sup>383</sup> In addition, as noted above, the amended Act includes a discretionary “custom plan” whereby the Minister can approve individualized consultation, participation and information requirements for a specific application.<sup>384</sup> In the context of Ontario’s planning system, scholars have noted the influence of private interests in the planning process and the emphasis on economic development.<sup>385</sup> In the context of aggregate disputes, the participatory potential of the planning process is particularly limited by the proponent-driven nature of the process both at the application and consultation stages. In fact, despite the protection of aggregate resources as a matter of provincial interest, the consultations about aggregate application are conducted and controlled by the proponent. The Ministry has no role in addressing objections made by citizens or EBR comments and can therefore issue a licence without formally addressing concerns expressed in these forums.<sup>386</sup> In fact, as will be discussed below in Chapters Four and Five, the Ministry tends to play a limited role at both the

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<sup>381</sup> Groves, Munday & Yakovleva, *supra* note 23 at 340.

<sup>382</sup> *Aggregate Resources and Mining Modernization Act*, *supra* note 13, s 10(1), repealing s 11(3).

<sup>383</sup> *Ibid.*, s 10(1), amending subsection 11(5) of the Act.

<sup>384</sup> *Ibid.*, s 10(1).

<sup>385</sup> Valiante, *supra* note 22 at 106; Chipman, *supra* note 95 at 45–49.

<sup>386</sup> A 2014 case indicates that the Minister can make decisions without formal consideration of EBR comments, and prior to the deadline for commentary, see *Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, 2014 ONSC 2826 [*Animal Alliance*].

consultation and litigation stages, even where Ministry concerns or objections have arisen at some stage in the process without a clear resolution. One planner commented, “MNR is a very closed shop. They stick to their obligations under the licensing process and although they may have staff involved in the JART [a joint-municipal planning process in the Halton Region], they keep their cards very close to their chest and don’t go to hearings.”<sup>387</sup> The amended Act makes the participation of the Ministry in hearings expressly optional.<sup>388</sup>

The Standards require the proponent to provide public notice that 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. Once a proponent has filed an application, public notice is also required under the Provincial Standards. A copy of the Application must be on file at the local Ministry of Natural Resources office.<sup>389</sup> Under the Act, Site Plans and Reports submitted for licences become the property of the Crown only when a licence is issued.<sup>390</sup> The Ministry has interpreted this to mean that they cannot “produce” copies for members of the public during the application process. The policy manual states that interested parties can view these documents at the local MNR office or the local municipality.<sup>391</sup> Parties can also request information from the proponent; however, the Ontario Environmental Commissioner has noted concerns about the effective right of the proponent to withhold information.<sup>392</sup> In practice many proponents provide online access to information, as do municipalities where they are involved in decision-making. However, the process is complex and involves a number of different decision makers and actors. As well, the timeline and process for objections must be seen in light of the volume and density of information

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<sup>387</sup> Interview, September 3, 2014.

<sup>388</sup> *Aggregate Resources and Mining Modernization Act*, *supra* note 13, 10(3).

<sup>389</sup> *Ibid* at 10, s. 4.1.2. Notice is required by concurrent publication of a copy of the Form 1 *Notice of Application* for a licence and Form 2 *Notice of Information Session* in a local newspaper, personal or registered mail delivery of copies of both to landowners within 120 metres of boundary, and the posting of a sign on the boundary of the site. The on-site sign must advise of the Application, including whether it is Class A or B and whether it is above or below the water table, and must specify the size, the name and contact information of the Applicant, the date and time of the Information Session. The sign must also indicate that a copy of the Application is on file at the local Ministry of Natural Resources office.<sup>389</sup>

<sup>390</sup> The Act, *supra* note 36 ss. 8(7), 9(2).

<sup>391</sup> The Manual”, *supra* note 179 at 3–4.

<sup>392</sup> Environmental Commissioner of Ontario, *supra* note 214 at 81.

involved in aggregate applications. The application documents may be hundreds or thousands of pages, including highly technical expert reports. Many of the participants in this study commented on the “learning curve” involved and the need to find expertise within the community to assist with understanding the application and the process. One more-than-owner party reflected,

It was very curious because we just had to go and learn. We knew the questions that we wanted to ask, but we had to figure out how to ask them, who to ask, who not to ask and how to become part of what to us became very quickly a very complicated way to solve local planning issues.

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*.<sup>393</sup> While the Ministries involved do have some discretion regarding what is posted, according to Ontario’s Environmental Commissioner almost all new aggregate licences are posted on the Registry. As noted in Part III below, the government consultation Blueprint document discussed the possibility for online information requirements for applications and the need for plain language summaries for all application materials. However, these are not included in the Act and all proposed changes to these aspects of the process are subject to future regulations making it impossible to say whether and how the reforms would impact the consultation process at the time of writing.

The Provincial Standards require the proponent 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 or to ensure compliance. In fact, the Policy Manual directs Ministry staff *not* to attend meetings unless there are “special circumstances.”<sup>394</sup> The Standards suggest a non-exhaustive list of forms such a meeting may take, including an information session, an open house or a community meeting. The only requirements

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<sup>393</sup> 1993, SO 199s, c 28.

<sup>394</sup> Manual, *supra* note 179 at A.R. 2.01.02.

set out in the Standards are that the meeting must take place *at least* 20 days after the Notice is published and 10 days before the closing of the notification period.<sup>395</sup> It is the responsibility of the proponent to notify the Minister when the notification requirements have been completed.<sup>396</sup>

The Provincial Standards specify that objections must be served on the applicant and the District Manager of the Ministry of Natural Resources within the 45-day notification period.<sup>397</sup> This requirement includes objections from any agency. Both the statute and the Standards require that the objector specify the nature of the objection. 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>398</sup> Notably the amendments repeal the section in the Act requiring the applicant to work towards resolution and move these to regulations.<sup>399</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>400</sup> Proponents are also required to provide the Ministry with documentation of landowner, stakeholder and agency circulation.<sup>401</sup>

Notably, Environmental Registry comments are not considered to be objections under the Act and therefore do not afford the participant the same procedural rights outlined above. The proponent is also not required to respond, although some may do so in practice. Non-owner third parties in Ontario cannot appeal land use planning decisions as-of-right. While the *Environmental Bill of Rights* provides for parties with a demonstrable interest to seek leave to appeal certain kinds of provincial decisions, the test for leave is

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<sup>395</sup> Natural Resources Management Division, *supra* note 285 at 4.2.

<sup>396</sup> *Supra*, note 36, s. 11(2).

<sup>397</sup> The Standards, *supra* note 87 at 4.2.2.

<sup>398</sup> *Ibid*, ss. 4.3.6, 4.3.3.1.

<sup>399</sup> *Aggregate Resources and Mining Modernization Act*, *supra* note 13, s 10(1), repealing s 11(4).

<sup>400</sup> *Ibid*, s. 4.3.3.3.

<sup>401</sup> *Ibid*, s12, s. 4.3.3.3.

“stringent” and the majority of applications have been turned down.<sup>402</sup> The most common and easiest way to satisfy the standing requirement for leave is to have made a submission on the instrument in question; however, it is possible to establish an interest without having made a submission, for example through proximity to a proposed development.<sup>403</sup> Generally, a party seeking leave may be required to justify having not submitted at an earlier stage. In practice, the Board hears aggregate disputes as a result of a Ministerial referral, an appeal of a municipal decision, 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>404</sup> As a result, quarry litigation often formally includes non-owner parties and/or participants either as individuals or as groups with 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.

With respect to Official Plan Amendments, the *Planning Act* requires that the municipal council hold at least one public meeting. In advance of the meeting the proposed official plan amendment must be available to the public for a minimum of 20 days before the meeting. However if they refuse to adopt the amendment, the meeting requirement is waived. The *Planning Act* provides that any person or public body may make written

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<sup>402</sup> *Dawber v Ontario (Director, Ministry of the Environment)* (2007), 28 CELR (3d) 281; affd (2008), 36 CELR (3d) 191 (Ont Div Ct); leave to appeal refused (Ont CA File No M36552, November 26, 2008); Richard Lindgren, “Third Party Appeals Under the *Environmental Bill of Rights* in the Post-*Lefarge* Era: The Public Interest Perspective” (Toronto: Canadian Environmental Law Association, 2009) [Lindgren].

<sup>403</sup> See for example the Environmental Review Tribunal decision in *Dawber*, *supra* note 402, discussed in Lindgren, *supra* note 402.

<sup>404</sup> The Act, *supra* note 36, 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 it considers to not 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, see discussion accompanying notes 402-403.

submissions to council during the timeline specified by council.<sup>405</sup> It also specifies that council must inform the public at the meeting about the power of the Board to dismiss an appeal if the appellant has not provided council with oral submissions at a public meeting or written submission before an amendment is adopted.<sup>406</sup> Similarly, a municipality is required to hold at least one public meeting before passing a zoning by-law amendment with a minimum of 20 days' notice to the public and must ensure "sufficient" information is provided to the public.<sup>407</sup> If changes are made to the proposed amendment the public has the right to request another meeting.<sup>408</sup>

Scholars in Canada<sup>409</sup> and the United Kingdom<sup>410</sup> have noted the important contributions made by more-than-owner or "public" participants in planning processes. In the context of aggregate, this contribution was also noted by multiple participants in this research.<sup>411</sup> One more-than-owner party noted it is "citizen's groups" rather than the Ministries tasked with evaluating the applications in the public interest that are stopping applications.<sup>412</sup> Indeed, in several cases examined for this research, serious and complex mitigation requirements or site reductions and changes to the application were the result of more-than-owner party interventions rather than government agencies.<sup>413</sup> Another more-than-owner party noted, "The technical reviews by the Minister were, shall I say, fallible because they didn't seem to give it the kind of scrutiny we have and we are not experts. We just kept bumping up on little things that we would go, 'how did they miss this?'"<sup>414</sup> Yet structural opportunities for participation and deliberation within the planning system have been diminished as the target of state reforms aimed at 'modernizing' or

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<sup>405</sup> *Supra*, note 87, ss. 17(20), (21).

<sup>406</sup> *Ibid.* ss. 17(19), (34).

<sup>407</sup> *Ibid.* s. 34.

<sup>408</sup> *Ibid.* s.34(17).

<sup>409</sup> Robert B Gibson, "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress" (2012) 30:3 *Impact Assessment and Project Appraisal* 179 at 556.

<sup>410</sup> Cowell & Owens, *supra* note 21 at 406.

<sup>411</sup> Interview February 13, 2014; Interview, July 7, 2014; Interview, July 17, 2014; Interview September 3, 2014; August 23, 2014.

<sup>412</sup> Interview July 17, 2014.

<sup>413</sup> Rockfort, *supra* note 203; Walker, *supra* note 93; *Citizens Concerned for Michipicoten Bay v Municipality of Wawa* (2009), PL040025.

<sup>414</sup> Interview, August 23, 2014.

‘streamlining’ the processes that control land use and development in Ontario.<sup>415</sup> This is consistent with trends in other jurisdictions within Canada,<sup>416</sup> and internationally, such as the United Kingdom<sup>417</sup> where neoliberal environmental governance promotes “flexibility” and economic competitiveness and shifts towards market mechanisms in the planning system.<sup>418</sup> As noted in Chapter Two, planning has a long history with efforts to replace the ‘politics’ of planning with professional expertise through a “technical-rational” model of land use decision-making.<sup>419</sup> In the context of neoliberal environmental governance, deliberative opportunities are deemed “blockages” and more-than-owner parties engaging in the planning process are depicted as anti-growth, anti-progress and even dangerous or criminal.<sup>420</sup> As discussed in Chapters Six to Eight, this research demonstrates that even where parties do continue to engage in the planning process, the failure to recognize the full range of people-place relations with private land as relevant to land use decisions results in a more subtle form of exclusion. This enclosure of “the affective and unruly elements” of planning conflicts upholds the privileged position of aggregate proponents and limits the transformative and democratizing potential of planning.<sup>421</sup> Thus, the data put forward by more-than-owner

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<sup>415</sup> Roger Keil & Gene Desfor, “Ecological Modernisation in Los Angeles and Toronto” (2003) 8 *Local Environment* 1 27; Julie-Anne Boudreau, Roger Keil & Douglas Young, *Changing Toronto: Governing Urban Neoliberalism* (Toronto: University of Toronto Press, 2009); Young & Keil, *supra* note 259; Scott Prudham, “Poisoning the well: neoliberalism and the contamination of municipal water in Walkerton, Ontario” (2004) 35 *Geoforum* 3 343; Mark S Winfield & Greg Jenish, “Comment-Ontario’s Environment and the “Common Sense Revolution”” (1998) 57 *Studies in Political Economy*; Judith McKenzie, *Environmental Politics in Canada: Managing the Commons into the 21st Century* (Oxford: Oxford University Press, 2001).

<sup>416</sup> Gibson, *supra* note 412; Zalik, *supra* note 258; Carter, Fraser & Zalik, *supra* note 58; Dayna Nadine Scott, “The Networked Infrastructure of Fossil Capitalism: Implications of the New Pipeline Debates for Environmental Justice in Canada” (2013) 43 *Revue générale de droit* 11.

<sup>417</sup> Susan Owens & Richard Cowell, *Land and Limits: Interpreting Sustainability in the Planning Process* (Taylor & Francis, 2010); Richard Cowell, “The Greenest Government Ever? Planning and Sustainability in England after the May 2010 Elections” (2013) 28 *Planning Practice & Research* 1 27; Cowell & Owens, *supra* note 21; Groves, Munday & Yakovleva, *supra* note 23.

<sup>418</sup> Sager, *supra* note 321 at 155.

<sup>419</sup> Cowell & Owens, *supra* note 21 at 406.

<sup>420</sup> Groves, Munday & Yakovleva, *supra* note 23; Young & Keil, *supra* note 259; McKenzie, *supra* note 418; Tyler A McCreary & Richard A Milligan, “Pipelines, permits, and protests: Carrier Sekani encounters with the Enbridge Northern Gateway Project” (2014) 21 *cultural geographies* 1 115; Tyler McCreary & Vanessa Lamb, “A Political Ecology of Sovereignty in Practice and on the Map: The Technicalities of Law, Participatory Mapping, and Environmental Governance” (2014) 27 *Leiden Journal of International Law* 03 595; Gordon Christie, “Discourse and Negotiations Across the Indigenous/Non-Indigenous Divide: ‘Obligations,’ Decolonization and Indigenous Rights to Governance” (2014) 27 *Can JL & Juris* 259.

<sup>421</sup> Zalik, *supra* note 258 at 2453.

parties serves as a valuable supplement to state oversight while the challenges they pose are bracketed to maintain an orderly and efficient process.<sup>422</sup> Citing public frustration with aggregate approvals and other forms of development, the Environmental Commissioner has recently noted the need for *meaningful* consultation on land use issues:

First, consultation is not simply telling people what you intend to do and, then, listening to their comments.

...

To be legitimate, an approval process must be able to reach a decision not to proceed. I'm not saying that this should be a common outcome. Quite the contrary, one would expect that the vast majority of proposed undertakings would be well-designed and well-considered, even before they reach the public consultation stage, so as to be likely candidates for approval. But, in a valid and meaningful consultation process, we would expect that sometimes rational arguments or contrasting societal value systems would and should lead to a "No". Without that possibility, there is no value in consultation.<sup>423</sup>

## **Other Approvals and Applicable Laws**

The provincial Ministry of the Environment is responsible for three forms of approvals related to aggregate extraction. The Ministry's responsibilities are based on both the *Ontario Water Resources Act*<sup>424</sup> and the *Environmental Protection Act*<sup>425</sup> in the case of a potential contaminant. These approvals are *not* required before a licence is granted. However, it is the Ministry practice not to process the application until other approvals have been granted, as they are required before operations can begin at an aggregate extraction site.

Under the *Ontario Water Resources Act*, the Ministry is responsible for the supervision of the province's ground and surface water supply. Permits to Take Water are required when more than 50,000 litres of water per day will be taken. Since water table and groundwater

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<sup>422</sup> Lachapelle & McCool, *supra* note 5 at 280.

<sup>423</sup> Environmental Commissioner of Ontario, *Annual Report 2007/2008 - Getting to K(no)w* (Toronto: Environmental Commissioner, 2008) at 5.

<sup>424</sup> RSO 1990, c O.40.

<sup>425</sup> RSO 1990, c E.19.



impacts are often a central aspect of public concerns about an application, these applications can be quite contentious and attempts have been made to appeal approvals.<sup>426</sup> Industrial sewage Certificates of Approval are required when sewage is discharged into ground or surface water under the *Ontario Water Resources Act* s. 53. In the context of aggregate extraction, dewatering systems and wash plants require this form of approval. The permitting system controls water takings for the purpose of avoiding adverse impacts on other water users or the environment. The Board has, at least once, required a permit and certificate as a condition for the issuance of the licence for aggregate extraction.<sup>427</sup> However, this is not standard practice.

Permits have historically been required in connection with endangered and threatened species and species habitat under the *Endangered Species Act*.<sup>428</sup> In 2013 however, amendments to that Act introduced a “rules-in-regulation” or “permit-by-rule” system for a range of industrial development activities, including pits and quarries.<sup>429</sup> The new system means proponents are simply required to follow the rules as set out in the regulations and no longer require a permit. In effect, as the Environmental Commissioner concluded, the Ministry no longer has the power to stop activities based on their impact on endangered species in the province:

That is where the regulatory changes of 2013 have their most profound consequences: they do not allow MNR to say “no.” Every place, no matter how unique or ecologically important, will be open to activities with the potential to adversely affect species at risk; no place is untouchable or

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<sup>426</sup> *St. Mary's Cement Inc. (Canada) v Ontario (Director, Ministry of the Environment)* (2012), 65 CELR (3d) 302, 2012 CarswellOnt 678 (Ont. Environ. Rev. Trib.), aff'd (2012), 70 CELR (3d) 266, 2012 ONSC 3879 (Ont. Div. Ct.); *Friends of Rural Communities & the Environment v. Ontario (Director, Ministry of the Environment)* 2011 CarswellOnt 6736 (Ont. Environ. Rev. Trib.); *Friends of Rural Communities & the Environment v. Ontario (Director, Ministry of the Environment)* (2008) 39 CELR (3d) 112, 2008 CarswellOnt 5319 (Ont. Environ. Rev. Trib.). For a review of the Permit to Take Water appeals in the Flamborough Quarry case see, <http://www.stopthequarry.ca/stmarys/grs-testing/>. See also, *Trent Talbot River Property Owners Association v Ontario (Director, Ministry of the Environment)* (2006), 22 CELR (3d) 216 (Ont. Environmental Review Trib.), rev'd (2007) 31 CELR (3d) 129, 2007 CarswellOnt 5210.

<sup>427</sup> Re Barbara McCarthy and MAQ Aggregates Inc. (4 January 2012) PL010623, OMB.

<sup>428</sup> SO 2007, c 6.

<sup>429</sup> O Reg 176/13, amending O Reg 242/08, ss 22, 23.14.

special. And that does not appear to be consistent with the purposes of the Act or the general standards of modern natural resource management.<sup>430</sup>

The regulations also provide species-specific exemptions for projects that meet certain conditions, including species such as bobolinks<sup>431</sup> and butternut trees,<sup>432</sup> which have been at issue in aggregate extraction proposals. Further, instead of requirements for “overall benefits” to the affected species that commonly applied to permits, many activities will only be subject to requirements to “minimize adverse effects.”<sup>433</sup> There are however seven species excluded from exemptions for aggregate operations.<sup>434</sup> Notably these amendments were part of an effort to “streamline” the approvals process and reduce the cost of maintaining the permit system. Of particular interest in the context of reforms to the *Aggregate Resources Act* and the use of discretionary regulatory powers, the government tabled the *Endangered Species Act* changes as part of an omnibus budget bill in 2012.<sup>435</sup> These were withdrawn in response to widespread criticism but then later implemented by regulation, without public consultation or legislative debate.

Aggregate extraction is also excluded from the list of “drinking water threats” under the *Clean Water Act*.<sup>436</sup> Aggregate licences and permits are now prescribed instruments under the *Clean Water Act*, which means that they can be used to implement the protection and management of water sources.<sup>437</sup> The *Clean Water Act* sets out “source protection areas”<sup>438</sup> within the province and establishes “source protection committees”<sup>439</sup> for each. The committees must develop “source protection plans” with policies to prevent significant drinking water threats.<sup>440</sup> Sections 39 and 43 of the *Clean Water Act* now respectively require new and existing instruments to “conform” to

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<sup>430</sup> *Laying Siege*, *supra* note 285 at 39.

<sup>431</sup> O Reg 287/07, s 4.1.

<sup>432</sup> *Ibid*, s 23.7.

<sup>433</sup> *Ibid*, s 23.14 (5).

<sup>434</sup> *Ibid*, s 23.14 (2).

<sup>435</sup> Bill 55, Strong Action for Ontario Act (Budget Measures), 2012 SO 2002 c 8.

<sup>436</sup> *Clean Water Act*, 2006, SO 2006, c 22; O Reg 287/07, s 1.1.

<sup>437</sup> *Ibid*, at s. 2.

<sup>438</sup> *Ibid*, at s. 4(1).

<sup>439</sup> *Ibid*, at ss. 7.

<sup>440</sup> *Ibid*, at s. 22.

significant threat policies and designated Great Lakes policies in source protection plans. However only new instruments are required to “have regard” to other source protection plan policies.<sup>441</sup> Therefore while aggregate operations are not prescribed threats, aspects of their operation, such as handling and storage of fuel are, and must therefore be managed in accordance with the source water protection plan. Proposed amendments to the Act provide the authority to require changes to existing instruments and conditions for new approvals.<sup>442</sup> Municipal *Planning Act* decisions must also “conform” to significant threat policies and designated Great Lakes policies in source protection plans and “have regard” to other source protection plan policies.<sup>443</sup>

While the provincial *Environmental Assessment Act* does not apply to aggregate applications, more-than-owner parties and environmental organizations have raised concerns about this in the context of large-scale applications, including the Superior Aggregates proposal in Michipicoten Bay on the coast of Lake Superior,<sup>444</sup> and the Melancthon mega quarry.<sup>445</sup> In the case of the Melancthon quarry, opponents successfully lobbied the province to order an environmental assessment due to the unprecedented scale of the proposed development, which would have been one of the largest in Canada and in North America.<sup>446</sup> The proposal was subsequently withdrawn and the EA was never conducted so it is not clear how this would have operated in relation to the process under the Act.

Federal Jurisdiction can be engaged by aggregate applications, particularly under the *Fisheries Act*<sup>447</sup> and protection of waterways. However, as discussed in Chapter Two, recent changes to those regimes have limited their application.<sup>448</sup> Similarly, the

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<sup>441</sup> *Ibid*, at s. 39.

<sup>442</sup> Bill 39, *supra* note 13, ss 13(1), 13(3), 23, 25, 31, 37(1).

<sup>443</sup> *Ibid*, s. 39(1).

<sup>444</sup> *Citizens Concerned for Michipicoten Bay v Municipality of Wawa*, *supra* note 413.

<sup>445</sup> See the application on the *EBR* Registry, Number 011-2864.

<sup>446</sup> O Reg 444/11.

<sup>447</sup> RSC, 1895, c F-14.

<sup>448</sup> Gibson, *supra* note 412.

application of the federal environmental assessment regime has been narrowed to make it unlikely to be applied in a provincial aggregate siting situation.<sup>449</sup>

The *North American Free Trade Agreement* may be implicated depending on whether the proponent could qualify as a “foreign investor,” in particular the proponent may invoke the investor protection mechanism if the application is turned down.<sup>450</sup> A recent NAFTA case was launched by a foreign-owned proponent in conjunction with a civil suit against the provincial government following the provincial use of the rarely invoked Ministerial Zoning Power and was only withdrawn after a \$15-million settlement was made by the province.<sup>451</sup> Despite widespread recognition that the NAFTA suit was an inappropriate mechanism to challenge the government’s decision, the eventual settlement may have a chilling effect on future decision makers.<sup>452</sup> While outside the scope of this project, a 2007 decision of a federal-provincial environmental assessment Joint Review Panel to reject a proposed quarry in Nova Scotia was successfully challenged under NAFTA.<sup>453</sup> The proponent, Bilcon, is seeking \$100,000,000 in compensatory damages. Notably, there was a strong dissent from one member of the NAFTA panel who warned the decision could result in a “chill on the operation of environmental review panels”.<sup>454</sup> The member went on to disagree with the majority’s finding that the Joint-Review Panel was wrong to emphasize the effect of the project on the human environment and to take

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<sup>449</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52. See Gibson, *supra* note 409.

<sup>450</sup> The North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December, 1992, CAN TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA].

<sup>451</sup> Documents related to the NAFTA claim are available online here: [http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/st\\_marys\\_vcna.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/st_marys_vcna.aspx?lang=eng).

<sup>452</sup> Steven Rowe, “Quarry Application Withdrawn: Settlement and implications” (2013) 28:3 Ontario Planning Journal 4; Gus Van Harten & Dayna Nadine Scott, “Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada” (2016) 7 J Int Disp Settlement 1 92.

<sup>453</sup> *Clayton/Bilcon v Government of Canada* (2015), PCA 2009-04, Award on Jurisdiction and Liability, online: <http://www.pcacases.com/web/view/50>. Information about the claim and proceedings can also be found on the Global Affairs Canada site: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng>.

<sup>454</sup> *Ibid*, Dissenting Opinion of Professor Donald McRae, at 48.

“account of the community’s own expression of its interests and values”.<sup>455</sup> He concluded,

This result may be disturbing to many. In this day and age, the idea of an environmental review panel putting more weight on the human environment and on community values than on scientific and technical feasibility, and concluding that these community values were not outweighed by what the panel regarded as modest economic benefits over 50 years, does not appear at all unusual. Neither such a result nor the process by which it was reached in this case could ever be said to “offend judicial propriety”. Once again, a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11. In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection.<sup>456</sup>

Canada filed a notice of application for judicial review in Federal Court in June 2015, arguing that the NAFTA tribunal exceeded its jurisdiction and the dispute should have been taken to a Canadian court.<sup>457</sup> While the proponent attempted to stay the proceedings pending the NAFTA Tribunal’s decision on damages, the Federal Court denied the motion and will allow the Canadian government’s application to proceed.<sup>458</sup> Bilcon is appealing the decision. The majority’s finding that “community core values” fell outside the proper scope of the environmental assessment inquiry and preference for technical and biophysical evidence exemplifies the closure of a decision-making process to the range of people-place relations engaged by planning decisions. As noted by the dissenting member, the decision has the potential to reinforce and deepen closure in planning systems and reinforces the emphasis on expertise and technocratic approaches to environmental governance. While scientific and technical evidence are key parts of land use decisions, they are an inherently “complex mix of the scientific, social, economic, political” and material and decision makers must grapple with all these dimensions in order to find sustainable solutions.<sup>459</sup>

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<sup>455</sup> *Ibid*, Dissenting Opinion of Professor Donald McRae, at 49.

<sup>456</sup> *Ibid*, Dissenting Opinion of Professor Donald McRae, at 51.

<sup>457</sup> *Attorney General of Canada v William Ralph Clayton et al.*, 2017 FC 214, at 1.

<sup>458</sup> *Ibid*, at 2.

<sup>459</sup> Cullingworth, *supra* note 18 at 6.

## Hearings and Decisions: Aggregate Resources Act and Official Plan and By-Law Amendments

### A. The Ministry of Natural Resources

Under the *Aggregate Resources Act* process, the Ministry will make a recommendation to the Minister within 30 days of the proponent submitting all required documentation about resolved and remaining objections at the end of the two-year period.<sup>460</sup> The Minister has three statutory options: 1) refer the application and any objections to the Ontario Municipal Board for a hearing, or in the case of a site within the Niagara Escarpment Plan Area, a joint-board of the Ontario Municipal Board and the Environmental Review Tribunal under the *Consolidated Hearings Act*;<sup>461</sup> 2) issue the licence; 3) refuse to issue the licence.<sup>462</sup> Section 12(1) of the Act sets out the matters that the Minister must consider in making the decision:

- (a) the effect of the operation of the pit or quarry on the environment;
- (b) the effect of the operation of the pit or quarry on nearby communities;
- (c) any comments provided by a municipality in which the site is located;
- (d) the suitability of the progressive rehabilitation and final rehabilitation plans for the site;
- (e) any possible effects on ground and surface water resources;
- (f) any possible effects of the operation of the pit or quarry on agricultural resources;
- (g) any planning and land use considerations;
- (h) the main haulage routes and proposed truck traffic to and from the site;
- (i) the quality and quantity of the aggregate on the site;
- (j) the applicant's history of compliance with this Act and the regulations, if a licence or permit has previously been issued to the applicant under this Act or a predecessor of this Act; and
- (k) such other matters as are considered appropriate.<sup>463</sup>

The amended s 12 (e) includes effects on drinking water sources as a consideration.

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<sup>460</sup> *Supra* note 36, s. 4.3.5.

<sup>461</sup> *Supra* note 93, s 4(1).

<sup>462</sup> *The Act, supra* note 36 ss. 11(5), (9).

<sup>463</sup> *The Act, supra* note 36.

Section 7 of the *Environmental Bill of Rights* requires the Ministry to have a Statement of Environmental Values. Section 11 requires that the Minister “take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the Ministry.”<sup>464</sup> The Statement lists the following principles:

- A sound understanding of natural and ecological systems and how our actions affect them is key to achieving sustainability
- As our understanding of the way the natural world works and how our actions affect it is often incomplete, MNR staff should exercise caution and special concern for natural values in the face of such uncertainty.
- The finite capacity of our natural systems should be recognized in planning and allocation decisions.
- Natural resources should be properly valued to provide a fair return to Ontarians and to reflect their ecological, social and economic contributions.
- Participation in resource management by all those who share an interest is a necessary ingredient, particularly in support of communities who must balance economic diversity with other needs. Those affected by proposed changes must have access to information and opportunities to provide input to decisions that affect their lives.
- Applied research and sharing of scientific and technological knowledge and innovative technologies must be fostered to support the sustainable development of natural resources.
- An ecosystem approach to managing our natural resources enables a holistic perspective of social, economic and ecological aspects and provides the context for integrated resource management.
- The planning for and management of natural resources should strive for continuous improvement and effectiveness through adaptive management of natural resources.
- In order to achieve sustainable development, environmental protection must be an integral part of the development process and cannot be considered in isolation.
- From both a sound business and environmental perspective, it is less costly and more effective to anticipate and prevent negative environmental impacts before undertaking new activities than it is to correct environmental problems after the fact.
- Rehabilitating degraded environments is an important aspect of resource stewardship.

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<sup>464</sup> *Supra*, note.

However, the Ministry has historically interpreted the Statement as relevant only to decisions related to the development of “Acts, regulations, and policies” and not to instruments, such as *Aggregate Resources Act* applications. The Environmental Commissioner has repeatedly pointed out that the Environmental Bill of Rights does not exempt instruments and that the Ministry should be considering the Statement in determining the outcome of aggregate applications. Indeed, this was confirmed by the Ontario Divisional Court in *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*: “There is no exclusion for Directors when they are making a decision whether or not to implement a proposal for a Class I or a Class II instrument.”<sup>465</sup> The Ministry of Natural Resources has taken the position that the Statement is an embedded part of the existing aggregate licensing process. Upon review, the Commissioner “found no reference to how specific SEV principles (e.g., cumulative effects, the ecosystem approach, the precautionary approach) had been considered.”<sup>466</sup> The 2011/2012 Annual Report to the Legislature rejected this approach:

To adequately demonstrate that SEV consideration has occurred, SEV consideration documentation requires an explicit explanation of which specific SEV principles were considered, and why and how they were considered, applied and/or dismissed during the decision-making process.<sup>467</sup>

In the 2014 *Animal Alliance* decision, the Divisional Court accepted the Ministry of Natural Resources’ process for consideration of the Statement as fulfilling the section 11 requirements, known as the “SEV consideration statement,” a form of checklist with placeholder notations, such as, “a total of XXXX comments were provided” and “I have taken into consideration the aforementioned in my decision to approve [proposal title].” The Court also held that there was no concern with the Ministry’s completion of the Statement consideration in advance of the closing of the 30 day Environmental Registry public comment period, concluding that these processes mandated by the *Environmental Bill of Rights* are “separate” and it was not necessary to demonstrate that all comments

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<sup>465</sup> 2008 CanLII 30290 (ON SCDC), at para 56.

<sup>466</sup> Environmental Commissioner of Ontario, *supra* note 270 at 24.

<sup>467</sup> *Ibid* at 25.



were reviewed.<sup>468</sup> Further, the Court pointed out that failure to comply with Part II, including section 11, “does not affect the validity of any policy, Act, regulation or instrument, except as provided in section 118.”<sup>469</sup> Section 118 limits applications for judicial review to the grounds that the Minister “failed in a fundamental way to comply with the requirements of Part II respecting a proposal for an instrument.” However, according to the Environmental Commissioner’s investigation, even this minimal formalistic process is not part of the aggregate licensing review process at the Ministry.<sup>470</sup> In light of this, the impact of the Statement on aggregate licensing is arguably quite limited.

If the Minister refuses the licence, notice must be served on the application with reasons.<sup>471</sup> No reasons are required for approval. The applicant is entitled to a hearing by the Board if notice is served.<sup>472</sup> Therefore the application may end up before the Board by referral or by appeal of a refusal. The proponent is automatically entitled to a hearing in the case of a refusal. Notably, unlike in referral hearings, objectors are not included as mandatory parties to a refusal hearing; only the Minister and the applicant are required, although the Minister has discretion to include other parties.<sup>473</sup> In practice, most controversial applications will end up being referred to the Board.

### B. Planning Act Approvals

Under the Act no licence can be issued if extraction is prohibited by an applicable zoning by-law.<sup>474</sup> Therefore, the Act requires the proponent to apply to local authorities for appropriate amendments to the Official Plan or By-Laws under the *Planning Act* before a licence can be issued. After the consultation process described above takes place, the Municipality must make a decision on the application.

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<sup>468</sup> *Ibid*, at para 24. See section 37.

<sup>469</sup> *Ibid*, at para 25. See also *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609 (CanLII), 2011 ONSC 609, 105 O.R. (3d) 111 (Div. Ct.).

<sup>470</sup> Environmental Commissioner of Ontario, *supra* note 270 at 25.

<sup>471</sup> The Act, *supra* note 36, s 11(10).

<sup>472</sup> *Ibid*, s 11(11).

<sup>473</sup> *Ibid*, s. 11(13).

<sup>474</sup>The Act, note 36, s. 12.1(1).

As set out in the *Planning Act*, all policy and decisions of municipal governments must be consistent with the Policy Statement.<sup>475</sup> Therefore, as Valiante notes, the areas of provincial interest and the Policy Statement are “potentially ambiguous and arguably contradictory”, leaving “room for interpretation by local councils and the OMB” about how to achieve the right balance between conflicting priorities.<sup>476</sup> The long-standing provincial interest in aggregate resources and their privileged position in the Policy Statement mean local decision makers are in fact highly constrained in the context of these applications. Further, despite the relative openness of municipal planning processes and the wide ability to make submissions, scholars have noted the potential for such processes to be dominated by well-resourced business or other private interests such as property-owners associations and the systemic lack of access for marginalized parties, such as tenants, low-income, and racialized or Indigenous persons or communities.<sup>477</sup> Therefore, it is unclear whether and how Councils will consider and be informed by views that challenge dominant people-place and socio-economic relations.

If the amendment is refused or if the municipality fails to adopt the amendment within 180 days for Official Plans, and 120 days for zoning by-law amendments, the proponent can appeal to the Ontario Municipal Board for a hearing.<sup>478</sup> Notably while a decision to deny an application requires reasons, none are required where an application is approved.<sup>479</sup> In practice, most controversial planning amendments, including those in relation to aggregate extraction applications, will be subject to an appeal to the Board.<sup>480</sup> However, the rarely invoked Minister’s Zoning Order power has also been applied in a recent quarry dispute.<sup>481</sup>

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<sup>475</sup> *Planning Act*, *supra*, note 87, s. 3. But, notably, s 66(1) of the Act limits municipal powers to regulate aggregate extraction: This Act, the regulations and the provisions of licences and site plans apply despite any municipal by-law, official plan or development agreement and, to the extent that a municipal by-law, official plan or development agreement deals with the same subject-matter as this Act, the regulations or the provisions of a licence or site plan, the by-law, official plan or development agreement is inoperative

<sup>476</sup> Valiante, *supra* note 22 at 112–113.

<sup>477</sup> Marcia Valiante, “Role of Local Governments in Great Lakes Environmental Governance: A Canadian Perspective, The” (2006) 40 U Mich JL Reform 1055 at 115; Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (University of Chicago Press, 2012).

<sup>478</sup> *Planning Act*, *supra* note 87 s. 34(11).

<sup>479</sup> *Ibid*, s 22 (6.7).

<sup>480</sup> Valiante, *supra* note 22 at 114.

<sup>481</sup> O Reg 138/10.

### C. The Ontario Municipal Board

The role of the Ontario Municipal Board is a key element in the regulation of aggregate extraction as the Minister routinely refers applications to the Board where members of the public and/or ministries, planning authorities and local governments file objections. It is a uniquely powerful institution, as recently noted by the Ontario Bar Association: “There is no tribunal in Ontario that has a similarly broad jurisdiction and responsibility as the OMB and there is no comparable tribunal or agency in any other province.”<sup>482</sup> An understanding of the Board’s powers and procedures is therefore essential to the context of aggregate extraction decisions.

A 2009 study on the relationship between the City of Toronto and the Board argued that the Board shifts responsibility for political planning decisions, particularly contentious development decisions, away from elected officials.<sup>483</sup> The study measured the relative success of private developers before the Board when compared to both the City and to community groups. Notably, it found not only that developers were significantly more successful before the Board, winning 64% of the time when directly opposing developers, but also demonstrated that the City fared significantly *worse* when aligned with a community group participating in the hearing.<sup>484</sup> As will be discussed below in Chapter Seven, aggregate extraction licence applications are overwhelmingly approved at the Board, despite a few notable exceptions in recent years.<sup>485</sup> Even in the *Niagara Escarpment Plan Area*, created in part in response to concerns about the impact of pits and quarries, the first application was not rejected until 2012 in the *Re Nelson Aggregates Co.* decision.<sup>486</sup> Indeed, in *Re Walker Aggregates Co.*, another 2012 case within the NEPDA, the majority of the panel approved a large quarry adjacent to an existing one,

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<sup>482</sup> Environmental Commissioner of Ontario, *Losing Touch: Annual Report 2011/2012 Part 1* (Toronto, Ontario, 2012) at 24.

<sup>483</sup> Aaron Alexander Moore, *Planning Politics in Toronto: The Ontario Municipal Board and Urban Development* (Toronto: University of Toronto Press, 2013).

<sup>484</sup> *Ibid.*

<sup>485</sup> See Rockfort, *supra* note 203.

<sup>486</sup> *Supra* note 93.

despite a strong dissent from the third panel member.<sup>487</sup> The Divisional Court denied the Niagara Escarpment Commission's application for leave to appeal in *Walker*.<sup>488</sup>

Where hearings related to the Official Plan and/or municipal by-law amendments are also required under the *Planning Act*, the proceedings will likely be consolidated.<sup>489</sup> In most aggregate conflicts both municipal and licensing issues are considered during a hearing. Therefore, the municipal decision-making process is relevant to the Board's decision. Since 1997 the *Planning Act* has stated that the Board "shall have regard to" decisions by municipal council or approval authorities made under the Act and related to the same matter, including the information and material considered by council.<sup>490</sup> This has been interpreted by the Board as a lower standard of deference than the "shall be consistent with" requirement applied to the Provincial Policy Statement, requiring the Board to "consider them carefully in relation to the circumstances at hand, their objectives and the statements as a whole, and what they seek to protect."<sup>491</sup> The Board has rejected the interpretation that this section binds the Board, citing the need to maintain its "independent decision making authority."<sup>492</sup>

The Board controls its own process as per s 91 of the *Ontario Municipal Board Act*<sup>493</sup> and s 25.1 of the *Statutory Powers and Procedures Act*<sup>494</sup> and has set out rules related to standing and the hearing process, including the form of documents and exhibits, filing and notice requirements, adjournment powers, mediation and the conduct of the proceedings in the *Ontario Municipal Board Rules of Practice and Procedure*. The Rules specify further discretion over their own procedure. For example, Rule 3 states that the

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<sup>487</sup> Ibid.

<sup>488</sup> *Niagara Escarpment Commission v. Joint Board*, 2013 ONSC 2497, leave to appeal denied.

<sup>489</sup> O Reg 30/02, Section 1 provides authority for the Board to consolidate, hear matters at the same time or one after another, or to stay or adjourn any matter until others are determined. Rule 58 of the OMB Rules details the difference between consolidation and being heard together. Consolidation unifies procedure, parties and evidence, whereas hearing together maintains separate procedures and parties.

<sup>490</sup> *Supra*, note 87

<sup>491</sup> *Concerned Citizens of King (Township) v King (Township)* (2000), 42 OMBR 3 (Div. Ct.) at 9.

<sup>492</sup> *Re Keswick Sutherland School Inc. and Halton (Region) and Halton Hills (Town)*, (24 July, 2009) PL080918, OMB.

<sup>493</sup> RSO 1990, c O.28 ["OMB Act"].

<sup>494</sup> RSO 1990, c S.22.

Rules “shall be liberally interpreted to secure the just, most expeditious and cost-effective determination” and Rule 4 considers matters that are not dealt with in the Rules.

The Board may at any time in a proceeding make orders with respect to the procedure and practices that apply in the proceeding. If these Rules do not provide for a matter of procedure, the Board may do whatever is necessary and permitted by law to enable it to adjudicate effectively and completely on any matter before it.<sup>495</sup>

Rule 5 guards against overly technical procedural objections, allowing for “substantial compliance with the Rules” and Rule 6 provides the Board with powers of exemption:

“The Board may grant all necessary exceptions from these Rules or from a procedural order, or grant other relief as it considers appropriate, to ensure that the real questions in issue are determined in a just, most expeditious and cost-effective manner.”

The combined effect is to provide the Board with considerable discretion to seemingly contravene specific rules while adhering to the broader scheme.

The Board retains screening power to dismiss a proceeding prior to the hearing on jurisdictional grounds and, in a range of municipal matters including official plan and zoning amendments. This includes where the Board finds no “apparent land use planning ground,” the failure to make prior submissions on the matter, or that the appeal was not made in “good faith, is frivolous or vexatious, or is made only for the purpose of delay.”<sup>496</sup> Therefore, as Valiante notes, “many issues, concerns, and values that might have been considered by council must be either abandoned or reformulated in a way that will qualify” on these grounds.<sup>497</sup>

#### *i. Standing and Participation at the Hearing*

Party standing, and full participation, before the Board is determined by the *Planning Act*, or the development permit regime applicable to a specific dispute, such as

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<sup>495</sup> Ontario Municipal Board Act, R.R.O. 1990, Reg. 889: Ontario Municipal Board Rules of Practice and Procedure, r 4 [“OMB Rules”].

<sup>496</sup> *Ibid*, r 56.

<sup>497</sup> Valiante, *supra* note 22 at 117.

the *Aggregate Resources Act*, and in many cases, linked to participation during the prescribed consultation period. Parties who object to an aggregate application during the initial 45-day notice process do have a presumptive right to be parties to hearings on applications referred under the Act,<sup>498</sup> though notably not an appeal of a ministerial refusal of an application.<sup>499</sup> The Act specifies that the Minister, the applicant and the objectors are parties to the hearing,<sup>500</sup> though the amendments make it optional for the Minister to join.<sup>501</sup> As noted above, since 2007 the right to appeal a municipal decision on an official plan amendment or a zoning by-law is restricted to persons who made oral or written submissions to council during the decision-making process.<sup>502</sup> Such persons can also be *added* by the Board as Parties to an appeal of a zoning by-law amendment but do not have a right of appeal for a zoning amendment.<sup>503</sup> The Board retains some discretion to add persons who fail to meet the *Planning Act* submission requirements if there are “reasonable grounds” to do so,<sup>504</sup> or “other such persons” under the Act.<sup>505</sup> Recent decisions indicate the Board has taken a strict approach to the submission requirements, including that oral submissions must be made at the statutory meeting not in another forum, and written submissions must describe the objection.<sup>506</sup>

Under the Board rules, Parties are defined as full participants in the proceedings, with the full range of rights, including:

- a) Serving and filing motions;
- b) Receiving copies of all documents exchanged or filed;

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<sup>498</sup> The Act, *supra* note 36, 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 it considers to not made in good faith, to be frivolous or vexatious, or to be made only for the purpose of delay.

<sup>499</sup> *Ibid*, s 11(13)

<sup>500</sup> *Ibid*, s. 8.

<sup>501</sup> *Aggregate Resources and Mining Modernization Act*, *supra* note 13, s 10(3).

<sup>502</sup> *Planning Act*, *supra* note 87, ss 17(24), 17(36), 34(19).

<sup>503</sup> *Ibid*, s 34(24.2).

<sup>504</sup> *Ibid*, ss 17(44.1)-17(44.3).

<sup>505</sup> The Act, *supra* note 36, s 11(b)(d).

<sup>506</sup> Re Pogachar, 2011 CarswellOnt 2966; Fancy Dell Development Inc. v Toronto (City), 2009 CarswellOnt 5880; Pemic Kmoka Development Corp, Re, 2009 CarswellOnt 2840; Re Angus Glen North West Inc., 2011 CarswellOnt 12479.

- c) Making opening and closing submissions;
- d) Presenting and cross-examining witnesses;
- e) Claiming or being subject to costs;
- f) Requesting a review of the Board decision.<sup>507</sup>

Parties are entitled to make a motion for discovery where another party has refused to provide information.<sup>508</sup> However, opportunities to participate are effectively limited by the ability to retain legal representation and fund independent technical expertise, as well as the onerous length and complexity of the hearings. Board rules also provide for discretionary “participant” status and many individuals and groups opt for this more limited role because of financial constraints or because the Board can grant “participant” status without an individual or group having made prior submissions under the *Planning Act* procedure.<sup>509</sup> Board practice is to grant such standing in most cases.<sup>510</sup> Participant status affords only the ability make a statement, rather than full participation. One more-than-owner party described the experience of being a participant: “We felt very token there. If you didn’t have a lawyer and you weren’t an “expert”, you didn’t feel like they were listening to you.”<sup>511</sup> In particular, participants are not entitled to call or cross-examine witnesses. Whether as parties or participants, individuals and groups involved in Board hearings face considerable conceptual and practical obstacles to meaningful participation, from the accepted language and narrative of planning considerations outlined in the Policy Statement and the relevant local development regime to the political and financial burden of retaining expertise and representation.

The Board also has a large role in pre-hearing mediation and case management. Board Associate-Chair S. Wilson Lee described the pre-hearing as follows:

[A] tool to map out, delineate the morphology of the issues. It is a forum to cull issues, to bring about a more rational organization of how hearings are to be segmented. Finally, it is the venue where the Board Member can probe and create a climate whether an alternative adjudicative mechanism can be

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<sup>507</sup> OMB Rules, *supra* note 495 r 32.

<sup>508</sup> *Ibid*, r 33.

<sup>509</sup> *Ibid*, r 2, 32.

<sup>510</sup> Bruce Wayne Krushelnicki, *A Practical Guide to the Ontario Municipal Board* (Toronto: Lexis Nexis, 2007); Moore, *supra* note 486.

<sup>511</sup> Interview, September 9, 2014.

deployed. For more complex cases, Members will work with the parties to design facilitation of expert witnesses; and, finally, work schedules for the hearings.

*ii. Witnesses – Experts and Non-Experts*

Witnesses, particularly expert witnesses on planning and technical or scientific matters, play an essential role in many land use hearings,<sup>512</sup> including aggregate extraction conflicts in which highly technical information is central to decision-making. As one lawyer told me, “Even with free legal counsel, you can’t do these cases without experts. It is never a legal issue. It is always the experts that are more important than lawyers in that setting.”<sup>513</sup> An expert working for more-than-owner parties noted while lawyers and planners “deal with the process”, without technical experts “the guns aren’t loaded” and parties are unlikely to succeed.<sup>514</sup> The Board Rules were amended in 2013 to include an amended Rule 21 requiring experts appearing on behalf of Parties to a hearing expected to be 10 days or more, or where requested by a Party, to sign the “Acknowledgment of Expert’s Duty” form stating the following or provide the same information in the body of their report:

I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

- a) to provide evidence that is fair, objective and non-partisan;
- b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
- c) to provide such additional assistance as the Board may reasonably require to determine a matter in issue.

Clause 4 also requires the expert to acknowledge this duty “prevails over any obligation” to the party they are engaged by or on behalf of. Rule 21 requires that the form, along with documentation of the expert’s qualifications, details of the issues he or she will address, the opinions, reasons and conclusions of the expert, and a list of reports or documents he or she will refer to, be served on other Parties and filed with the municipal clerk 30 days in advance of the hearing. The Rule 21.01 now also sets out the “Duty of the Expert Witness” in the same terms as above and including that these duties prevail.

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<sup>512</sup> Valiante, *supra* note 22 at 120; Moore, *supra* note 486 at 68.

<sup>513</sup> Interview, July 25, 2014.

<sup>514</sup> Interview, July 9, 2014.



These changes brought the Board's procedure for expert evidence in line with general civil practice under rule 4.1.01 of the *Rules of Civil Procedure*, which was introduced to respond to concerns about "opinions for sale" and expert reports and evidence being shaped by clients rather than the expert opinions of the professionals.<sup>515</sup> The changes, recommended by Justice Osborne in the Report for the Civil Justice Reform Project, clarified that the duty of the expert is to assist the court, first and foremost. Notably, the Report acknowledges a lack of enforceability may limit the impact of the rule, but concludes the change "cannot hurt the process and will hopefully limit the extent of expert bias."<sup>516</sup>

The role of experts and expertise is a particularly contentious issue before the Board<sup>517</sup> and the role of experts as "advocates" or "lobbyists" remains a concern for parties and for the planning profession.<sup>518</sup> Both more-than-owner and professional participants in this study noted problems with retaining expert witnesses because of the costs, but also because many experienced professionals were "conflicted out because they have all acted for the proponent at one time or another" and "few experts want to work for NGOs."<sup>519</sup> Several participants noted that they had "scoped down" or scaled back the issues they would challenge at the Board because of the cost of hiring multiple experts rather than based on the merit of the arguments.<sup>520</sup> The Board has the discretion to determine the weight that both expert and non-expert evidence will be given on any particular matter. Even where more-than-owner parties were able to retain witnesses, lawyer and expert participants in this study reported that the Board routinely gave more weight to proponent

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<sup>515</sup> Honourable Coulter A Osborne, QC, *Civil Justice Reform Project – Summary of Findings & Recommendations* (Toronto: Ministry of the Attorney General, 2007) at 71; Marc McAree & Robert Woon, "Experts in Environmental Civil Actions" (Paper, delivered at Ontario Bar Association Conference, 20 September 2012).

<sup>516</sup> Coulter, *ibid* at 72.

<sup>517</sup> See for example, Ontario (Ministry of Municipal Affairs & Housing) v Ontario (Municipal Board) (2001), 20 MPLR (3d) 93, 41 OMBR 257.

<sup>518</sup> Michael Melling & Matthew Di Vona, "Thoughts on the Role of the Planner as Lobbyist" 2013, online: < <http://www.davieshowe.com/thoughts-on-the-role-of-the-planner-as-lobbyist/>>. See also *Re Preston Sand and Gravel Co.* (2013), 78 OMBR 80, 81 CELR (3d) 95.

<sup>519</sup> Interview, July 25, 2014.

<sup>520</sup> Interview, July 25, 2014; Interview, August 13, 2014; Interview, August 23, 2014; Interview, August 29, 2014; Interview, September 09, 2014.

witnesses. One expert noted, “They do whatever they can to discredit you...there is always this stigma if you work for rate payers. You see it in Board decisions. It will say ‘we preferred the applicant’s witnesses’”.<sup>521</sup> Another more-than-owner group advised that their ecology witness on an endangered plant species was found not to be an “expert,” as he did not have academic credentials despite years of working in the field.<sup>522</sup> As a witness who regularly works for government and more-than-owner parties told me, because he grew up in areas near to some of the sites in the applications he appears on, he has been challenged as lacking objectivity rather than recognized as having relevant local expertise: “Everything is legal. It is process. Everything is strangers from away. They didn’t have any idea about the local agriculture.”<sup>523</sup>

Other witnesses also play a role in proceedings, including formal Participants and may be required under Rule 21.02 to provide a witness or participant statement, including, background, experience and interest in the matter, as well as details of the issues to be addressed, evidence to be presented, and any reports to be relied on. More-than-owner participants in this study shared experiences of engaging in the hearing process. One participant shared his sense that the affective dimensions were deemed irrelevant: “You take it on because you are human, yet you know full well that taking this emotional impact to the Board has really no factual bearing. [The] Board couldn’t care less if you cry.”<sup>524</sup> Another reflected on the process, “It doesn’t listen to the heart. It listens to legislation. I would think that rather than looking just at process, they should be looking at the heart of the matter, the emotions...they shouldn’t be just restricting it to legal issues and lawyers’ arguments.”<sup>525</sup> Thus more-than-owner parties are required to spend valuable resources on technical evidence, which is used by decision-makers to supplement the inadequate proponent data and the lack of state-funded assessment, and in doing so reinforce the exclusion of other issues, experience, knowledge, and values relevant to the people-place relations at stake.

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<sup>521</sup> Interview, July 9, 2014.

<sup>522</sup> Interview, August 3, 2014.

<sup>523</sup> Interview, July 9, 2014.

<sup>524</sup> Interview, February 13, 2014.

<sup>525</sup> Interview, August 23, 2014.

### *iii. Decisions: Powers of the Board*

The Board has exclusive jurisdiction to determine all questions of law and of fact in matters before it.<sup>526</sup> However, under the *Aggregate Resources Act*, the Minister can specify the issues that the Board can determine.<sup>527</sup> The Board can also refuse to consider certain objections and continue with a hearing on the basis of remaining objections under both the Act and its own Rules. As an administrative tribunal the Board does not follow the *stare decisis* principle and members may consider, but are not bound by, prior decisions of the Board.<sup>528</sup>

Section 12(1) of the Act sets out the matters that the Board, like the Minister, must consider:

- (a) the effect of the operation of the pit or quarry on the environment;
- (b) the effect of the operation of the pit or quarry on nearby communities;
- (c) any comments provided by a municipality in which the site is located;
- (d) the suitability of the progressive rehabilitation and final rehabilitation plans for the site;
- (e) any possible effects on ground and surface water resources;
- (f) any possible effects of the operation of the pit or quarry on agricultural resources;
- (g) any planning and land use considerations;
- (h) the main haulage routes and proposed truck traffic to and from the site;
- (i) the quality and quantity of the aggregate on the site;
- (j) the applicant's history of compliance with this Act and the regulations, if a licence or permit has previously been issued to the applicant under this Act or a predecessor of this Act; and
- (k) such other matters as are considered appropriate.<sup>529</sup>

In 2011, the Board in *Jennison Construction*, concluded that where a proponent has satisfied the Policy Statement and municipal land use tests, the tests in section 12 would

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<sup>526</sup> The OMB Act, *supra* note 493, s 35-36.

<sup>527</sup> *Ibid*, s. 11(5).

<sup>528</sup> For this reason consideration of specific cases before the Board is part of the analysis in Chapters 3 and 4 rather than treated here as a body of case law.

<sup>529</sup> The Act, *supra* note 36.

also be satisfied.<sup>530</sup> In that case the Board has also determined that the “minimize adverse interests” test set out in the Purpose of the Act must be addressed but concluded that it is less onerous than the “no negative impacts test” set out in the Policy Statement.<sup>531</sup> However, it should be noted that section 12 of the Act applies more widely to the “environment” rather than the specific natural heritage features considered under the Policy Statement, which are discussed in more detail below.

If the Board directs the Minister to issue a licence, then they can specify conditions. The Minister is not bound by the Board conditions if she finds they are not consistent with the Act.<sup>532</sup> The Provincial Standards impose a series of “Prescribed Conditions” for each category of licence, including dust mitigation, blasting standards and hours, maintenance of monitoring records, requirement to obtain any required Certificate of Approval and/or Permit to Take Water.<sup>533</sup> The standards also impose a set of “Operational Conditions,” governing basic aspects of extraction, fencing, transport, berms and some aspects of rehabilitation.<sup>534</sup>

Decisions by the Board are subject to an internal appeal under section 43 of the *Ontario Municipal Board Act*, which allows the Board to “rehear, review, rescind, change, alter or vary” it. Decisions are otherwise final; however, an application for leave to appeal on a question of law can be made to the Divisional Court under section 96(1).<sup>535</sup> The province does retain one unique and powerful tool to intervene on planning matters, such as appeals of official plans and amendments, through the ‘declaration of provincial interest power’ by the Minister of Municipal Affairs and Housing, which renders the Board decision subject to confirmation, variation or rescindment by the Lieutenant Governor in Council (in practice Cabinet).<sup>536</sup> This tool is rarely used.

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<sup>530</sup> Construction, *supra* note 248.

<sup>531</sup> *Ibid*, at para 139.

<sup>532</sup> *Ibid*, s. 11(8).

<sup>533</sup> *Supra*, note 177, s.3.0.

<sup>534</sup> *Ibid*, s. 5.0.

<sup>535</sup> *Supra*, note 489.

<sup>536</sup> *Supra* note 87, at s 17(51)-(54).

### **Part III: A Regulatory Regime in Flux – 2017 Amendments to the Act and the Niagara Escarpment Plan**

#### *A. Aggregate Resources Act Reform*

In 2011, during a provincial election campaign in which the proposed Melancthon Mega Quarry north of Toronto became a surprise campaign issue, the incumbent Liberals promised a legislative review of the Act.<sup>537</sup> In May 2012, they initiated an all-party review of the *Aggregate Resources Act* at the Standing Committee on General Government. The review included the consultation process, siting, operations, and rehabilitation, best practices and industry developments, fees and royalties, and, aggregate resource development and protection, including conservation and recycling.<sup>538</sup> It did not include provincial planning policy or any other municipal or provincial planning legislation, including consideration of the guiding Provincial Policy Statement or the role of the Ontario Municipal Board in aggregate resources matters.

On Friday May 4, 2012, the government announced that the review would begin the following Monday May 7, 2012, with hearings before the Committee on May 7, 9, 12 and 14 for 2 to 3 hours each day.<sup>539</sup> The Ontario Environmental Commissioner and several industry representatives were scheduled to depute during the first week. Similar to the Bill 52 process described above, no community groups, agricultural groups or environmental organizations were notified or scheduled to depute. The public, including such organizations, were invited to provide written comments or submit a request to depute during the remaining two days. After public outcry about the limited notice, the location of the hearings in Toronto and not in host-communities, and very limited spaces for deputation, the Committee held five additional public hearings in Toronto,

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<sup>537</sup> Brad Pritchard, ““Liberals promise to review aggregate rules”, *Simcoe.com* (20 September 2011) online: <http://www.simcoe.com/news/news/article/1107291>.

<sup>538</sup> Ontario, Legislative Assembly, *Orders and Notice Paper*, 40<sup>th</sup> Parl, 1<sup>st</sup> Sess (March 22, 2012).

<sup>539</sup> See announcement here: [http://ontla.on.ca/committee-proceedings/committee-hearings-notices/files\\_html/ARA%20English.htm](http://ontla.on.ca/committee-proceedings/committee-hearings-notices/files_html/ARA%20English.htm).

Orangeville, Kitchener, Kanata and Sudbury.<sup>540</sup> The Committee heard 86 depositions from industry, municipal representatives, the Environmental Commissioner of Ontario, community groups, environmental organizations, professional organizations and individuals.<sup>541</sup> Further comments could be submitted in writing. In addition, the Committee spent portions of four days visiting 12 operating, rehabilitated, proposed, or abandoned pits and quarries across Ontario. These visits were facilitated by, and accompanied by representatives from the Ontario Stone, Sand & Gravel Association, as well as individual aggregate companies and staff.<sup>542</sup> Members of the public or community were not invited to participate in site visits. While the Report notes a visit to the proposed site of the Melancthon Mega Quarry, local residents have noted that the members simply drove by a portion of the site, having declined an invitation to visit the adjacent farmland from local community members.<sup>543</sup>

When the Standing Committee on General Government released its report, the recommendations focused on nine areas: improving public information; licensing and fees; review of licences; the use of recycled materials; municipal responsibilities; agricultural land; water resources; rehabilitation; and alternative modes of transport.<sup>544</sup> Given its narrow mandate, it is not surprising that the recommendations deal exclusively with the managerial elements of the regulatory regime under the Act. With respect to the licensing process, a central issue for many submitters, the Committee emphasized the need for simplification and standardization, and the adoption of efficiency measures, such as digital data collection for inspections.<sup>545</sup> The Committee also focused on the use of recycled aggregates and the need to standardize and possibly increase fees.<sup>546</sup> The Report did recommend more scrutiny for significant site plan amendments and an increase in the

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<sup>540</sup> *Report on the Review of the Aggregate Resources Act*, supra note 12.

<sup>541</sup> Transcripts of the depositions can be found online, see [http://www.ontla.on.ca/web/committee-proceedings/committee\\_transcripts\\_current.do?ParlCommID=8958&locale=en](http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_current.do?ParlCommID=8958&locale=en).

<sup>542</sup> *Report on the Review of the Aggregate Resources Act*, supra note 12, Appendix A, 1.

<sup>543</sup> North Dufferin Agricultural and Community Task Force, email dated November 4, 2013, on file with author.

<sup>544</sup> *Report on the Review of the Aggregate Resources Act*, supra note 12.

<sup>545</sup> *Ibid* at 21–22.

<sup>546</sup> *Ibid* at 21, 23.

public notification period, as well as identifying the need for stronger requirements for rehabilitation on agricultural land and the assessment of cumulative impacts on water resources.<sup>547</sup> However, the report failed to address any of the deeper policy questions about the privileged status of aggregate extraction over other land uses, the limitations on the planning role of municipal governments, and the lack of acknowledgement of the rights of Indigenous communities. Indeed, the two recommendations related to municipal governments emphasize their circumscribed role, requiring them to “apply sound planning principles” to the separating land uses and minimizing “disruption and tension with current or future non-aggregate land uses.” Additionally, they recommended Municipalities work with relevant ministries in the exercise of their responsibilities to protect aggregate resources, accommodate extraction, and develop “suitable relationships with neighbouring land uses.”<sup>548</sup>

In February 2014 the government released its “Comprehensive Government Response to Standing Committee on General Government’s Report on the Review of the *Aggregate Resources Act*” responding to the Report.<sup>549</sup> In some respects the government response went further than the Committee. They explicitly mentioned the need to meet constitutional and other obligations to Aboriginal peoples, including the distinctive nature of the Duty to Consult and accommodate.<sup>550</sup> They also noted that it might be necessary go beyond the recommendations made by the Committee with respect to site plan amendments and agricultural land.<sup>551</sup> They promised consultations with stakeholders and Aboriginal communities on several issues: changes and enhancement to information and studies required in the application process; changes to notification and consultation requirements; agricultural impacts; and the site plan amendment process. However, they also reinforced the limited role for municipal planning, only offering enhanced geological

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<sup>547</sup> *Ibid.*

<sup>548</sup> *Ibid* at 24.

<sup>549</sup> Ministry of Natural Resources Ontario, *Comprehensive Government Response to Standing Committee on General Government’s Report on the Review of the Aggregate Resources Act* (Toronto: Queen’s Printer, 2014).

<sup>550</sup> *Ibid* at 4–5.

<sup>551</sup> *Ibid* at 4, 12.

information to allow municipalities to implement the Policy Statement – in other words, preserving and protecting aggregate minerals and extraction sites.<sup>552</sup>

A series of sessions were held with key stakeholders, agencies, and First Nation and Métis communities and a consultation paper was developed to seek feedback on proposed changes. The “Blueprint for Change: A Proposal to modernize and strengthen the *Aggregate Resources Act* policy framework” document was posted to the Environmental Registry on October 21, 2015 with 55 days for public comment.<sup>553</sup> The Ministry received 451 comments.<sup>554</sup> The Blueprint was cautiously well received.<sup>555</sup> As noted in the EBR summary, comments strongly support changes to the regime but specific proposals received mixed reaction. Notably the EBR summary notes that a large number of submissions called for more transformative change to Ontario’s planning law and policy than the Blueprint offered with respect to the protection of water and agricultural lands. Further, several comments emphasized the rights of Indigenous communities as well as the Duty to Consult. Many supportive commentators did note omissions or concerns including the failure to require an analysis of need.<sup>556</sup> Following the Blueprint consultation, some further targeted consultation took place. Bill 39, *An Act to Amend the Aggregate Resources Act and the Mining Act*, was introduced in October 2016 and received Royal Assent in May 2017 at the very late stages of this project. Table 4 at the end of this chapter summarizes the changes proposed in the Blueprint. The bolded text indicates where a proposal has been incorporated directly in the amendments to the Act,

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<sup>552</sup> *Ibid* at 11.

<sup>553</sup> See EBR Posting 012-5444.

<sup>554</sup> These comments have not been included in the analysis in this project; however, several submissions were reviewed. Online comments are available for public review online on the EBR at Posting 012-5444.

<sup>555</sup> Ontario Federation of Agriculture, Re: EBR Registry Number 012-5444 A Proposal to modernize and strengthen the Aggregate Resources Act policy Framework (Ontario: Ontario Federation of Agriculture, 2015); Corporation of the Town of Milton, Aggregate Resources Act Review (Milton, ON: Corporation of the Town of Milton, 2015); Development Approval and Planning Policy Department, Town of Caledon Comments on the Province of Ontario Paper: A Blueprint for Change - A Proposal to modernize and strengthen the Aggregate Resources Act policy Framework (Caledon, ON: Town of Caledon, 2015); Ontario Professional Planners Institute, Re: A Blueprint for Change: A Proposal to modernize and strengthen the Aggregate Resources Act Policy Framework: EBR Registry Number 012-5444 (Toronto: Professional Planners Institute, 2015).

<sup>556</sup> Canadian Environmental Law Association, Re: A Blueprint for Change: A Proposal to modernize and strengthen the Aggregate Resources Act policy Framework: EBR Registry Number 012-5444 (Toronto: Canadian Environmental Law Association, 2015); Corporation of the Town of Milton, *supra* note 558.



including the section number in the Bill. Several of the changes have been noted above in this chapter's discussion of the legal and policy framework.

Most of the Blueprint proposals were not directly incorporated into the amended Act. Like its predecessors, the amended Act is enabling legislation and much of the detailed content is left to future regulations or to the discretion of the Minister. The current Minister, Kathryn McGarry, noted this in her introduction of the Bill for second reading: "Should this bill pass, we will continue to move forward with our phased approach, with changes to regulations and provincial standards, including changes to fees to come soon after passage."<sup>557</sup> She noted that the government will provide for further consultation in the development of further regulations. However, with the exception of regulations related to fees, there is neither a timeline nor any specific proposal for this process at this time.

As a result, few of the more substantive proposals have been realized at the time of writing. Indeed, some of these could lead to a range of outcomes depending on what is actually proposed, which could then exacerbate the challenges faced by more-than-owner parties and municipalities under the current framework. For example, as one submission noted, while recycling of aggregate materials is important, the increased emphasis on recycling at aggregate extraction sites could increase the pressure on rural areas to accommodate impactful industrial activities largely related to urban growth and development. In my view, the changes will do little to ensure the complex socio-materiality of the places at stake is foregrounded in future aggregate resource decisions. The Act continues to be a proponent-driven regime and nothing in the Blueprint suggests Ontario will move towards a broader publically driven strategic planning process for aggregate minerals under future regulatory changes. Nor does it suggest any meaningful increase in the capacity of the Ministry to deal with compliance issues and increase enforcement activities.

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<sup>557</sup> Ontario, Legislative Assembly, Official Report of Debates (*Hansard*), 41<sup>st</sup> Parl, 1<sup>st</sup> Sess, (27 October 2016) at 16:40.

Several members at Committee and stakeholders have expressed concern about the lack of detail in the Bill and submissions from several parties suggested that it should not go forward until the proposed regulations are prepared and available for public review.<sup>558</sup> New Democratic Member Michael Mantha noted at third reading: “Again, the government is asking this Legislature to trust. This enabling legislation is vague and leaves almost all of the crucial details to regulations.”<sup>559</sup> Progressive Conservative member Todd Smith observed, “In the 37 pages of legislation that deal with aggregate resources, there were 59 references to regulation in the bill as it was before us at second reading.”<sup>560</sup> New Democratic member Jennifer French had specific concerns about the substantive content that was left to Cabinet at second reading, none of which have been resolved to date:

There are no interpretive guidelines or tools for approval authorities to help them balance the need for aggregate operations with other public interests. There is still no clear obligation to screen out pit or quarry applications that conflict with the government’s own protections for natural heritage or source water, as the Environmental Commissioner recommended a decade ago. If the government is sincere about modernizing the ARA to provide better environmental safeguards, then it should demonstrate this in the legislation.<sup>561</sup>

While the Blueprint and Bill 39 were not the subject of this dissertation, this brief review informs the recommendations and conclusions found in Chapter 9. It is not intended to be comprehensive. Indeed, as the Act continues to be enabling legislation and much of the substantive content is either contained in the Provincial Policy Statement, or is to be included in future regulations or internal Ministry policy, it is premature to offer a comprehensive analysis. Many of the government’s own proposals fall outside of the

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<sup>558</sup> Halton Area Planning Partnership, *Bill 39 - An Act to amend the Aggregate Resources Act and the Mining Act Joint Submission*, PD-053-16 (Halton Region, ON: Halton Area Planning Partnership, 2016); Corporation of the Town of Milton, *Planning Report - Aggregate Resources Act Review*, PD-053-16 (Milton, ON: Corporation of the Town of Milton, 2016).

<sup>559</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41<sup>st</sup> Leg, 2<sup>nd</sup> Sess, (11 April 2017) at 1650 (Michael Mantha).

<sup>560</sup> *Ibid.*, at 1700 (Todd Smith).

<sup>561</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41<sup>st</sup> Leg, 2<sup>nd</sup> Sess, (15 November 2016) at 0940 (Jennifer French)

amendments, making it difficult to assess whether these proposals will be incorporated and what impact they might have. As well, changes to the Policy Statement were outside of the review and the amendment process, leaving the fundamental assumptions about land use, development, and the privileged position of aggregate extraction unchanged, and even reinforced. Amendments to the Niagara Escarpment Plan described below also fail to challenge the hierarchical ordering of interests and actors in the context of aggregate mineral development.

#### B. The 2015 Co-ordinated Provincial Plan Review: Changes to the Niagara Escarpment Plan

As noted above, The NEPDA requires the government to review the Plan regularly and now requires that it be reviewed at the same time as the Greenbelt Plan under the Greenbelt Act under s.17 (1). A coordinated review of these and other Provincial Plans, including the Oak Ridges Moraine Conservation Plan and the Greater Golden Horseshoe Growth Plan began in 2015.<sup>562</sup> The coordinated review began in 2015 with an appointed advisory panel who developed a set of recommendations.<sup>563</sup> The Panel members included former Toronto Mayor David Crombie, a municipal planner, a geologist and former Ministry of Natural Resources employee, and representatives from the Ontario Federation of Agriculture, the development industry, and the viticulture industry. The review included public and stakeholder consultation and the Commission and other arms-length agencies participated in this process. Initial public consultation took place through online submissions and a series of public meetings in March, April and May 2015. The government developed draft plans and released these for a period of public comment until October 2016.<sup>564</sup> More than 1,000 comments were received on the draft plans. Final revised plans were expected in early 2017, but had only just been released as this project was completed.<sup>565</sup> A detailed analysis is therefore beyond the scope of this project.

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<sup>562</sup> More information about the coordinated review and the new plans can be found on the Ontario Ministry of Municipal Affairs and Housing website: <http://www.mah.gov.on.ca/Page10882.aspx>. See, the guiding document for public consultation, (Our Region, Our Community, Our Home, 2014).

<sup>563</sup> Co-ordinated Land Use Planning Review Advisory Panel, *Planning for Health, Prosperity and Growth in the Greater Golden Horseshoe: 2015 – 2041* (Toronto: Queen’s Printer, 2015).

<sup>564</sup> The four amended Plans can be viewed online: <http://www.mah.gov.on.ca/Page10882.aspx>.

<sup>565</sup> The final revised Plan was released in May 2017 and takes effect as of June 1, 2017.

Proposals and revisions directly related to aggregate minerals are briefly reviewed below but were not the subject of this research. The Minister of Natural Resources makes any final decisions about changes to the NEP pursuant to the review, as per section 17 (3).

As part of the review, the Commission provides the Ministry with recommendations related to the NEP. The Commission prepared for the 2015 statutory review of the NEP and the Provincial Plans with a series of Staff Reports and conversations about key issues at the Commission. In September 2014, the Commission considered a staff report on whether, 30 years later, Commission aggregate mineral policies had realized the goals and intentions of the NEPDA, or whether changes were required to achieve protection of the Escarpment.<sup>566</sup> Many of the groups who participated in the research for this dissertation made submissions to the Commission on the aggregate policies, calling for an end to, or moratorium on, aggregate extraction in the NEPA. Despite the modest recommendation by planning staff to “review and improve existing policies and development criteria,” in September 2014 the Commission voted 7 to 5 to end aggregate extraction in the NEPA. Commissioners characterized the staff recommended options as “business as usual” and concluded, “[I]t is time to get back to first principles. There has been a long period of accommodating aggregate extraction. It is time to transition and phase this use out of the NEP.”<sup>567</sup> In November 2014 staff presented a follow up memo detailing how these changes would work in practice.<sup>568</sup>

The Commission made a submission to the Advisory panel in May 2015 and made final submissions in December 2016. Their 2015 submissions included the recommendation

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<sup>566</sup> Niagara Escarpment Commission, *Topic 6: Aggregate Resources Policies*, Niagara Escarpment Plan Review 2015 Discussion Paper (Georgetown, ON: Niagara Escarpment Commission, 2014).

<sup>567</sup> Personal correspondence, October 7, 2014. Commission discussion papers and Minutes of Commission policy meeting are available online: <http://www.escarpment.org/planreview/NECDiscussionPapers/index.php>. See the September 17 minutes for the decision referenced here.

<sup>568</sup> Niagara Escarpment Commission, *Topic 6: Aggregate Resources Policies - Addendum 1*, Niagara Escarpment Plan Review 2015 Discussion Paper (Georgetown, ON: Niagara Escarpment Commission, 2015).

that no new mineral aggregate operations would be permitted in the NEP area.<sup>569</sup> The revised Plan did not adopt this position and maintains that new Mineral Resource Extraction Areas producing more than 20,000 tonnes can be considered through a plan change.<sup>570</sup> No plan change is required for extraction under 20,000 tonnes.<sup>571</sup> It also expressly incorporates the lack of a needs analysis as set out in the Provincial Policy Statement directly into the Plan.<sup>572</sup> The Commission has historically opposed this clause,<sup>573</sup> and has relied on a 2001 protocol with the Ministry acknowledging the Commission’s authority to consider need. While applicants were not required to submit evidence on need under the protocol, MNR would provide expert advice. For a number of years the protocol informally remained in place and need has been considered in applications within the NEP.<sup>574</sup> In 2010, the protocol was updated to reflect the 2005 Policy Statement, which as described above, expressly excludes needs analysis. Nonetheless, the Commission has continued to draw attention to the relevance of need in considering the justification for a particular development since the renegotiation of the protocol.<sup>575</sup>

Section 1.2.2 of the new Plan revised the requirements for amendments for Mineral Resource Extraction Areas. It expressly excludes “demonstration of need” for the resource, making the Plan consistent with the Policy Statement. It also revises the criteria to be considered as follows:

- a) protection of the *Escarpment environment*;
- b) opportunities for achieving the objectives of the *Niagara Escarpment Planning and Development Act* through the final

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<sup>569</sup> Niagara Escarpment Commission, Coordinated Land Use Planning Review: Recommendations to the Minister of Natural Resources and Forestry on Policy Revisions to the Niagara Escarpment Plan, Niagara Escarpment Commission Staff Report (Georgetown, ON: Niagara Escarpment Commission, 2015) at Appendix C, 62-69.

<sup>570</sup> NEP 2017, *supra* note 348, s 1.2.2.

<sup>571</sup> *Ibid* at 1.5.3.

<sup>572</sup> *Ibid* at 1.1.2(2).

<sup>573</sup> Niagara Escarpment Commission, The Niagara Escarpment Commission’s Recommendations on Part 2.5 Mineral Aggregates Planning Reform Provincial Policy Statement Draft Policies (Toronto: Queen’s Printer, 2003).

<sup>574</sup> Niagara Escarpment Commission, Initial Staff Report - Proposed Niagara Escarpment Plan Amendment PG 159/05 (Harold Sutherland Construction Ltd) (Georgetown, ON: Niagara Escarpment Commission, 2010) at 10–11.

<sup>575</sup> Niagara Escarpment Commission, *Re: Five Year Review of the Provincial Policy Statement* (Toronto: Queen’s Printer, 2010) at 6.

- rehabilitation of the site;
- c) the protection of *prime agricultural areas*, the capability of the land for *agricultural uses*, and its potential for rehabilitation for *agricultural uses*; and
- d) opportunities to include rehabilitated lands in the Niagara Escarpment Parks and Open Space System.

Notably, the new criteria substitutes the very broadly defined term *Escarpment environment* for the much more specifically defined former “natural and cultural environment” outlined above, which included endangered (both regulated and non-regulated), rare, special concern and threatened species habitat. *Escarpment environment* is defined in the new Plan as “the physical and natural heritage features, *cultural heritage resources*, and *scenic resources* associated with the Escarpment landscape.”<sup>576</sup> It remains to be seen how this will be interpreted by the Commission and the Board and whether it includes the same considerations included in the form criteria. The new criteria does add express consideration of *prime agricultural lands*; however, it removes the “maintenance and enhancement” standard for the “quality and character of natural systems, water supplies, including fish habitat” from the amendment considerations.<sup>577</sup> While the revised general development criteria does include protection and, “where possible”, enhancement for “key natural heritage features and functions” and “*scenic resources* and *open landscape character*,” these are considered at the development permit stage rather than the primary inquiry into whether the plan should be amended.<sup>578</sup> Further, the revised Plan’s development criteria provides an express exception for mineral aggregate extraction within the habitat of endangered and threatened species in accordance with the exceptions under the *Endangered Species Act* described above.<sup>579</sup> Many of the “key natural heritage features” are narrowly defined as those already designated as “significant”.<sup>580</sup> The Commission’s final recommendations opposed the exception for mineral aggregate extraction and state that this policy is “inconsistent with the NEP objectives for protection of key natural heritage features” and “would be considered a lowering of the standard for protection of habitat of species at risk”.<sup>581</sup> In my view,

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<sup>576</sup> 2017 NEP, *supra* note 348, Appendix 2.

<sup>577</sup> *Ibid*, s 1.2.2.

<sup>578</sup> *Ibid*, s 2.7.

<sup>579</sup> *Ibid*, 2.7.8.

<sup>580</sup> *Ibid*, s 2.7.1.

<sup>581</sup> Niagara Escarpment Commission, *supra* note 572 at 70–71.

despite the position taken by the Commission in the lead up to the review, the revised 2017 Plan has weakened both the amendment criteria and the development criteria with respect to aggregate mineral development in the Niagara Escarpment Plan Area.

### C. Ontario's Aggregate Reform: Opportunity Lost

In my view, the recent review and amendment process is a lost opportunity to bring about transformative change in the provincial land use law framework. Instead, the amendments reinforce the closure of the planning system to public debate and contestation by exacerbating the highly discretionary nature of aggregate mineral regulation and the determinative agency of the aggregate industry. They fail to respond to the long-standing crisis in enforcement capacity and the lack of consultation and accommodation for Indigenous rights. Perhaps most importantly, they leave the hierarchical ordering of land uses in the Policy Statement unchallenged. The changes uphold and reinforce the primacy of private ownership in a proponent driven framework and a model of planning foregrounding a development-oriented and narrow view of people-place relations. Therefore, despite six years of efforts on the part of legislators and interested parties throughout the province, little has changed for Ontario's quarry stories. Individual site-specific land use planning conflicts will continue to provide the limited but strategic openings for the assertion and articulation of alternative people-place relations in Ontario's land use law; however, the planning system remains closed to the values such as ecological integrity and just sustainability and to relations of the places at stake. Aggregate proposals will continue to be amongst the most contentious land use disputes in the province and more-than-owner parties will face the same barriers not only to participation, but also to the inclusion and meaningful consideration of their articulations about the people-place relations at stake.

### **Conclusion**

This chapter provided a detailed overview of the legal and policy framework through which aggregate extraction is governed in Ontario. In particular, it considered the structure of relations established and upheld by the Act and the Policy Statement, examined the role of decision makers, owners and more-than-owner parties in the formal

processes engaged by aggregate extraction decisions, and introduced recent and ongoing amendments to the relevant statutes and instruments. The following chapters build on the detailed understanding of the legal and policy framework developed here to undertake an eco-relational assessment of Ontario's quarry conflicts and the people-place relations at stake.



<b>Proposed Changes for New Applications</b>	<b>Proposed Changes for Existing and Future Sites</b>	<b>Proposed Changes to Fees and Royalties</b>	<b>Other Proposed Changes</b>
Enhanced requirements for impact studies for natural environment, water, cultural heritage, noise traffic and dust	<b>Power to require studies, information (ss 45, 62.3, 62.4), and updated site plans (ss 13(1), 25, 31)</b>	<b>Alignment of fees between crown and private land (Proposed changes to Regulation 244/97)</b>	<b>New powers in relation to Aggregate Resources Trust (s 6(1))</b>
Requirement for agricultural impact studies on prime agricultural lands or lands within prime agricultural areas	<b>Ability to establish conditions related to source water protection plans (s 13(1), 13(3), 23, 25, 31, 37(1))</b>	Disbursement of fees outside of municipalities	<b>All specific requirements for applications, amendments, and reporting to regulations and standards (ss 7, 13(1), 16(1), 21(2), 30, s 49(3),</b>
Enhanced summary statement requirements for all applications	<b>Standardizing tonnage to include recycled aggregate from site (s 53)</b>	Index fees and royalties to the Consumer Price Index	<b>Consolidate definitions of rock (s 49(1))</b>

Requirement to establish a maximum disturbed area in site plan, to be incorporated as condition	<b>Reporting requirements for site rehabilitation (s 39, 49(11)) and removal of recycles/blended materials</b>	<b>Royalty applied to aggregate sites subject to mining leases (s 38)</b>	Powers to establish programs to certify and train aggregate operations
Plain language summaries for proposals and technical studies	Requirement for record-keeping on importation of fill for rehabilitation and clarification of record-keeping during operations	<b>Establish fees in regulation (ss 7, 26, 49(6))</b>	Elimination of hearings for revocation for non-payment of royalty for permits
Online information requirements for applications 1 million tonnes +	Streamline self-compliance reports from annual to bi- or tri-annual depending on Class of licence/permit	<b>Power to waive fees on private land (s 7(4.1), 14)</b>	<b>Minister <i>may</i> rather than must be a party at the Board (s 10(3))</b>
List of notified agencies to include Ministry of Transportation, Conservation Authorities, and source water protection authorities	Establishing list of significant amendments requiring circulation with exceptions available	<b>Regulatory power to address unanticipated needs in relation to fees (s 49)</b>	<b>Contact information for participants are public record (ss 10(2), 20(3), 29)</b>

Ministerial discretion to waive publicity requirements for remote or isolated areas or if not feasible, or where substitute plan approved

Criteria for determination of notification requirements for amendment proposals

**Requirement for “adequate” consultation with Aboriginal communities (s 2)**

**Self-filing of amended site plans for minor changes that would be in effect once filed (s13(1), 25, 31)**

Digital submissions

**Remove minimum fine to allow for the use to tickets under the *Provincial Offences Act* (s 42)**

Requests for existing site to extract below the water table to require a new application

**Increase maximum fines to 1,000,000 plus an additional \$100,000/day for continuation of offence (s 42)**

**Removal of sections requiring licensee to serve copies of approvals and site plans to municipalities (ss 12, 24)**

**New applications for small, temporary extraction on farms, extraction of pre-existing stockpiles of Crown-owned aggregate (s 7(1), 28(1), 28(2), 28(3), 41(1), 49(2), 49(10))**

**Clarify that it is an offence to provide false information related to any reporting requirement (s 41(1))**

**Ability to waive application requirements (ss 8, 9, 10, 11)**

**No-consent transfer power for sites using Crown-owned aggregate (s 34, 35)**

**Ability to refuse applications on Crown land**

**Liability protection for ministry employees (s 4)**

**Enabling power to provide for peer review requirements for technical studies (s 45)**

New definition of “established sites” to allow for grandfathering in newly designated areas

Permit by rule for low-risk activities with rules and maximums for extraction on private land for personal use

Conditions and time limits for primary purpose exemption orders

**Table 4: 2017 Amendments to the Aggregate Resources Act**

## Chapter Five – Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning<sup>1</sup>

### 1. 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 relationship 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>2</sup> is informed by specific and “locatable” legal and cultural narratives about what property is, and what it does.<sup>3</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>4</sup> and to critically examine the ways in which it shapes our relationships with the non-human environment.

According to American property theorist Carol Rose, private property regimes “hold together only on the basis of common beliefs and understandings.”<sup>5</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

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<sup>1</sup> Originally published as Van Wagner, E. (2013). Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning. *Revue général de droit* 43, 271. Portions of this Chapter are the same or similar to portions of Chapters 1, 2 and 4. These portions are italicized to alert the reader what is repeated and allow them to skip these portions as desired. Citation style has been maintained as in the publication.

<sup>2</sup> 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.

<sup>3</sup> Libby Porter, *Unlearning the Colonial Cultures of Planning*, (Burlington, VT: Ashgate Publishing Company: 2010) at 44.

<sup>4</sup> Nicholas Blomley, “Remember Property” (2005) 29 *Progress in Human Geography* 125 [Blomley, “Remember Property”].

<sup>5</sup> Carol M Rose, “Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership,” (Boulder, CO: Westview Press: 1994) at 5

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 II 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>6</sup> Part III 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>7</sup> in land use conflicts is explored by bringing together Graham’s property critique and Jennifer Nedelsky’s relational analysis. In Part IV, I consider these relational perspectives in the context of recent aggregate extraction conflicts in Ontario, which have emerged as some of the most contentious environmental disputes in the province.<sup>8</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. Part V 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.

## **2. 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>9</sup> A multitude of valuable and

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<sup>6</sup> Nicole Graham, *Landscape: Property, Environment, Law*. (New York, Routledge: 2011) [Graham, *Landscape*].

<sup>7</sup> Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Toronto: Oxford University Press, 2011) [Nedelsky, “Law’s Relations”].

<sup>8</sup>“Land Use Planning in Ontario: Recommendations of the Environmental Commissioner 2001-2011” (2011): <http://www.eco.on.ca/blog/2011/01/25/land-use-planning-in-ontario-ten-years-of-eco-recommendations/> [Environmental Commissioner]. “Aggregate” is defined in s.1 of the ARA as “gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite and rock, or other prescribed material”.

<sup>9</sup> Blomley, “Remember Property”, *supra* note 4 at 126; Nicole Graham, “Owning the Earth” in *Exploring Wild Law*, Peter Burdon, Ed. Wakefield: Kent Town, South Australia, 259-269 at 261 [Graham, *Owning*].

diverse critiques of the historical development and contemporary application of property in legal theory and practice exist within legal scholarship and other disciplines.<sup>10</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 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>11</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>12</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>13</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>14</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>15</sup> The right to

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<sup>10</sup> See Margaret Davies, *Property: Meanings, History, Theories*. (London, Routledge: 2007) for an excellent overview [Davies]. See also, C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, (Oxford, Oxford University Press: 1962); Allan Pottage, “Instituting Property”, (1998) 18 *OJLS*; Kevin Gray, “Property in thin air” (1991) 50 *CLJ*; Nicholas Blomley, David Delany and Richard Ford. *The Legal Geographies Reader: law, power, space*. (San Francisco, Wiley-Blackwell: 2001); Hilarly Lim and Anne Bottomley, eds. *Feminist Perspectives on Land Law*. (New York, Routledge: 2007)

<sup>11</sup> Graham, *Landscape*, *supra* note 6 at 27.

<sup>12</sup> John Borrows, “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47 *UTLJ* 417 at 427.

<sup>13</sup> *Ibid*, at 445; Porter, *supra* note 3 at 151.

<sup>14</sup> Graham, *Landscape*, *supra* note 6 at 2.

<sup>15</sup> Carol Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership*. (Boulder, CO: Westview Press: 1994) at 5 [Rose]; Graham, *Landscape*, *supra* note 6 at 24.



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 transform or destroy it.<sup>16</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>17</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>18</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>19</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>20</sup> Dephysicalized property protects value rather than things.<sup>21</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>22</sup>

Graham traces dephysicalisation in property law to Locke’s “uncanny rationalisation of the physical severance of people and place.” Linking this separation of people and place with the imposition of colonial legal order, Graham argues that laws derived from this model make certain kinds of land use possible.<sup>23</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>24</sup> However, she argues, people-place relationships are

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<sup>16</sup> Graham, *Owning*, *supra* note 9 at 266; Kate Galloway, “Landowners’ vs. Miners’ Property Interests: The unsustainability of property as dominion” (2012) 37 *Alt L J* 77 at 80 [Galloway].

<sup>17</sup> Graham, *Landscape*, *supra* note 6 at 169.

<sup>18</sup> Nedelsky, “Law’s Relations”, *supra* note at 7 95.

<sup>19</sup> Rose, *supra* note 15 at 20, 28; Graham, *Owning*, *supra* note 9 at 261.

<sup>20</sup> Graham, *Landscape*, *supra* note 6 at 160.

<sup>21</sup> Kenneth J. Vandavelde “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property” 29 *Buff. L. Rev.* (1980) at 259-60 [Vandavelde], discussing Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” 23 *Yale L.J.* 16 (1913); Hohfeld, “Fundamental Legal Conceptions As Applied in Judicial Reasoning” 26 *Yale L.J.* 710 (1917).

<sup>22</sup> Vandavelde, at 360.

<sup>23</sup> Graham, *Landscape*, *supra* note 6 At 160.

<sup>24</sup> *Ibid*, 5, 7.

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>25</sup> The result, Graham argues, is a “maladapted” and dysfunctional system of land use law.<sup>26</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 materialization 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>27</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>28</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 legal and cultural recognition and treatment of such claims in decision-making processes related to land use and environmental planning.<sup>29</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>30</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.

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<sup>25</sup> *Ibid*, at 7.

<sup>26</sup> *Ibid*, at 206.

<sup>27</sup> *Ibid*, at 183-4.

<sup>28</sup> J. David Wood, “Making Ontario: Agricultural Colonization and Landscape Recreation Before the Railway” (Montreal & Kingston, McGill-Queens University Press: 2005).

<sup>29</sup> Graham, *Owning*, *supra* note 9 at 261.

<sup>30</sup> Graham, *supra* note 6 at 20; John Borrows, “With or Without You: First Nations Law (In Canada)” (1996) 41 *McGill L.J.* 629; G. Wa and D. Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet’suwet’en Hereditary Chiefs in the Supreme British Columbia 1987-1990*. (Gabriolla, BC, Reflections: 1996).

### 3. 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>31</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>32</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>33</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 limited use.”<sup>34</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>35</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>36</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>37</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

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<sup>31</sup> Graham, *Landscape*, supra note 6 at 185-6.

<sup>32</sup> Margaret Davies, “Persons, Property, Community”, 2012 2 *feminists@law* at 13, <http://journals.kent.ac.uk/index.php/feministsatlaw/issue/current> [Davis, “Persons, Property, Community”].

<sup>33</sup> *Ibid*, at 14.

<sup>34</sup> *Ibid*, 15-16.

<sup>35</sup> *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 (<http://www.nrm.gov.au/funding/stewardship/index.html>).

<sup>36</sup> Nedelsky, “*Law’s Relations*”, supra note 7; “Law, boundaries, and the bounded self” 1990 30 *Representations* 162.

<sup>37</sup> “*Law’s Relations*”, supra note 7 at 65.

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>38</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>39</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>40</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 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>41</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>42</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>43</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>44</sup>

In fact, she notes, the etymological origins of the word “property” invokes a “mutually formative” relationship between property and identity.<sup>45</sup> In the original sense, property was

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<sup>38</sup> *Ibid*, at 4.

<sup>39</sup> *Ibid*, at 373.

<sup>40</sup> *Ibid*, at 196.

<sup>41</sup> *Ibid*, 117.

<sup>42</sup> *Ibid*, at 152.

<sup>43</sup> *Ibid*, at 199.

<sup>44</sup> Graham, *Landscape*, *supra* note 6 at 18.

<sup>45</sup> *Ibid*, at 26.

all about the interconnections between people and things, with land in particular being central to the formation of identity for individuals and communities.<sup>46</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>47</sup>

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 meaningfully 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 “dissenting voices.”<sup>48</sup>

Nedelsky proposes a four-step approach to resolving a particular dispute.<sup>49</sup> Her approach is based on her distinction 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>50</sup> Rights, in Nedelsky’s model, 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

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<sup>46</sup> *Ibid*; David Seipp, “The Concept of property in the early common law” 1994 12 *Law and History Review*, 29 at 49.

<sup>47</sup> *Ibid* at 27; Davies, *supra* note 10 at 27; David Lametti, “The concept of property: relations through objects of social wealth” 2003 325 *UTLR* 325 at 354.

<sup>48</sup> Graham, *supra* note 7, at 163.

<sup>49</sup> “*Law’s Relations*”, *supra* note 7 at 236.

<sup>50</sup> *Ibid*, at 241.

mind, the question becomes how would different types of rights structure relations differently in the relevant context?<sup>51</sup>

Creating space for articulations and assertions of the people-place relationship 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>52</sup> Feminist family property litigation has also successfully challenged law's construction of ownership and property relationships.<sup>53</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 I 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 and use them to reorient property and rights towards environmental justice.

#### **4. In Context: Aggregate Extraction, Place and Property<sup>54</sup>**

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

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<sup>51</sup> *Ibid*, at 236.

<sup>52</sup> See for example, John Borrows, *Canada's Indigenous Constitution*, (Toronto: University of Toronto Press, 2010); G. Wa and D. Uukw, *supra* note 12.

<sup>53</sup> See for example, *Peter v. Beblow*, [1993] 1 S.C.R. 980; Mary Jane Mossman, "Running to Stand Still: The Paradox of Family Law Reform", 1994 5 *Dalhousie L.J.* 6; Heather Conway and Philip Girard, "No Place Like Home": The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain." 2005 30 *Queen's L.J.* 715.

<sup>54</sup> This repeats portions of the material that appears also in Chapter Four, pages 138-139.

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>55</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>56</sup> Since 2005, conflicts over large-scale quarry developments in the urban-rural fringe of Southwestern Ontario have resulted in major community mobilizations,<sup>57</sup> complex multi-year litigation,<sup>58</sup> a foreign investment protection claim against the federal and provincial governments,<sup>59</sup> and an election promise of legislative review.<sup>60</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>61</sup> The range and diversity of claims raised by these parties through formal objections 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.*

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>62</sup> However, this

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<sup>55</sup> Jane Urquhart, *Away* (Toronto, McLelland & Stewart: 1993) at 9.

<sup>56</sup> *Supra*, note 8.

<sup>57</sup> "Mega quarry defeat is a lesson in activism", Toronto Star, Sunday November 25, 2012, [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).

<sup>58</sup> For example, see "Nelson Aggregate Hearing Explained", Lake Ontario Waterkeeper, November 17, 2010: <http://www.waterkeeper.ca/2010/11/17/nelson-aggregates-hearing-explained/>.

<sup>59</sup> "St. Mary's Cement Group – Update January 2013", Halton Region, <http://www.halton.ca/cms/one.aspx?portalId=8310&pageId=10296>

<sup>60</sup> Legislative Assembly of Ontario, Orders and Notice Paper, 1<sup>st</sup> session, 40<sup>th</sup> Parliament, March 22, 2012.

<sup>61</sup> A representative range of objections from non-owner parties are available on the North Dufferin Agricultural and Community Task Force ("NDACT") website: <http://ndact.com/index.php/letters-a-reports/letters-general>.

<sup>62</sup> 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 for example, <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 kinds of interests raised in land use conflicts.

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 land use planning 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.

#### A. Legislation and Policy – The Aggregate Licensing Process<sup>63</sup>

*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>64</sup>

*The Aggregate Resources Act<sup>65</sup> provides for several categories of aggregate mine.<sup>66</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*

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<sup>63</sup>This section is a summary of the material that appears also in Chapter Four, pages 162-177.

<sup>64</sup> 32 ILM 289, 605 (1993), ch. 11.

<sup>65</sup> R.S.O. 1990, c. A. 8 [the “Act”].

<sup>66</sup> *Ibid*, at ss.7, 23, 34.



license under the Act.<sup>67</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>68</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 Policy and Internal Procedures Manual*.<sup>69</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>70</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>71</sup> Under the Act no license can be issued if extraction is prohibited by an applicable zoning by-law.<sup>72</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>73</sup> Under the *Planning Act*, the *Policy Statement*

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<sup>67</sup> *Ibid.*, at s.7(2)(a).

<sup>68</sup> *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.”

<sup>69</sup> *Aggregate Resources Provincial Standards*, 1997, Natural Resources Management Division [the “Standards”]. [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 Policy and Internal Procedures Manual*, 1996, Ministry of Natural Resources, Land and Water Branch, Aggregate and Petroleum Resources Section [the “Manual”]. [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).

<sup>70</sup> *ARA*, *supra* note 64, 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 Development and Planning Act*, R.S.O. 1990, c.N.2, the matter is referred to a Joint Board of the Ontario Municipal Board and the Environmental Review Tribunal [the “Joint Board”].

<sup>71</sup> R.S.O. 1990, c. P. 13, s.22 [the “*Planning Act*”].

<sup>72</sup> *Supra* note 65, s. 12.1(1).

<sup>73</sup> 2005, Ministry of Municipal Affairs and Housing. <http://www.mah.gov.on.ca/Page215.aspx> [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 Environmental Review Tribunal, shall be consistent with the Policy Statement.*<sup>74</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 PPS, 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>75</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>76</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>77</sup> In fact, this protection continues even where an operation or a license “ceases to exist”,<sup>78</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 possible shall be made available as close*

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<sup>74</sup> Planning Act, *supra*, note 71, s. 3.

<sup>75</sup> Matt Binstock and Maureen Carter-Whitney, *Aggregate Extraction in Ontario: A Strategy for the Future* (Toronto, Canadian Institute for Environmental Law and Policy: 2011).  
[http://cielap.org/pub/pub\\_aggregatestrategy.php](http://cielap.org/pub/pub_aggregatestrategy.php).

<sup>76</sup> PPS, *supra*, note 73, s. 2.5.2.

<sup>77</sup> *Ibid*, ss. 2.5.2.4, 2.5.2.5.

<sup>78</sup> *Ibid*.

to markets as possible.”<sup>79</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>80</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>81</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>82</sup>

The Policy Statement attempts to resolve this apparent conflict by classifying aggregate extraction as an “interim” activity.<sup>83</sup> “Rehabilitation” to “accommodate subsequent land use” is explicitly required.<sup>84</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>85</sup> Beyond the absurdity of a potentially infinite licence for an “interim” activity, and concerns about the nature and quality 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>86</sup> At

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<sup>79</sup> *Ibid*, s.2.5.2.1.

<sup>80</sup> *Ibid*, s. 2.5.2.2.

<sup>81</sup> *Ibid*, s. 2.6.1.

<sup>82</sup> *Ibid*, s. 6.0

<sup>83</sup> *Ibid*, s. 2.5.3.1.

<sup>84</sup> *Ibid*.

<sup>85</sup> Martin Heidegger, *The Question Concerning Technology, and Other Essays* (New York: Garland, 1977), cited by David Harvey, *Justice, Nature and the Geography of Difference* (Cambridge, Mass: Blackwell, 1996) at 134.

<sup>86</sup> 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) at 139-144.

*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>87</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>88</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>89</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.*

#### **B. Legislation and Policy – Notice and Participation<sup>90</sup>**

*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>91</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*

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<sup>87</sup> Joseph Castrilli and Ramani Nadarajah, “Submissions to the Standing Committee on General Government on the Aggregate Resources Act”, May 14, 2012: <http://s.cela.ca/files/839Aggregates.pdf>.

<sup>88</sup> *Ibid*, s. 2.3.1.

<sup>89</sup> *Ibid*, s. 2.5.4.

<sup>90</sup> This section provides a summary of the material presented in Chapter Four, pages 190-207.

<sup>91</sup> MNR, Standards, *supra* note 69, ss. 4.1.1., 4.2.

remaining objectors.<sup>92</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>93</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 decisions,<sup>94</sup> the test for leave is “stringent” and the majority of applications have been turned down.<sup>95</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>96</sup> As a result, quarry litigation often formally includes non-owner parties either as individuals or as groups with 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.*

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<sup>92</sup> *Ibid*, ss. 4.3.6, 4.3.3.1.

<sup>93</sup> *Ibid*, *supra* note 69, s. 4.3.3.3.

<sup>94</sup> S.O. 1993, c. 28.

<sup>95</sup> Richard Lindgren, “Third Party Appeals Under the *Environmental Bill of Rights* in the Post-*Lefarge* Era: The Public Interest Perspective” (Toronto: Canadian Environmental Law Association, 2009).

<sup>96</sup> *ARA*, *supra* note 65, 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 it considers to not 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.

### 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>97</sup> *Nelson Aggregate Co., Re*<sup>98</sup> and *Re Walker Aggregates Inc. (Re)*.<sup>99</sup> The first part of the analysis is organized around four themes identified in the decisions: 1) onus; 2) precaution, 3) reinserting need, and, 4) place and ecological context.<sup>100</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 stake and identify a path to resolution in future land use disputes.

#### *i.* 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.

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<sup>97</sup> (2010) 66 O.M.B.R. 263 [Rockfort].

<sup>98</sup> 2012 CLB 29642 [Nelson].

<sup>99</sup> 2012 CLB 16274 [Walker].

<sup>100</sup> 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. That decision is now being appealed by the Niagara Escarpment Commission, which opposed the application before the Board and whose submissions were largely adopted by the dissent. The dissent is the focus of the analysis below.

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 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>101</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>102</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 their 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>103</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>104</sup> He notes that the majority does not provide reasons or make findings of credibility to explain these preferences or conclusions.<sup>105</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

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<sup>101</sup> *Walker*, *supra* note 99 at 1, emphasis added.

<sup>102</sup> *Ibid*, at 1.

<sup>103</sup> *Ibid*, at 2.

<sup>104</sup> *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.

<sup>105</sup> *Ibid*.

extraction as a “long-established land use” and note the “positive history” and “lack of negative impact” of the applicant’s existing quarry.<sup>106</sup>

The majority notes that they considered the applicant’s “many years of data.”<sup>107</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>108</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>109</sup>

In contrast, the dissenting member in *Walker* emphasizes the onus on the proponent, finding that the majority in had in fact reversed it.<sup>110</sup> He goes on to note that under the majority’s test few proposals could fail.<sup>111</sup> The dissenting member also took care to note that amendments and development permits “are not granted as of right”.<sup>112</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>113</sup> While the majority concluded that their role was to “determine the appropriate balance” between the environmental, social and economic benefits,<sup>114</sup> the dissenting member explicitly rejected this “rebalancing” approach.<sup>115</sup> He found that the *Niagara Escarpment Plan* was an “environmentally focused plan” and other contemplated activities, regardless of their purported social and economic benefits, are secondary, and in the case of aggregate mining, restricted.<sup>116</sup>

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<sup>106</sup> *Ibid*, at 5.

<sup>107</sup> *Ibid*, at 4.

<sup>108</sup> *Ibid*, at 251.

<sup>109</sup> *Ibid*, at 251-252.

<sup>110</sup> *Ibid*, at 188.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid*, at 168.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid*, at 18.

<sup>115</sup> *Ibid*, at 178.

<sup>116</sup> *Ibid*.



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 *ARA*:

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>117</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 *ARA* determination.<sup>118</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>119</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 *ARA* 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.

### *ii. 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 "add analytic value."<sup>120</sup> In *Telstra Corporation Ltd. v. Hornsby Shire Council*,<sup>121</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>122</sup> While the *Rockfort* and *Nelson* decisions do not explicitly reference the precautionary principle, their analysis appears to put

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<sup>117</sup> *Rockfort*, *supra* note 97 at 271.

<sup>118</sup> *Ibid*, at 271.

<sup>119</sup> *Ibid* at 276.

<sup>120</sup> Chris Tollefson, "A Precautionary Tale: Trials and Tribulations of the Precautionary Principle", 2012, *Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage*, University of Calgary, March 23-24 at 13.

<sup>121</sup> *Telstra Corporation Ltd v Hornsby Shire Council*, [2006] NSWLEC 133 [*Telstra*].

<sup>122</sup> *Ibid*, at para. 128.

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, is required before the Board approves the applications. Such demonstration has not taken place.<sup>123</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 Policy Statement and OP, and that test goes beyond supportable conclusions."<sup>124</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>125</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>126</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>127</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>128</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>129</sup> He

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<sup>123</sup> *Rockfort*, *supra* note 7 at 333.

<sup>124</sup> *Ibid*, at 328.

<sup>125</sup> *Ibid*, at 329.

<sup>126</sup> Alan Randall. "Coal seam gas – toward a risk management framework for a novel intervention" 2012 29 EPLJ 152 at 159.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Walker*, *supra* note 99 at 176.

<sup>129</sup> *Ibid*, at 188.

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>130</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>131</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>132</sup> The standard applicable in that case was to establish with "a substantial degree of certainty that implementation of the proposed development will ensure that the Jefferson Salamander and its habitat will be protected."<sup>133</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>134</sup> Applicant proposals to mitigate rather than prevent potentially catastrophic harm to land and non-human species exemplify they type of maladapted land use practices and material consequences that Graham's argument result from law's dephysicalized model of property.<sup>135</sup>

### *iii. Reinserting Need*

Despite the explicit rejection of need-based analysis in the PPS, 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

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<sup>130</sup> *Ibid*, at 257.

<sup>131</sup> *Nelson*, *supra* note 98 at 19.

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid*, at 21.

<sup>134</sup> Randall, *supra* note 126 at 161.

<sup>135</sup> Graham, *Landscape*, *supra* note 6 at 183-4.

evidence on behalf of JDCL 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>136</sup>

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>137</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>138</sup>

#### *iv. 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 Board’s 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>139</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”

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<sup>136</sup> *Rockfort*, *supra* note 97 at 281.

<sup>137</sup> *Walker*, *supra* note 99 at 222.

<sup>138</sup> *Ibid*, at 223.

<sup>139</sup> *Walker*, *supra* note 99 at 211.

in the material reality of the land.<sup>140</sup> Citing *Nelson*, the dissent rejects the proposal to “protect” significant 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>141</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>142</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>143</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>144</sup>

Finally, the member explicitly rejects the characterization of the quarry as an “interim use” of the subject land, finding that the total time period of activity until complete rehabilitation was between 58 and 80 years.<sup>145</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

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<sup>140</sup> *Graham, Lawscape, supra* note 6 at 20.

<sup>141</sup> *Walker, supra* note 99 at 194.

<sup>142</sup> *Ibid*, at 245.

<sup>143</sup> *Ibid*, at 200.

<sup>144</sup> *Ibid*, at 204.

<sup>145</sup> *Ibid*, at 252-3.

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 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>146</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 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>147</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>148</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.

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<sup>146</sup> *Rockfort*, *supra* note 97 at 318.

<sup>147</sup> *Ibid*, at 76.

<sup>148</sup> *Ibid*, at 323.

#### 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.

##### i. 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 *ARA* process, the owner as applicant is the primary actor and their ownership of the land as private property is the core relation. While the establishment of a regulatory regime like the *ARA* 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>149</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, fundamentally 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 *ARA* and the *PPS*. However, the *ARA* 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>150</sup>

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<sup>149</sup> Graham, *Landscape*, *supra* note 6 at 183-4.

<sup>150</sup> Graham, *Owning*, *supra* note 9 at 261.

## ii. 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.

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>151</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>152</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?

## iii. 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 *ARA* 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

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<sup>151</sup> Graham, *owning*, supra note 9 at 266.

<sup>152</sup> *Ibid.*



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 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>153</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>154</sup> Taking a precautionary, "slow-down and learn"<sup>155</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>156</sup>

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<sup>153</sup> *Ibid*, at 267; Graham, *Lawscape*, *supra* note 6 at 18.

<sup>154</sup> *Ibid*, at 18.

<sup>155</sup> Randall, *supra* note 126 at 161.

<sup>156</sup> Davies, *supra* note 32.

These types of relationships with land might be described as ‘stewardship’<sup>157</sup> or ‘custodianship.’<sup>158</sup> As Graham argues, they should be characterized by reciprocity with the land and acknowledgment of interdependence and responsibility.<sup>159</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>160</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>161</sup> The key is that the land is brought back in to 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>162</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 connections to land and consider the material consequences of a range of human activities, including but not limited to those proposed by the owner.

#### iv. 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,

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<sup>157</sup> Ibid.

<sup>158</sup> Graham, *Owning*, *supra* note 9 at 268.

<sup>159</sup> *Ibid* at 262.

<sup>160</sup> Borrows, *Constitution*, *supra* note 52, at 246.

<sup>161</sup> Graham, *Owning*, *supra* note 9 at 267.

<sup>162</sup> 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.

contesting and implementing such values?”<sup>163</sup> 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>164</sup> Proposals for rights or standing for the land or non-human species have also been proposed and might be appropriately considered.<sup>165</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>166</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 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

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<sup>163</sup> Nedelsky, *supra* note 7 at 241.

<sup>164</sup> David Boyd, *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (Vancouver: UBC Press, 2012).

<sup>165</sup> For example see, Peter Burdon, Ed., *Exploring Wild Law: the philosophy of earth jurisprudence*, (Kent Town, South Australia: Wakefield, 2011).

<sup>166</sup> Galloway, *supra* note 16 at 80.

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.

## 5. Conclusions

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>167</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

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<sup>167</sup> Graham, *supra* note 6 at 175, 206.

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:

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>168</sup>

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<sup>168</sup> *Ibid.*, at 206.

## **Chapter Six – The Work of Ownership: Shaping contestation in Ontario’s aggregate extraction disputes<sup>1</sup>**

### **Introduction**

Disagreements about property – what, where, and whose it is - take place in a range of forums and can take many different forms. Such contestation often engages with formal law at various stages. Therefore, while formal law may only be one aspect of contested property claims, ‘law does matter’ to property relations and to the ways in which they can be contested and transformed (Valverde, 2012, p. 6). This chapter examines the land use planning dispute as one particular space in which disagreements about property occur. While land use has been, and continues to be, treated as a presumptively neutral technical concept (Blomley, 2016), this chapter critically examines the role of legal ownership in land use law. It explores the ways in which law ‘brackets’ human relationships with land to produce and (re)enforce particular forms of land use (Blomley, 2014) by examining the specific work that legal concepts of ownership are used to perform in disputes about how private land can be used (C. A. Arnold, 2002; Blomley, 2016; Porter, 2012; Smit & Valiante, 2015; Valverde, 2012). The discussion below, like O’Donnell’s work in this volume, explores the way that ownership is used to shape the relationship between private property and planning in order to expose opportunities for the creative rethinking of property relations. This chapter contributes to a small body of scholarship exploring this relationship in the Canadian context (Blomley, 2016; Smit & Valiante, 2015) through an examination of disputes about aggregate mineral mining in the province of Ontario.

Land use disputes about particular places and developments are often embedded in broader tensions about how private land can and should be used, and in whose interest such decisions are made. Inherently involving a negotiation about the power of the state to place restrictions on private property rights in order to benefit particular conceptions of the ‘public interest’

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<sup>1</sup> Forthcoming as, Estair Van Wagner, “The Work of Ownership: Shaping contestation in Ontario’s aggregate extraction disputes” Mikkel Thorup, Maja Hojer Bruun, Bjarke Skærlund Risager & Patrick Cockburn eds. *Contested Property Claims: What disagreement tells us about ownership* (London: Routledge, forthcoming). Portions of this Chapter are the same or similar to portions of Chapters 2 and 4. These portions are italicized to alert the reader what is repeated and allow them to skip these portions as desired, a note at the start of the section points the reader to the relevant portions of earlier chapters. Citation style has been maintained as in the publication, as has grammatical.

(Smit & Valiante, 2015, p. 7), land use conflicts uniquely expose the relationship between private property and planning. Groves et al. argue that planning forums can provide critical opportunities to examine and rethink assumptions built into planning law and policy and to consider larger questions about social, economic and ecological relations: ‘If a piece of infrastructure is a kind of solution to a problem, participatory governance may, by including more perspectives, enable the problem itself to be examined, along with the ways in which it has been framed *as* a problem.’ (Groves, Munday, & Yakovleva, 2013, p. 342) In this sense, planning disputes can be opportunities for creative rethinking about how we relate to each other and our environment despite being grounded in seemingly narrow or site-specific issues of infrastructure siting or zoning. Yet, a resource-oriented and instrumental planning perspective can obscure non-instrumental relations with land while foregrounding instrumental relationships to land (Henwood & Pidgeon, 2001; Nash, Lewis, & Griffin, 2010). The ideological flexibility of planning makes it essential to identify how specific concepts and tools shape the boundaries of conversations we have in land use processes, and therefore, the outcomes.

British geographers Richard Cowell and Susan Owens point to the locally based resistance to aggregate extraction in rural England as having successfully ‘reframed’ both the problems and the solutions related to extraction. (Cowell & Owens, 2006, pp. 405–406). As they argue,

...the importance of planning lies not simply in its instrumental capacity to deliver environmental sustainability, but in its relative openness to influence by environmental interests and concerned communities, which enable connections to be drawn between projects, plans and wider policies. (Cowell & Owens, 2006, p. 417)

They point to a key link between the successful use of participatory opportunities by environmental interests and concerned communities and the integration of environmental concerns into the formal land use decision-making framework (Cowell & Owens, 2006, p. 406; Owens & Cowell, 2002). This potential for creativity and reflection is largely dependent on the process – whether the broad policy goals are realized through genuinely deliberative processes and genuine opportunities to influence outcomes (Scotford & Walsh, 2013). One of the central functions of law in land use disputes is to structure the relations between the parties at all stages of the process. Law orders and manages relations between the parties and the decision makers, but also, the less visible relations between all of these actors and the land itself (Blomley, 2014; Nedelsky, 2012; Van Wagner, 2013, 2016a). As noted by both

O'Donnell and Pasternak in this volume, the interests and agency of more-than-human actors are obscured by colonial property relations in settler states; however, this structure of legal relations attempts to shape the extent to which, and the ways in which, all actors, human and more-than-human, engage with the particular decision-making processes. In doing this work, law is used to bound and define the nature of the contestation in procedural and substantive terms. In one sense this is a necessary exercise in organizing and scoping a particular dispute in order to find realistic and timely ways to resolve it. Nonetheless, the specific ways in which law is used to achieve this work have consequences that extend beyond the outcome of a particular dispute as 'a set of relations specified as legally consequential are bracketed and detached from entanglements (ethical, practical, ecological, ontological) that are now placed outside the frame' (Blomley, 2014, p. 136). As noted by American environmental law scholar Joseph Sax, layering-on increasingly complex environmental regulatory regimes has done little to limit environmental degradation without attention to structural elements of the legal system that create rewards and incentives for particular forms of land use and ecological transformation (Sax, 2008, pp. 9–10).

While the success of bracketing may be limited and partial, Blomley notes that the work of producing and upholding brackets is nonetheless deeply political: 'When and how they are constructed and who gets to bracket are deeply consequential questions. For not everyone has the opportunity or the power to successfully frame law in ways that stick.' It is, therefore, important to understand precisely how this work is done through law and to trace its successes and failures (Blomley, 2014, p. 139). As Valverde's provocative work on spatiotemporalities in law suggests, we must do so in terms of the interrelations between space and time at work in particular contexts. She notes, '...for law to work smoothly, disputes about the substance and qualitative features of governance have to be turned into seemingly mundane and technical questions about who has control over a particular spacetime' (Valverde, 2015, p. 84). Both directly and indirectly, Valverde argues, the 'how of governance' is sidestepped by transforming political questions into purportedly technical questions about legal jurisdiction and 'consumers of legal decisions are kept from asking: how should problem X or Y be governed in the first place' (Valverde, 2015, p. 86). Ownership, it is argued here, is one key category through which land use law is used to manage both the ordering of actors and events and to control the flows of knowledge and information that are included or excluded in the process. As such, ownership works through land use law in two key ways: It asserts the chronological power to control the sequencing of



events; and, it simultaneously upholds the substantive power to manage and control the messy complexity of relations engaged by decisions about how land can, and should, be used.

The disputes about aggregate mineral mining examined below provide one example of how private ownership plays a critical role in bracketing the relationships between landowners, other parties, and the land itself through land use law. These conflicts demonstrate that despite explicit environmentally-focused policy goals and opportunities for participation in planning law and policy, the enduring legal conception of property ownership as a ‘thingless,’ abstract bundle of rights brackets the procedural and substantive nature of land use decision-making in significant ways. The ‘dephysicalized’ formal legal concept of property deems human relationships *with* places legally irrelevant and therefore serves to assert limits on development or use while other forms of relations with place are often not cognizable (Graham, 2010; Hohfeld, 1913; Vandeveld, 1980). Dominant property relations successfully foreground the role of land as commodity – an object that can, and indeed should, be alienated and used for production and profit without regard to the specificity of location and relational spatial or temporal effects (C. A. Arnold, 2013; Freyfogle, 2011; Sax, 2008). Other messy affective, social, and ecological relations with particular places are severed for the purposes of legal decision-making, even where they have been invited (or perhaps tolerated) at consultative stages in the planning process or are acknowledged features of the natural systems at stake. As Blomley explains, this bracketing performs an ‘attempt to stabilize and fix a boundary within which interactions take place more or less independently of their surrounding context’ (Blomley, 2014, p. 135).

The centrality of the owner in aggregate extraction decisions is obscured by formal state control of the licensing process and structural opportunities for participation. However, the role of ownership in determining the sequence of events in the decision-making process results not only in the power to determine when a decision-making process is initiated, it situates the private owner at the peak of a hierarchy of land use planning actors. As such, the owner is imbued with substantial power to shape spatial and temporal dimensions of how land use governance is enacted and who can meaningfully participate and influence the outcome. In Valverde’s terms, ownership answers preliminary questions about the *who* of governance over the timespace of the application and the site; and, in doing so, ‘implicitly determines *how*’ land use disputes should be governed (Valverde, 2015, p. 84, 86). This ‘re-making of nature-society relations’ through private property environmental governance

mechanisms produces owners as ‘efficient, profit-seeking, ‘rational’ individuals’ without regard to the nature of their relationship with the particular place at stake (Mansfield, 2007, p. 393) and without acknowledgment of the wider affective and more-than-human relations engaged (Murdoch, 2005; Whatmore, 2002, 2006).

As the discussion below will demonstrate, these conflicts demonstrate that legal ownership remains a powerful determinant of when and how land is used. Ontario’s public land use planning framework formally upholds the public power to restrict private property rights (Smit & Valiante, 2015), yet private ownership remains a key category in shaping particular relationships to land as legally significant while others are deemed extra-legal or irrelevant. At the same time, these legal spaces of contestation about land use can provide important insights about challenging the boundaries set by dominant property relations. According to property theorist Carol Rose, moments of cultural and political recognition of alternative property relations have the potential to change our definition of property and property practices (Rose, 1998, p. 141). O’Donnell argues in this volume that land use contestation about the impacts of climate change can expose openings for alternative approaches to property relations. The Algonquin tenure system described by Pasternak, also in this volume, demonstrates how one place-based Indigenous legal order asserts enduring jurisdiction over land use governance through relations of responsibility and care. As I have argued elsewhere, rural land use movements can play a role in redefining people-place relations if they resist a parochial politics of place and take on the difficult and unsettling work of meaningful engagement with Indigenous legal orders (Bartel & Graham, 2016; Van Wagner, 2016b, p. 323). The disputes about aggregate mineral mining examined below reveal strategic opportunities to rethink property through land use planning law and to transform the ways in which law shapes, and is shaped by, people-place relations. In particular, this chapter argues that decentering ownership in land use disputes has the potential to transform power imbalances upheld by the hierarchical ordering of authority and the chronological ordering of key steps in planning processes.

## **Aggregate Extraction: The construction of a unique land use<sup>2</sup>**

Aggregate mineral resources – sand, gravel, rock, and stone - are widely acknowledged to be essential to the built environment as the foundation of infrastructure developments from roads to subways to housing and sewer mains. They are valuable natural resources with the potential to produce economic value when extracted and transformed into marketable commodities through industrial mining and production. At the same time, aggregate minerals are functioning and integrated parts of the physical environment in which they are embedded, with material, ecological and social relations (Eyles & Eyles, 2002). These landscapes are often layered with other, potentially conflicting interests, such as agricultural production, housing development, recreational use, Indigenous land rights and jurisdiction, and ecological and amenity values (Van Wagner, 2013, 2016a).

*While quarrying for aggregate minerals has long been practiced by many societies and in diverse locations, contemporary aggregate mines are large, industrial, open pit mines. As such, they have significant, transformative, and enduring impacts on the land and the human and more than human communities in which they are located (Sandberg & Wallace, 2013; Sandberg, Wekerle, & Gilbert, 2013; Van Wagner, 2016a, 2016b). It is therefore not surprising that, quarries have also long been a source of legal and political conflict about appropriate land use in the province (Binnstock & Carter-Whitney, 2011, p. 1; Miller et al., 2009; Policy Division, Ministry of Natural Resources, 2010). Indeed, since 2005 aggregate extraction has become one of the most contentious land use issues in the province (Sandberg & Wallace, 2013; Environmental Commissioner of Ontario, 2012; Patano & Sandberg, 2005). Disputes, including those examined for this research, often arise from disagreement about the nature and extent of these impacts on the local environment, human health, and social factors, such as traffic, noise, and employment. Aggregate extraction disputes therefore provide an important example of the material consequences of framing land use decisions through dominant property relations and instrumental relationships to land. In particular, aggregate extraction in Ontario primarily occurs on privately owned land. Therefore, the disputes that arise provide a unique case through which to explore how private ownership operates through law to shape procedural and substantive elements of disagreements about land use.*

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<sup>2</sup> This section provides a summary of the material in Chapter Four, pages 132-142. Repeated content is italicized.

*Land use is regulated by multiple complex and overlapping legal regimes in Ontario, including a range of land use planning statutes and policies, environmental regulation, as well as both the statutory registration framework and common law of property. While the development and oversight of aggregate mines have some similarities with other extractive activities and certain types of infrastructure, the majority of aggregate extraction is regulated through a distinctive interaction between the provincial planning policy, municipal plans and bylaws, and the Aggregate Resources Act (1990) [the 'Act'], a standalone statutory framework governing the process for aggregate licence and permit applications.<sup>3</sup> In this way, aggregate mines are structured as a legally unique land use, with decisions informed by general planning policy, but set apart through distinct procedural and substantive considerations.*

*Within a broad and complex network of land use law and policy potentially engaged by proposals for aggregate mineral extraction, this chapter is focused on a subset of primary legal frameworks that have been the subject of disagreement and contestation through ongoing law reform and legislative review processes, the Act and the Provincial Policy Statement.<sup>4</sup> Formal oversight of aggregate extraction in Ontario was limited until the 1950s when the scale of extraction and growth of suburban development led to increasing conflict (Sandberg & Wallace, 2013; Baker, Slam, & Summerville, 2001, p. 468; Cullingworth, 1987, p. 229). Since that time, aggregate regulation in Ontario has shifted to a provincially led, and increasingly proponent-driven, activity (Baker et al., 2001, p. 466) in which non-state actors are enrolled in flexible forms of regulation that neither privilege nor require formal authority (Gunningham, 2009, p. 181; Gunningham & Holley, 2010). This shift is consistent with the broader international 'shift from bureaucratic regulation to public entrepreneurialism' in*

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<sup>3</sup> While the majority of production is covered by the Act, it should be noted that it has a limited geographic application, which excludes private land in most of northern Ontario. In these areas *Planning Act* approvals govern the establishment of aggregate extraction operations on private land in these areas of the province. However, portions of the north have been progressively added as disputes arise with respect to specific applications, see the Ontario Municipal Board decision on the Superior Aggregates proposal on the shores of Lake Superior: *Citizens Concerned for Michipicoten Bay v Municipality of Wawa* (2009), PL040025.

<sup>4</sup>In May 2012, an all-party review of the *Aggregate Resources Act* was initiated at the Standing Committee on General Government (Legislative Assembly of Ontario, Orders and Notice Paper, 1<sup>st</sup> session, 40<sup>th</sup> Parliament, March 22, 2012). The review included the consultation process, siting, operations, and rehabilitation, best practices and industry developments, fees and royalties, and, aggregate resource development and protection, including conservation and recycling.

*planning regimes, driven and shaped by inter-urban competition for global investment capital (Sager, 2011, p. 156).*

*Conflicts over large-scale quarry developments in the urban-rural fringe of Southwestern Ontario have resulted in major community mobilizations, (“Mega quarry defeat is a lesson in activism,” 2012) complex multi-year litigation (Bull, 2010), a foreign investment protection claim against the federal and provincial governments, (Halton Region, 2013; St. Mary’s VCNA, LLC v. Government of Canada, 2013) and a legislative review of the governing legislation (Ontario, Legislative Assembly, Standing Committee on General Government & Standing Committee on General Government, 2013).<sup>5</sup> With a fixed, non-renewable ‘essential’ resource situated in areas of overlapping and conflicting relationships with land and the potential for direct and cumulative social, health, and environmental impacts of extraction, aggregate mining exemplifies the ‘wicked problems’ that land use law and policy aim to resolve (Rittel & Webber, 1974). In this context, law works through ownership to simplify and sever this complexity and to uphold relations with land that support particular land uses and conceptions of economic development.<sup>6</sup>*

### **Extracting Private Profit in the Public Interest: The centrality of ownership in the aggregate licensing process<sup>7</sup>**

#### A. The Legal Structure of Aggregate Disputes

*In Canada, planning falls within provincial jurisdiction over municipal institutions and property and civil rights (The Constitution Act, 1867). In Ontario, the province provides broad guidance and maintains considerable power to constrain local government action*

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<sup>5</sup> At the time of writing a Bill to amend the Aggregate Resources Act had been introduced to the provincial legislature as a result of the legislative review process: Bill 39 Aggregate Resources and Mining Modernization Act 2017, available online: [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=4213](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4213). The Bill retains key features of the existing regime discussed in this chapter.

<sup>6</sup> This chapter is based on a larger qualitative research project examining a series of aggregate mineral mining disputes in Ontario, Canada between 2001 and 2014. Specific cases for detailed documentary analysis and in-depth interviews were selected through a review of key documents to identify the level of participation by members of the public and governmental and non-governmental organizations in the regulatory process and the types of issues and concerns about the impact of extraction raised by such parties. 18 unstructured in-person interviews were conducted with 25 participants involved in aggregate extraction disputes. Participants were largely activists in local or regionally-based organizations formed to respond to a specific application or pre-existing organizations who chose to become involved with a particular quarry application based on a particular set of environmental or social concerns.

<sup>7</sup> This section provides a summary of the material in Chapter Four, pages 150-201 and 219-227. Repeated content is italicized.

*through both the Planning Act (1990) and the Provincial Policy Statement (Ministry of Municipal Affairs and Housing, 2014), a policy document that ‘sets the policy foundation for regulating the development and use of land.’<sup>8</sup> The bulk of day-to-day planning powers and responsibilities are devolved to local municipalities who regulate land use through zoning in Official Plans and by-laws (Kong, 2010; Makuch, Craik, & Leisk Signe, 2004), though provincial planning regimes, such as the Niagara Escarpment Planning and Development Act (1990), retain significant centralized planning powers in particular parts of the province. While it is not the focus of this chapter it is important to note that aggregate decisions directly engage the constitutional and/or treaty rights of First Nations and Metis communities and the applicable Indigenous legal orders in their territories. Indigenous communities in Ontario have long been asserting their right to consultation and accommodation and demanding more control over aggregate resource decisions (Ritchie, 2013); however, the Duty to Consult and accommodate such rights and interests was only formally acknowledged in the revised 2014 Policy Statement and is still absent in formal aggregate extraction law and policy.*

*Adjudicative review of planning decisions in Ontario is divided between the Ontario Municipal Board (the ‘Board’), which serves as the primary appeal body for planning and development decisions, and the Environmental Review Tribunal, ostensibly dividing ‘land use’ from ‘environmental’ decisions despite the environmentally-focused nature of many objections to planning decisions (Sandberg et al., 2013; Van Wagner, 2013). One of the unique features of Ontario’s planning system remains the powerful role of the Board in decisions with clear environmental implications such as amendments to Official Plans affecting public space, protected green space, and agricultural lands, as well as the often-contentious applications for aggregate development considered here. It has jurisdiction to deal with issues and disputes under more than 100 statutes, including the Aggregate Resources Act.<sup>9</sup>*

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<sup>8</sup> In April 2014 the Ministry of Municipal Affairs and Housing released the 2014 Policy Statement, which took effect on April 30, 2014 [the ‘2014 PPS’], however, the cases discussed in this chapter were considered under the former 2005 Provincial Policy Statement, <http://www.mah.gov.on.ca/Page215.aspx> [the ‘2005 PPS’]. The key aggregate mineral provisions discussed below remain largely unchanged in the new version.

<sup>9</sup> For certain appeals, including some aggregate disputes where hearings may be required from both tribunals, a joint-board is formed under the *Consolidated Hearings Act* (1990). See for example, *Nelson Aggregate Co., Re*, 2012 CLB 29642, [Nelson], *Re Walker Aggregates Inc. (Re)*, 2012 CLB 16274 [Walker].

As noted above, aggregate decisions engage a dual set of processes; the general land use planning process through municipal zoning and land use governance, and, the specific licensing process managed by the Ministry of Natural Resources (the ‘Ministry’). The current Aggregate Resources Act is an operational statute for the management of aggregate mining proposals. It is not a framework for broader planning inquiries that are dealt with under the Planning Act process and the resulting Official Plans. Section 2 sets out 4 purposes:

- (a) to provide for the management of the aggregate resources of Ontario;
- (b) to control and regulate aggregate operations on Crown and private lands;
- (c) to require the rehabilitation of land from which aggregate has been excavated; and
- (d) to minimize adverse impact on the environment in respect of aggregate operations.

‘Management’ is defined in the Act as the ‘identification, orderly development and protection of the aggregate resources of Ontario,’ clearly establishing the development-focus of the Act (s 1(1)). No license can be issued if extraction is prohibited by an applicable zoning by-law (s 12.1.1); therefore, if the land for which a quarry is proposed 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 (s 22). Some applications will also involve special provincial planning regimes, such as the *Niagara Escarpment Planning and Development Act*, or urban growth plans (*Places to Grow Act*, 2005) and associated policy (Ministry of Public Infrastructure Renewal, 2006). This may mean additional planning authority approvals or the application of additional standards in certain areas. Therefore, the general planning question of whether extraction is an appropriate land use in a particular place should be the initial inquiry in siting aggregate development in accordance with planning documents of the local authority. However, this order of decisions and jurisdiction is restructured by law in two key ways. First, s 66(1) of the Act expressly limits municipal powers to regulate aggregate extraction:

This Act, the regulations and the provisions of licences and site plans apply despite any municipal by-law, official plan or development agreement and, to the extent that a municipal by-law, official plan or development agreement deals with the same subject-matter as this Act, the regulations or the provisions of a license or site plan, the by-law, official plan or development agreement is inoperative.

Second, the *Planning Act* stipulates that all policy and decisions of municipal governments and land use tribunals, *shall* be consistent with the Policy Statement (s 3). The hierarchical structure of interests in land set out in the Policy Statement expressly prioritizes aggregate development, restricts the power of local land use decision makers, and shifts the focus to the mechanics of operation to be presumptively approved. Indeed, it limits the municipal ability

to impose higher standards where they would conflict with any of its policies (s 4.7). Official plans are required to identify and protect provincial interests in their land use designations and policies, particularly by directing development to ‘suitable areas’ (s 4.7).

The effect is to limit the ability of local authorities to regulate exploration, extraction and operation, including the potential to prohibit extraction, to impose a needs-based analysis into the assessment of applications, or to impose protection on features not deemed provincially ‘significant’ (M. Bull & Estrela, 2012). The jurisdiction of local authorities over extraction is rendered hollow by this shift from an inquiry about land use governance throughout the area to one about the protection and development of one resource, and the management of one site. This inversion of the land use versus operational decisions is compounded by the procedural practice of having the planning and licensing inquiries run parallel or even jointly once it reaches an appeal or adjudicative stage. While this may have important efficiency and clarity implications for all parties in an already complex and time-consuming process, the effect of compressing these distinct inquiries is that land use questions often end up secondary to the technical and managerial licensing inquiry about a specific site (*Re Walker Aggregates Inc.*, 2012). In this way, the messier and more difficult aspects of decisions about extractive and transformative land uses are severed and shifted outside of the legal decision-making space.

Within this spatial and temporal frame created by the intersection of general planning law and the aggregate extraction regime, private land ownership plays a particular role in upholding the ordering of interests in Ontario’s aggregate mineral law and policy. Legal ownership is used to perform two key boundary-setting functions in this process, which have both spatial and temporal dimensions. First, the owner becomes the planner by proposing a specific land use in a particular location and initiating a decision-making process. This may be accompanied by physical changes to the landscape that shape the material conditions of the site in advance of a decision or even an application, thus changing the baseline for social, physical, and ecological impacts. Second, in a proponent-driven process, ownership includes the power to shape the story and establish the factual record on which decisions are made. This exclusive spatial access and chronological power has consequences for the procedural and substantive outcomes of aggregate applications. Ownership, as a legal category, both



shapes the sequencing of events and decisions within the process and centres the landowner as the decision maker within a hierarchy of actors and interests. In doing so, it powerfully influences the outcomes for a complex network of social, material, and ecological interests and actors.

### **The Owner as Planner: Site selection and the (re)shaping of the landscapes of extraction**

Aggregate minerals are fixed resources. As with other minerals, the rock is where it is and that is where extraction must take place. As one large aggregate producer, noted in their submissions to the 2012 legislative review, '[a]ggregate are fixed location non-renewable natural resources which can only be mined where Mother Nature deposited them.' The fixed nature of aggregate minerals also means that extraction is concentrated in particular areas, for example, the area around Orangeville, north of Toronto has a high concentration of mine sites. This raises the potential for effects to be cumulative, both geospatially and temporally, rather than simply site and project-specific and for contestation to cross jurisdictional, legal, temporal, and ownership boundaries.

But extraction is not only fixed by geological formations. According to the submissions of the Ministry of Natural Resources to the Legislative Review, over 90% of aggregate production in Ontario is on private land (*Aggregate Resources Act Review*, 2012, p. G145). In Ontario, surface and sub-surface rights may be unified or separated depending on the terms of the original grant and whether mineral rights were reserved to the Crown. However, the majority of private land includes both mineral and surface rights and recent amendments to mining legislation have further unified land rights, particularly in Southern Ontario where the majority of aggregate extraction disputes take place (Pardy & Stoehr, 2011, p. 6). Site selection is therefore inextricably linked to land ownership as it layers onto the fixed location of the resource. The rock is where it is, but it must be extracted where it is owned. In this way, land ownership and the rights associated with private ownership are central to the nature of the disagreements and contestations that arise in relation to aggregate disputes. Therefore, while contestation about the siting of aggregate quarries may have similarities with disputes about 'locally unwanted land uses' (LULUs) such as landfills or power stations and may similarly expose 'not in my backyard attitudes' within and between communities, the proponent-led process presents a distinctive context in which to explore the relationship between private land ownership and public land use planning.

#### Site Selection and Private Planning

An aggregate licence application is based on the proponent's site selection. While some proponents lease private land for aggregate development from other landholders, selection is largely grounded on their own ownership of the land in question. In noting the preponderance

of private land in aggregate resource development the Ministry of Natural Resources representative at the 2012 legislative review hearing observed, '[O]wnership of the land is very important' (*Aggregate Resources Act Review*, 2012). The link between private ownership and site selection raises concerns about whose interests are being served in the siting of transformative extractive development.

Because of the dual physical fix of an in situ resource extracted from privately-owned land aggregate mineral extraction is not dealt with through public planning or environmental assessment processes. As noted above, this distinguishes them from applications that go through processes such as environmental assessment and 'willing host' searches in which a number of alternative sites are considered. While these are subject to criticism in their own right, they do theoretically involve a broader type of deliberative public planning exercise than a process driven by private land ownership.<sup>10</sup> In the aggregate context, it is unlikely that a proponent would seriously consider alternative sites that they do not own and do not have access to for required testing and preparation when putting an expensive and time-consuming application together. Without such consideration of alternatives, there is a danger that site selection will be linked to an owner's ability to assemble land and to their economic assumptions and interests than to specific knowledge about local social and ecological relations of a particular place or to a notion of the 'public interest' in extractive land uses.

Some participants in the study expressed concerns about aggregate developers targeting areas with small populations and struggling economies with promises of jobs and economic development for land acquisition and future development (Participant 1, 2014; Participants 16-20, 2014). In the case of one large-scale proposal, an internal company communication obtained by a group opposing the quarry revealed that the site location had been selected because the area has one of the smallest populations in the province and the land had the least regulatory governance controlling extraction in North America (Participant 1, 2014). The aggregate industry and government decision makers routinely characterize overlapping interests in land recognized in law and policy, such as the environmental protections in the Niagara Escarpment, as 'constraints' on the development of the resource. Extraction is both

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<sup>10</sup> The provincial and federal environmental assessment regimes applicable in Ontario have both been subject to critique, particularly after amendments that narrowed opportunities for public participation (Auditor General, 2016; Environmental Commissioner of Ontario, 2008; Lindgren & Dunn, 2010). Notably, the regimes are also proponent-driven and therefore share some of the issues outlined below with respect to spatial and temporal control.

legally and politically constructed as a presumptively appropriate land use, but for the intrusion of other values and relations on the land that limit or restrict development.

Other participants noted concerns about the transparency of a process driven by private land acquisition. The selection and assembly of land can potentially start years or decades in advance of an application. In this sense, the sequence of events is initiated long before the formal statutory process begins. One participant described the process: ‘We found out later that they had been acquiring lands for 20 years, additional to what they already had. But under a numbered company, so it was not apparent that they were buying it. Some people sold it under a different understanding’ (Participant 4, 2014). Another described the impact on sellers who sold under the pretence that the land would continue to be used for agricultural purposes (Participant 1, 2014): ...[F]or some of the farmers who sold to see those houses be burned and lost was like us going to a year-long funeral...

Another participant recalled that the site owner went back to neighbouring land owners who had not sold prior to the Application and said, ‘you can't sell your house now because there is going to be a quarry on it, nobody is going to buy it, we will take it off your hands’ (Participants 13-14, 2014). This chronological power not only advantages the land owner by providing a head start in the process, but also through the potential to affect the property relations of neighbouring lands in ways that facilitate particular forms of future land use.

A number of participants reflected on the need for a broader public form of aggregate resource planning between local and provincial governments that could separate the private ownership of lands from decisions about where extractive land uses are appropriate within the province (Participant 15, 2014; Participant 1, 2014; Participants 2,3, 2014; Participant 4, 2014; Participants 13-14, 2014). Indeed, some groups intentionally shifted from site-specific opposition to demanding broader changes in the land use planning process in Ontario, calling for a different balance between different values and interests in land to be embedded within the legal and policy frameworks. Implicit within these reflections was a desire to engage directly with the ‘how’ of land use governance, the messy political elements of planning that were excluded as irrelevant in deliberations about specific applications (Valverde, 2015, p. 86).

## Making spaces of extraction: The transformation of private land

In a proponent-driven system, land ownership determines the physical location of the site and initiates the process of development. However, it also provides the owner with a more subtle chronological privilege: the power to determine the condition of the site at the time of application. Anglo-Canadian property conceptualizes ownership as a bundle of rights with respect to a particular piece of land or resource (Blomley, 2005; Davies, 2007; Mossman & Girard, 2014). This includes extensive rights to alter and transform the physical and material environment, and therefore, the material and temporal networks of relation embedded within or connected to that particular place – social, political, economic, ecological, geological, hydrological and other forms of relation. Thus ownership can be used to bracket what can be considered by decision makers by determining what exists at the critical moment in which the licensing process applies to the site. Through an owner's right to transform their land and to exclude the relevant features of the site, such as endangered species, forests, or wetlands, from consideration they can determine what exists for the purposes of the law. This pre-application control has important consequences for the ability of parties seeking to assert competing values and overlapping interests in the land and for the potential for decision makers to assess such claims. Heritage and environmental features that could potentially 'constrain' development can legally be destroyed, removed, minimized, or transformed long before an application is made by virtue of the extensive rights to transform private property as of right. As a result, relevant features, relations and interests are excluded from consideration in any subsequent planning process. In particular, and as noted by Pasternak in this volume, more-than-human beings and systems may be most profoundly impacted by these purportedly private decisions. Indeed, entire ecosystems and populations may be managed out of existence prior to the legal process being triggered. One participant expressed concerns about the impact of such transformation on the planning process (Participant 4, 2014): 'That is what is happening now with some developments. Yes, some developers buy the property, they clear it out, destroys its ecological value and then what is your argument? You have a woodland? I don't see a woodland.'

One dispute over a large-scale quarry began with concerns about violations of the local tree cutting by-law. A participant in that process observed that the by-law had been put in place in the context of agricultural land use to facilitate farming activities and large-scale woodlot removal would never have been contemplated (Participant 1, 2014). They later became

concerned that the removal of hectares of trees was motivated by the desire to ‘lessen the chances of wild life conduits and other conservation thought to stand in the way of their coming application’ (Participant 1, 2014). Another participant involved in the same quarry dispute described the subsequent destruction of the homes and farm buildings on the land acquired for the proposed quarry site (Participants 13-14, 2014):

There is a big house down the road... It is a huge, big house and they took all the windows out of the top part about November, December, let the wind and the snow and everything blow through and then they finally took it down. When that house went down, people started to believe that something was wrong.

These unanticipated changes impacted not only the physical landscape, but also initiated a sequence of events that transformed the social networks within the local community (Participant 13-14, 2014):

Nobody really blamed the sale but it left such a hole of connections. It is like [you] lay out a thousand piece puzzle and take 30-pieces out. It is not the same. As much as your people might suggest that losing a couple hundred or 300 people out of the community, people come and go, this wasn't it. This was forced, violent, burned, blown up, dug under. Farmsteads that had been cared for 100 years by people disappeared from the landscape ... dark and not a light of life anywhere at night. It left a profound emotional drain on the people.

In another case within the provincially protected Niagara Escarpment Plan Area, participants described the owner's attempt to destroy wetlands after the endangered Jefferson salamander was discovered on neighbouring property and the group opposing applied for provincial wetland designation over the area (Participant 15, 2014; Participant 4, 2014). The owner in that case was ultimately charged at the urging of local residents and opponents of the quarry and pled guilty. However, the success of this enforcement was due to the informal research and access of a neighbouring land owner to the habitat sites rather than any systemic legal safeguard.

Beyond the physical and ecological changes in advance of applications, participants reflected on the ways aggregate mining approvals in a particular place can facilitate a long-term and

wider transformation of the landscape by fixing industrial extraction as an appropriate land use for future applications for expansion or new mines in the local area (Participant 22, 2014; Participants 2, 3, 2014; Participant 7, 2014; Participants 16-20, 2014; Participant 21, 2014). 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 (ss. 2.5.2.4, 2.5.2.5). In fact, this protection continues even where an operation or a license ‘ceases to exist,’ (s. 2.5.2.4) resulting in 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.

Several participants expressed concerns that once approved, expansion in size or below the water table was much easier to attain, or that other proposals would be more likely to be approved once the area was seen as an extractive zone by decision makers (Participant 22, 2014; Participants 2,3, 2014; Participant 7, 2014; Participant 16-20, 2014; Participant 21, 2014). In the words of one participant: ‘[T]he only way to control it is to stop it’ (Participant 16-20, 2014). However, as described below, ownership also plays a strong role in shaping the process and substance of attempts to control or stop a particular application at both the planning and adjudicative stages. As I have demonstrated elsewhere, the overwhelming majority of applications are approved, either by the Minister or the Board, pointing to a structural imbalance in the process (Van Wagner, 2016a, pp. 45–46).

Controlling the facts, controlling the space: Knowledge and power in land use decisions

Citing public frustration with aggregate approvals and other types of land use decisions, the Environmental Commissioner has noted the importance of *meaningful* consultation:

First, consultation is not simply telling people what you intend to do and, then, listening to their comments.

...

To be legitimate, an approval process must be able to reach a decision not to proceed. I’m not saying that this should be a common outcome... But, in a valid and meaningful consultation process, we would expect that sometimes rational arguments

or contrasting societal value systems would and should lead to a “No”. Without that possibility, there is no value in consultation (Environmental Commissioner of Ontario, 2008, p. 5).

Participants in this study expressed concerns that despite opportunities for public participation, the process was structured to presumptively support development. Indeed, several noted that land owners proposing aggregate mines assumed that proposals would go forward despite the need for consultation and Ministerial or Board approval. One participant paraphrased a representative of the company at a community meeting, ‘It doesn’t matter what you people do, we are going to go forward with this’ (Participant 16-20, 2014). Another described the ‘arrogance’ of the proponent, ‘They had done the political legwork and under the *Aggregate Resources Act* and knew they could muscle this thing through. Couldn’t care less what the community wanted’ (Participant 1, 2014). A planner from one provincial planning agency reflected on the political pressure to move applications forward to approval (Planner 2, 2014, p. 2):

If, say, the municipality or the agencies has made a decision and it is not a favourable one, the operator may express its concern to Queen's Park. In response, we have had calls from the MPP and the Minister’s office requesting to understand what is going on and why it is taking so long to bring the application to a final decision. Then we need a briefing note explaining the process, the stakeholders involved, and what are the key issues?

For many participants, this ‘entitlement to approval’ was fuelled by a process driven by the proponent, who provides the majority of the information and expertise to decision makers for the express purpose of having the application approved. The *Aggregate Resources Provincial Standards* and the *Aggregate Resources Policy and Internal Procedures Manual* specify the technical information and reports the applicant is required to provide, including expert hydrogeologic report(s), natural environment report(s) and cultural heritage report(s), which must be prepared by a ‘qualified’ professional as defined in the Act (s 8). Licensing and planning approval processes and any subsequent litigation are based on this factual and technical record, subject to any independent technical or legal expertise and documentation that may be provided by Indigenous governments, municipal actors or planning authorities, and other groups or individuals at their own expense. The chronological power of site selection and modification, as well as initiation of the process, is thus compounded by the power to frame the questions and issues to be considered. By controlling the knowledge base

on which the decision will be made, owners powerfully shape the narrative of what is at stake.

Independent expert evidence and review of the Applicant's documentation is both logistically and financially onerous for Indigenous and small local governments and community groups, particularly given that they may or may not be accepted by the Board at a hearing and that access to the proponent's land may not be granted for direct investigation and data review (*Re Town of Richmond Hill*, PL990303, r'vd by *Ontario (Ministry of Municipal Affairs and Housing) v Ontario (Municipal Board)* 2001). As one lawyer noted, 'It is phenomenally expensive to really mount a legal challenge to an application for aggregate licence' (Lawyer, 2014). Many participants explained that they had scoped down their appeal to one or two issues because of the cost or the accessibility of experts (Participant 22, 2014; Participants 8-12, 2014; Participant 16-20, 2014; Participant 21, 2014). Two experts who have worked with parties opposing quarries noted that the Board tends to accept proponent expert opinions and shared experiences of being challenged as 'advocates,' unable to be objective (Consultant, 2014; Planner, 2014). Further, proponents are under no obligation to allow other parties and their experts onto the site, making review of the data limited and potentially impossible, particularly with complex hydrological or ecological data that require in-season and regular onsite observation. Even government agencies have limited access to verify data and collect independent data to challenge proponent claims.

This evidentiary and narrative power is compounded by what an applicant is not required to establish. Until 2005 the Policy Statement maintained that 'mineral resource needs' should be considered, providing a policy basis for supply and demand analysis as central to aggregate licensing decisions (2.2.3.1, 1996). Opposing parties and governments used this version of the policy to argue that the material to be extracted was not currently required and therefore that sites should not be approved (M. Bull & Estrela, 2012, p. 24). In 2005, the *Provincial Policy Statement* was revised to explicitly eliminate consideration of need in Policy 2.5.2.1:

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.



One environmental lawyer characterized this lack of a needs analysis as the ‘biggest stumbling block’ in the aggregate planning decision framework (Lawyer, 2014). This was also raised by a number of deputants at the all-party review of the Act before the Standing Committee on General Government described below and by commentators during the Policy Statement review (“Review of the *Aggregate Resources Act*,” 2013.).<sup>11</sup> While the Board has concluded that a needs analysis is not required, it has nonetheless also been a live issue in several cases as parties continue to press for the opportunity to contest the underlying assumptions in the framework (*Jennison Construction Ltd. V Ashfield-Colborne-Wawanosh (Town)*, 2011; *James Dick Construction*, 2010; *Re Walker Aggregates Inc. (Re)*, 2012). In one case the Board itself noted, ‘[a]ggregate extraction is the only use in the wide ranging Policy Statement where need is not required’ (*Capital Paving Inc v. Wellington (County)*, 2010, 16)

Planning and urban studies scholars have drawn attention to the operation and control of specific discursive frames that influence land use and environmental governance. Patano and Sandberg specifically note the ‘need’ or ‘demand’ narrative as a frame used by the aggregate industry to appeal to decision makers, including provincial and local governments and adjudicators (Patano & Sandberg, 2005; Young & Keil, 2005). Such ‘narratives of necessity’ place conceptual limits on the terms of debate about specific land use decisions (Cowell & Owens, 2006). Here the presumption of need embedded in the statute fixes the conception of the public interest as one of perpetual economic growth and expanding (sub)urbanism directly in law, foreclosing debate about the shape of the present and future built environment and the urban-rural relationship.

### **Defining the Landscape: The role of ownership in land use decision making**

Ontario’s planning law and policy does not expressly protect private property ownership. Nor does it expressly situate private owners as planners. Indeed, aggregate decisions engage many of the forward-looking, participatory and consultative aspects of the province’s public planning regime. Nonetheless, this chapter demonstrates how ownership endures as key legal category in land use law. Ownership is used to order actors in a hierarchy of interests in which aggregate development is prioritized over other relations with land and simultaneously structures the sequence of events to produce specific spatiotemporal relations. The successful

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<sup>11</sup> 111 of 166 comments on the Provincial Policy Statement Review can be accessed on the Environmental Registry, Registry Number 011-7070.

bracketing work done through ownership is reflected in the overwhelming success of aggregate applications in the province (Van Wagner, 2016a). However, the ongoing contestation about extraction points to the unsettled nature of the spatiotemporal boundaries law attempts to uphold. Understanding the specific work that ownership does through site selection, modification, and control of the factual record can serve to reveal strategic opportunities for intervention and the transformation of property relations into more just and complex people-place relations.

Transforming the aggregate planning process requires the decoupling of site selection from private ownership and the implementation of meaningful and inclusive consultation from pre-application throughout the life of a project. Decentring ownership, both temporally and spatially, could create opportunities for parties to introduce the material and spatial particularity of the human and ecological communities at stake and to expose the wider substantive and political aspects of the decisions. A better balance of power in the decision-making process would make visible what is really at stake (Nedelsky, 2012): how we make decisions about the extraction of important resources from their material and social context while attending to the transformative impacts of doing so for the human and ecological communities and networks of social and material relations. For example, aggregate development sites could be determined through a broad, policy-driven public planning process rather than purely site-specific private applications. Such a shift raises other concerns, particularly about the nature of participation in such a process, the power of private interests to determine ‘the public interest’, and the relationships between municipal and provincial actors and Indigenous governments; however, these are issues that land use governance must urgently and meaningfully address in planning more broadly. Perhaps transforming the way we make aggregate extraction decisions could be a starting point for this important work, including the recognition of Indigenous jurisdiction (Pasternak, this volume).

Would the legal decision-making process be transformed if the technical data was provided through an independent third party rather than by the proponent? Public funding for independent technical expertise and legal advice required by participating parties would be a first step towards a more balanced evidentiary record. However, to be meaningful this must include access to privately owned sites and oversight of pre-application site changes and this requires a shift from property as the realm of fixed, exclusive individual rights towards what

Margaret Davies has described as ‘more fragile, contextual, and limited use (Davies, 2012, pp. 15–16).’ Certainly a first step in rebalancing the power between the parties would be to re-establish the requirement that the proponent demonstrate need such that the costs and benefits of the proposal can be explicitly weighed by decision makers and openly contested by participants. Decentering ownership could affect these sequencing and evidentiary transformations in aggregate licensing decision and effectively reframe the question from *how* we will manage the extraction of this resource to *whether* we should be extracting this rock here, in this place, and in whose interests. Such a reorientation of decision-making away from ownership as the chronological and spatial starting point for land use decision certainly has the potential to change the outcome in individual disputes; but, perhaps more importantly it could strategically create space within the process of land use governance for urgently-needed meaningful dialogue about how we should govern the complexity of our environmental relations.

## Chapter Seven – Law’s Ecological Relations: The Legal Structure of People-Place Relations in Ontario’s Aggregate Extraction Conflicts<sup>1</sup>

### Introduction

What is the role of law in structuring human relationships to the more-than-human world in which our lives are embedded? I consider this question by examining Anglo-Canadian land use law – which I define broadly to include property, environmental, and planning law – in the province of Ontario, Canada. Through land use law we recognize and uphold various forms of control over and particular types of use rights to land (Lametti 2003; Mossman & Girard 2014; Penner 1997); however, we have a much more difficult time recognizing relationships with land and ecological systems themselves, in particular relations of responsibility, or even reciprocity, with place (Graham 2010; Mossman & Girard 2014).<sup>2</sup> These conceptual boundaries have important consequences for the people-place relations that are acknowledged and upheld by law.

While some argue that land use regimes have fundamentally redefined property relations from a commodified conception of private property rights towards democratized environmental decision-making (Scotford & Walsh 2013), I will argue that we must critically consider the people-place relationships that are structured through the everyday practice of law in specific places. I seek to look beyond the broad and aspirational goals of “sustainability” and “balance” embedded in legislation and policy documents, to ask whether and how planning regimes construct or constrain the space for contestation in order to secure recognition for relations between land and the more-than-human world (Harrison & Bedford 2003:443).

Land use conflicts can provide strategic opportunities for interventions in the way we organize our ecological relationships. As outlined below, land use planning law and policy in Ontario provide important procedural rights to participation and consultation in decision-

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<sup>1</sup> Originally published as, Van Wagner, E. Law’s Ecological Relations: The legal structure of people-place relations in Ontario’s aggregate extraction conflicts. *Projections* 12, 35. Portions of this Chapter are the same or similar to portions of Chapters 2, 3 and 4. These portions are italicized to alert the reader what is repeated and allow them to skip these portions as desired. Citation style has been maintained as in the publication.

<sup>2</sup> I am indebted to the work of Nicole Graham (2010) for this concept of reciprocity with place. For a discussion of ownership and responsibility, see the work of Joseph Singer (Singer 2001).

making about the uses of privately owned land. While disputes about the siting of infrastructure and industrial development, such as the conflicts about aggregate mineral mines, or quarries discussed in this article are sometimes characterized as purely about localized and narrow ‘not-in-my-backyard’ (“NIMBY”) politics in conflict with the broader public interest, land use disputes often raise a complex combination of issues and can become forums for attempts to disrupt traditional property relations. As Groves et al. argue, “siting conflicts over such infrastructure often act as condensation points for wider concerns, which can ‘cross scale’ from the interests of a specific community to connect with national and international issues” (Groves et al. 2013:340). Valverde’s research on the urban planning context in the city of Toronto demonstrates how conflicts about a wide range of socio-political issues are ‘funneled’ into the forums created by planning law’s public and consultative structure in Ontario (Valverde 2012:12).

In this context, I argue that critical examination of the day-to-day operation of participatory planning rights is required to understand how the values and relationships at stake are asserted and defined by parties and decision makers. Do the legal rights to be informed about, and to appeal and contest land use decisions offer more than a forum for competing claims of property to be efficiently channeled? Do they offer more than a way for opposition to private development to be managed in the interests of public interest narrowly defined as economic growth? Do they create space for rethinking of property relations? Or do they serve as an exclusive channel for privileged groups to perpetuate environmental injustice and spatial inequities?

This paper is an initial attempt to take up these questions through a study of a series of regional planning conflicts over the siting of aggregate mineral mines in Ontario. Below I set out a relational approach to land use conflicts and propose an eco-relational analysis of land use planning law. I then consider the current legislative framework for siting aggregate mineral extraction in the Province to examine law’s work in structuring people-place relations. As part of a larger empirical study, this paper specifically applies the relational approach to consider the ways in which Ontario’s planning law and policy organize and control the types of claims asserted in relation to land and ecological systems. The complex, and sometimes contradictory, values and relationships articulated by a range of parties in aggregate conflicts will be examined in greater depth as part of the larger project.

## **Relational Theory and Land Use Disputes: Why a Relational Framework?**

*What does it mean to be constituted by relationships rather than just living among others?* (Nedelsky 2012:19)

The relational work that law does in land use planning disputes has specific and material consequences for land and human and ‘more-than-human’ communities (Graham 2010). Understanding how law structures people-place relations in specific places is essential to our capacity to respond to the current ecological crisis. In particular, the legal construction of the relationships between landowners, other parties, and the land itself, shapes and constrains what is at stake in the land use decision-making process, and consequently impacts the ecological and material outcomes. As I have argued elsewhere, a relational legal analysis is ideally suited to exposing and examining law’s role in shaping people-place relations (Van Wagner 2013).

By offering an ecological adaptation of the relational rights theory of Canadian legal scholar Jennifer Nedelsky, my aim is to foreground the specific way in which land use law operates to constitute our relationships with the wider ecological communities in which our lives are enmeshed. Nedelsky’s work has influenced a growing body of feminist and critical property scholarship whose work reimagines property as responsibility, connection, and belonging rather than as exclusion and protection from the collective (Cooper 2007; Keenan 2010; Nedelsky 1990; Singer 2001; 2009). In *Law’s Relations*, Nedelsky proposes a relational rights framework with both methodological and normative dimensions. It is this formulation of her relational analysis that I engage with below.

For Nedelsky, an essential element of understanding the world relationally is seeing the interconnection between personal and institutional relationships: “each set of relations is nested in the next, and all interact with each other” (Nedelsky 2012:31). From this perspective, we can understand people-place relations as nested in broader relationships with family and human community, as well as the hydrological, geological, and ecological relations of the more-than-human world in a specific place, which are themselves shaped by societal structures of property ownership, land use regulation, and informal attitudes to the environment. In turn, broader economic forces, as well as global climate trends and environmental conditions, natural disasters, and human-induced ecological crises, shape these structures. In her view, through exposing the way that law structures key relationships we can

better understand what kinds of decisions are being made (Nedelsky 2012:65). Nedelsky offers her relational rights approach as both an evaluative and transformative framework through which to resolve disputes (Nedelsky 2012:32). Once this underlying context has been identified, the inquiry shifts to examine the values at stake, which she describes as the broad articulations of what is essential in a particular society. She then asks us to consider the kinds of relationships that would foster those values, leading to a consideration of what particular forms of ‘rights’ would structure relations differently – rights being the “institutional and rhetorical means of expressing contesting, and implementing values” (Nedelsky 2012:236).

Because the abstraction of the dominant ‘bundle of rights’ model of property reduces the rich multi-faceted relationship between people and places to the ownership relation (Graham 2010; Gray & Gray 1998; Penner 1995), it is necessary to first make people-place relations visible in the decision-making process before we can evaluate and potentially transform them. In particular it is essential to understand whether there are some people-place relations that are cognizable and others that remain outside the legally recognized rights and interests to land. If so, we must consider how this distinction is made and upheld.

#### Relational Theory and Planning: Seeing People-Place Relations in Law

Noting the limits of her own analysis to human relations, Nedelsky invites her readers to extend her relational rights framework to ecological relations:

Once attention is drawn to what kinds of relationships generate a given problem and what is shaping those relationships, it will become clear that the human institutions and norms I offer as examples above are themselves conditioned by the availability of natural resources as well as the way humans have constructed control over those resources and the way humans understand their entitlement to them (Nedelsky 2012:22).

In my view, land use planning disputes offer a compelling context in which to take up this invitation. Indeed, they often serve as one of the few legal forums in which these questions of control and entitlement are openly contested and alternative relations with land are, to some extent, “performed” (Blomley 2013).

Land use planning disputes are examples of “wicked problems,” (Rittel & Webber 1973) involving “multiple and competing values and goals, little scientific agreement on cause-

effect relationships, limited time and resources, incomplete information, and structural inequities in access to information and the distribution of political power” (Lachapelle & McCool 2005:279). As such, they are contentious and notoriously difficult to resolve. Land use planning, and planning law, are also inherently relational in their concern with how we live together (Massey 2005). They are about relationships: relationships between neighbours, both near and far; relationships between those who own land and those who do not; relationships between those who make decisions about land and those who live with these decisions; relationships between humans and the animate and inanimate more-than-human agents we share space with; and, relationships between the present generation and past and future generations. While Valverde’s detailed study of Toronto’s planning regime points to the fundamentally “social” nature of all planning, she points to the integration of the governance of human and more-than-human as one of the unique elements of planning in need of much more scholarly attention (Valverde 2012:217). Planning processes provide for a wide range of parties to participate in legal decision-making processes (Arnold 2002). Further, the physical world is uniquely exposed in land use decision-making through photos, maps, technical data, but also stories and site visits (Van Wagner 2013). Land use planning is also prospective in nature (Arnold 2002:47; Van Wagner 2013). Unlike environmental and property law that intervene in people-place relations to remediate after harm has been done, planning law has the potential for proactive restructuring of relations to avoid ecological harms.

However, the important relational work that planning law does is under-examined by legal scholars and often overlooked by others concerned with environmental disputes.<sup>3</sup> Valverde notes how the logic of zoning and land use law, focused on ‘uses’ rather than people, obscures law’s ordering of people and things (Valverde 2005:40–41). She has noted the incommensurability of the use logic of planning law and constitutional rights-based arguments relied on in many high profile land use cases (Valverde 2005, 2012).<sup>4</sup> As Nicole Graham observes, law “swiftly transform disputes about physical land use practices into disputes over abstract property rights.” Parties that speak of property as place and the loss

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<sup>3</sup> Indeed, Valverde (2012, 7) argues, the day-to-day operation of law has been neglected in scholarship about planning and urban studies. Tony Arnold similarly points to a neglect of land use regulation by both scholars and activists working on environmental justice issues (Arnold 2002). A 2014 Land Use Prof blog post by Canadian law professor Deborah Curran specifically noted the limited scholarly work on Canadian land use law, with Valverde’s work as a notable exception: [http://lawprofessors.typepad.com/land\\_use/2014/11/destined-to-be-classic-land-use-books-from-canada.html](http://lawprofessors.typepad.com/land_use/2014/11/destined-to-be-classic-land-use-books-from-canada.html).

<sup>4</sup> See for example *Batty v. Toronto (City)*, 2011 ONSC 6862, 108 OR (3d) 571.



associated with transformation of the nonhuman environment become “dissident voices” (Graham 2010:163). In the context of land use disputes, a resource-oriented and instrumental planning perspective can serve to obscure a range of relations that may be put forward by intervening parties (Henwood & Pidgeon 2001; Nash et al. 2010). In this context a relational analysis aimed at examining “the way law participates in a problem” is particularly relevant to understanding the relationship between law and planning (Nedelsky 2012).

My point is that while environmentally-motivated participants in land use disputes may find themselves frustrated with the process and the outcomes, land use planning is not inherently problematic from an environmental perspective. In fact, as noted above, it has some particular strategic potential for the transformation of ecological relations. Through careful and detailed attention to the legal structuring of relations through deeply embedded constructions of land as property and more-than-human others as objects, proprietary rights of control, exclusion, use, and destruction, facilitate power over the more-than-human world rather than responsibility to, and even reciprocity with, our ecological communities. As Harrison and Bedford argue, “a planning system underpinned by an ideology of private property rights and a free market forecloses alternative ways of valuing the natural world” (Boucher & Whatmore 1993; Cowell & Murdoch 1999; Foster 2002; Harrison & Bedford 2003:352). Therefore, while land use planning can be understood as creating space for alternatives to traditional property relations and may facilitate “public reflection on substantive issues” (Groves et al. 2013:342), we need to understand whether, and how, such opportunities are being realized on the ground in particular places. In my view, the promise of an ecological-relational analysis is the opportunity to link the broad participatory opportunities of planning contexts with the unique visibility and presence of place in land use disputes. In doing so, it opens up space for transformative performances of ecological relations and the treatment of people-place relationships as socially and legally significant.

#### From Relational Rights to Eco-Relational Rights: Place in Land Use Law

In shifting the relational rights analysis towards an ecological-relational framework, this paper adopts the language of ‘place’ and ‘people-place relations’ to understand the overlapping and nested relationships within the ecology of specific landscapes inhabited by communities of human relation alongside complex and layered networks of materials and entities. Place is used to express an explicit acknowledgement of the relationality of the

human and more-than-human: the negotiated “thrown-togetherness” of relation that make up the social and material dimensions of particular places (Massey 2004:140–141). In this way, the language of place replaces the division imposed when we talk about ‘resources’ – rocks or trees, plants or animals, lakes and rivers removed from their networks of ecological interdependence to enable use and profit. At the same time, the affective elements of people-place relations that are often excluded from technical resource-based planning are also made visible in this conception of place (Nash et al. 2010), and acknowledging the political nature of claims about, and to, place therefore reveals place-making as a site of power relations (Murdoch 2005:23; Pierce et al. 2011). This paper builds on Martin et al.’s conception of place as, “a setting for and situated in the operation of social and economic processes,” and “place claims” as “attachments to, and identification with, specific places” and their “ideals about land use and how spatial processes should unfold” (Martin et al. 2010:732, 182) to understand the political nature of particular places.

Martin et al. note how land use disputes expose the “discontinuity between place identity and legal regulation of place,” as relevant legal frameworks fail to account for the range of concerns and attachments expressed by participants. Pierce et al. (2011:61) argue that the concept of relational-place is “particularly relevant to conflicts that centre on change in and of places.” Building on Massey’s concept of places as “bundles of space-time trajectories” to construct a multi-scalar and relational concept of place, they conclude that “all places are relational places” (Pierce et al. 2011:60). Relational places are made up of “raw materials,” including, “physical features, individuals, coalitions, corporations and groups, as well as myriad parts of the built environment” (Pierce et al. 2011:59). Selection amongst these raw materials shapes both “individual human-environment experiences,” the formation of shared understandings about places and their meaning in pursuit of collective goals. These “bundles” are dynamic, ongoing and change over time, each place-frame being only ever a negotiated and strategic “fraction of a place” (Pierce et al. 2011:61). The disconnect between people’s place claims and law is “one of the central features of the law-space nexus” (Martin et al. 2010:182).

This paper contributes to the need for further research exploring the actors and networks that mediate spatio-legal production in struggles over land use (Martin et al. 2010) by examining law’s role in structuring the people-place relations at the heart of a specific set of conflicts. As will be discussed below, the persistent centrality of private property ownership in

substantive decisions about how private land can and should be used is concealed by the procedural emphasis on participation and consultation in Ontario's provincial land use governance. This privileging of the ownership relationship is further obscured by an emphasis on measurable and purportedly rational and objective criteria in the adjudication of land use disputes despite the affective and embodied nature of the ecological relationships at stake.

By focusing on parties who do not have ownership rights to the land involved, I centre the broad 'more-than-ownership' interests engaged by such disputes. In doing so, I examine the ways in which law creates, responds to, and resolves the discontinuities between place claims and legally recognized relations to place. Such parties or participants are most often defined as non-owners, third parties, or objectors, defined by their distance and exclusion from the primary legal relationship of, and the lack of enforceable interests at the outset of the analysis. Here, I reject a negative or residual definition and adopt the language of more-than-ownership to describe these parties and interests. My intention is to capture both the individuals and groups whose direct place-relations will be impacted by land use decisions and those who may be more indirectly connected to specific places but have related expertise and/or interest in the outcome. While not taken up directly in this paper, my intention is also to create space for the more-than-human entities with impacted relationships and interests, such as animals, plants, rivers, rocks or forests. These categories are not intended to simplify or romanticize local or "community" opposition – which can combine potentially exclusionary or parochial site-specific concerns with the assertion or development of more transformative socio-ecological relations. In this sense, 'more' is used to acknowledge those interests that fall outside of property-relations defined by the ownership model and not to grant any particular relation greater or privileged status. This shift in language is an initial attempt to account for the wide spectrum of contested relations with, and within, places that are shaped, obscured, and potentially disciplined by law.

### **Methodology<sup>5</sup>**

*This paper is part of a larger research project involving documentary analysis of the law and policy governing aggregate siting, which includes applications and appeals between 2001 and 2014 in Ontario, as well as the written and oral submissions made before a legislative*

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<sup>5</sup> This section summarizes the methodological approach outlined in Chapter Three, at pages 119-128.

review committee.<sup>6</sup> An initial review of the Provincial Environmental Registry, a public online database governed by the Environmental Bill of Rights (1993, SO 1993, c 28), where all Aggregate Resources Act (R.S.O. 1990, c. A. 8 [the “ARA”]) applications are publicly posted identified 242 decisions on large-scale industrial aggregate mines, including approvals, withdrawals, and denials. A database of the decisions was constructed identifying the dates of proposal and decision, location, depth of extraction, volume of extraction, objections filed, key issues identified, and, decision makers for each.

I selected cases for more detailed analysis through a review of key documents to identify the level and nature of participation by members of the public and regulatory and planning bodies. Cases with high levels of more-than-owner participation were identified and from these I selected proposals or appeals resulting in, or likely to result in, a hearing before the provincial land use tribunal. Selection was informed by the relational-place “methodological hooks” proposed by Pierce et al. (2011:61), in particular to “identify and examine the place-frames central to the conflict” and to “identify those actors and institutions key to place-framing” (Pierce et al. 2011:61) with a specific focus on more-than-owner parties. The cases included applications that were approved, denied, and withdrawn, as well as some additional cases including both large-scale extensions not included in the Provincial reporting regime and ongoing cases identified by a review of media coverage and through interview participants. Unstructured in-person interviews were held with over 25 participants in aggregate extraction disputes. Participants were largely activists in locally organized interest groups who had asserted, or continue to assert, more-than-ownership interests in relation to the land at stake in a particular proposal. In addition, two lawyers, one technical consultant, one policy analyst, and two planners were also interviewed. Interviews took place in both one-on-one and small group settings. Where possible, interviews took place in the area that was the subject of the conflict or I made subsequent site visits. All participants provided maps and often photographs of the sites. In two cases, participants took me on a tour of the larger area of the proposed development.

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<sup>6</sup>In May 2012, an all-party review of the Aggregate Resources Act was initiated at the Standing Committee on General Government (Legislative Assembly of Ontario, Orders and Notice Paper, 1<sup>st</sup> session, 40<sup>th</sup> Parliament, March 22, 2012). The review included the consultation process, siting, operations, and rehabilitation, best practices and industry developments, fees and royalties, and, aggregate resource development and protection, including conservation and recycling.

## Legal and Policy Context: The Law of Aggregate Extraction in Ontario

Like many jurisdictions, Ontario has developed a complex system of land use planning (Blais 2011; Cullingworth 1987; Kaplinsky 2012; Sandberg et al. 2013), including the overlapping network of laws that govern the use of private land (Environmental Commissioner of Ontario 2012). The ‘public interest orientation’ and consultative nature of the provincial planning regime suggests the existence of legitimate interests in land beyond private ownership. In fact, one of the key promises of planning is to reduce conflict where the ‘private’ and ‘public’ interests in the use of private land clash (Blais 2011:52).<sup>7</sup> Key aspects of provincial land use planning law and policy, such as zoning law, are premised on the acceptance of public limitations on the right of an owner to use their property in any way they wish (Kaplinsky 2012; Valverde 2012:139). Unlike the United States and Australia, Canada does not have constitutional protection for property rights and Canadian courts have traditionally taken a highly deferential stance on the power of the state to regulate the uses of private property (*Mariner Real Estate Ltd v Nova Scotia (Attorney General)* 1999; *Canadian Pacific Railway v Vancouver (City)* 2006).

In Ontario and other jurisdictions, participation in planning processes has realized some “subversive” potential.<sup>8</sup> However, Anglo-Canadian planning remains rooted in the liberal individualism of colonial property law and continues to enforce abstract, hierarchical, and anthropocentric conceptions of human-environment relations that limit the potential to reimagine people-place relations (Borrows 1997; Mossman & Girard 2014; Van Wagner 2013). In particular, despite the lack of constitutional protection for private property, the practice of land use law in Ontario reinforces the role of the owner in determining the use of private land.<sup>9</sup> The case of aggregate mineral extraction in Ontario provides a useful

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<sup>7</sup> For an example of efforts to empirically measure the benefits of planning, see Cheshire & Sheppard (2002). As Blais (2011) points out in the context of Ontario, we know very little about the actual costs and benefits of planning.

<sup>8</sup> A review of wider land use debates is beyond the scope of this paper, but see examples such as strengthened environmental protections (Patano & Sandberg 2005; Sandberg et al. 2013; Whitelaw et al. 2008), human rights protection in zoning decisions (*Advocacy Centre for Tenants Ontario v. Kitchener (City)* (2010), O.M.B.D. Case No. PL050611; *Alcoholism Foundation of Manitoba v. Winnipeg (City)*, [1990] M.J. No 212 (C.A.)), and has resulted in unlikely alliances for social and political change (Cowell & Owens 2006; Sandberg et al. 2013; Sandercock & Lyssiotis 2003; Scotford & Walsh 2013)

<sup>9</sup> While there is little scholarly commentary on land use law in Canada, see Curran’s 2014 blog post comparing the US and Canada and concluding that protections for property owners are similar in the two countries: [http://lawprofessors.typepad.com/land\\_use/2014/11/land-use-in-canada-where-extensive-and-restrictive-land-use-regulation-is-the-norm-by-deborah-curran.html](http://lawprofessors.typepad.com/land_use/2014/11/land-use-in-canada-where-extensive-and-restrictive-land-use-regulation-is-the-norm-by-deborah-curran.html). For a discussion of the private owner as the “primary land

illustration of the private landowner, and particularly, as the “primary land use decision maker” in the Canadian context.<sup>10</sup>

### Situating Aggregate Mineral Extraction in the Provincial Land Use Regime<sup>11</sup>

*While aggregate mineral extraction developments are open-pit mines, in Ontario they are regulated under land use planning law and policy. Unlike other large-scale industrial mining developments in the Province, they are also largely located on privately owned land. And, unlike other ‘locally unwanted land uses (“LULUs”), the siting of aggregate mineral mines is driven by private-owner proponents rather than public siting processes, such as environmental assessment.*

*Planning law in Ontario operates through a complex web of legislation and policy. Figure 1 illustrates the detailed “inventory of the laws” potentially applicable to any given aggregate extraction dispute in the Province.<sup>12</sup> Land use planning falls within provincial jurisdiction over municipal institutions and property and civil rights.<sup>13</sup> In the context of aggregate extraction, the legal framework includes, the constitutional and/or treaty rights of First Nations and Metis communities and the applicable Indigenous legal orders,<sup>14</sup> municipal powers and centralized provincial planning policy under the Planning Act, the Provincial Policy Statement (Ministry of Municipal Affairs and Housing 2014), [“PPS”], provincial planning regimes, particularly the Niagara Escarpment Planning and Development Act, and*

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use decision maker,” see (Platt 2014). At the time of writing a new volume on Canadian planning law was in press, Anneke Smit and Marcia Valiante. *Public Interest, Private Property* (UBC Press: Vancouver, 2015)

<sup>10</sup> It is important to note that the privileging of ownership rights is not the only explanation for outcomes described in the case study below. Land use planning decisions are complex and the siting of extractive activity is situated within larger dynamics of extractivism as well as rapid sub/urbanization. While I would argue that these are related to the structure of land ownership through private property and an owner-driven planning system, they also present distinct issues and considerations that are not taken up here. However, I see examining law’s role in privileging a specific form of relationship to land as critical to understanding how law upholds particular values about the more-than-human world in order to transform people-place relations in land use law.

<sup>11</sup> This section summarizes the material from Chapter Four, on pages 145-149, 162-192, and 219-227. Repeated text is indicated in italics.

<sup>12</sup> This visual representation is an adaptation of Valverde’s (2012, p. 21-28) “legal inventory of laws”, which aims to provide an overview of the “basic legal architecture” engaged by particular disputes.

<sup>13</sup> *Canadian Constitution Act 1867* (UK), 30 & 31 Victoria, c 3, s 92 (13).

<sup>14</sup> While the application of Indigenous law and the constitutional duty to consult First Nations and Metis governments is not discussed in this paper, they are considered in the larger project. Indigenous and Aboriginal law present some unique legal challenges to the existing aggregate extraction regime that are worthy of extensive and specific consideration beyond the scope of this paper.

*the ARA and associated Ministry of Natural Resources guidelines and standards.<sup>15</sup> While the decision- making process flows from the Act, most hearings in quarry conflicts include, and many are focused on, consideration of amendments to the local municipality’s Official Plan and zoning by-laws required. The Province provides broad guidance and maintains considerable power to constrain local government action through both the Planning Act and the PPS, which “sets the policy foundation for regulating the development and use of land.”<sup>16</sup>*

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<sup>15</sup> *Planning Act*, R.S.O. 1990, c. P. 13, s.22; *Provincial Policy Statement* (Ministry of Municipal Affairs and Housing 2014); Ministry of Natural Resources guidelines and standards (Ministry of Natural Resources, Land and Water Branch, Aggregate and Petroleum Resources Section 1996; Ministry of Natural Resources, Natural Resources Management Division 1997)

<sup>16</sup> The majority of cases discussed here were decided under the 2005 Provincial Policy Statement, Ministry of Municipal Affairs and Housing, <http://www.mah.gov.on.ca/Page215.aspx> [the “2005 PPS”]. In April 2014 the Ministry of Municipal Affairs and Housing released the 2014 Policy Statement, which took effect on April 30, 2014. Applications filed subsequently will be determined under the 2014 PPS.

**Figure 1: Inventory of Laws for Aggregate Extraction Siting**

<p><b>MUNICIPAL</b></p> <p>Official Plan(s) and Development Plans (municipal/regional), Zoning, Bylaws, the municipal land survey</p>	<p><b>PROVINCIAL</b></p> <p>Aggregate Resources Act , Planning Act, Endangered Species Act, Ontario Water Resources Act, Environmental Protection Act, Environmental Bill of Rights, Provincial Policy Statement, provincial land use plans, MNR guidelines and manual, common law of property</p>
<p><b>FEDERAL</b></p> <p>Fisheries Act, Endangered Species Act, Trade Agreements (NAFTA), Environmental Assessment Act, s.35 of the Constitution (Aboriginal rights and title) and the Duty to Consult, Canada Lands Inventory, Canada Soil Survey, the Geological Survey of Canada</p>	<p><b>INTERNATIONAL</b></p> <p>Indigenous legal orders Treaties International Investor Protection Mechanisms and Dispute Resolution in NAFTA and other Trade Agreements, international human rights and environmental obligations</p>

**Figure 1: Inventory of Laws for Aggregate Extraction Siting**



*Within this provincially led planning regime, the bulk of day-to-day planning powers and responsibilities are devolved to local municipalities. However, formal public participation requirements for local planning and development decisions are set out in the Planning Act (s. 17, 22, 26.2, 34). Review of planning decisions is divided between the Ontario Municipal Board (OMB) and the Environmental Review Tribunal (ERT), ostensibly dividing “land use” from “environmental” decisions, despite the environmentally-focused nature of many objections to planning decisions (Sandberg et al. 2013; Van Wagner 2013).<sup>17</sup> However, one of the unique features of Ontario’s planning system remains the powerful role of the OMB, a quasi-judicial administrative body, which serves as the primary appeal body for planning and development decisions, including ARA licensing and associated planning approvals.*

The data collected from the Environmental Registry revealed that applications for large-scale industrial aggregate mineral mines under the ARA are overwhelmingly approved, both by the Ministry that oversees licensing, and by the quasi-judicial appeal body that contested applications are reviewed by in Ontario. Table 5 shows that between 2001 and 2014, 86% of large-scale ARA applications listed on the Registry were approved with only 2% having been denied. While close to 12% are withdrawn, in at least two cases, the applications were resubmitted with modifications. In another case, the application was withdrawn after a multimillion dollar settlement with the Province and an unsuccessful claim against the Federal government under the investor protection clause of the North American Free Trade Agreement (NAFTA).<sup>18</sup> While another high profile withdrawal by the Highlands Company in 2011 is widely seen as a victory for the well-organized opposition, which brought together farmers, urban food movement activists, second home owners, environmentalists and indigenous groups, a revised Ontario geological survey now indicates that the applicant’s technical assessment of the quality the rock was incorrect and the value was overestimated.<sup>19</sup>

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<sup>17</sup> Notably the two quasi-judicial administrative bodies have recently been formally linked as part of the Environment and Land Tribunals cluster but it is too early to determine any substantive outcomes of the restructuring (Sossin & Baxter 2012). For certain appeals, particularly where hearings may be required from both tribunals, a joint-board is formed under the *Consolidated Hearings Act* (RSO 1990. c C.29), such as the high profile *Nelson Aggregate Co., Re*, (2012 CLB 29642), and, *Re Walker Aggregates Inc. (Re)* (2012 CLB 16274) cases.

<sup>18</sup> St. Mary’s Cement proposed a large quarry below the water table, located near Hamilton, Ontario. It was opposed by multiple agencies and local governments and a community group and eventually resulted in a rare Ministerial Zoning Order under section 77 of the *Planning Act* prohibiting aggregate development. Members of the community group were interviewed for this project.

<sup>19</sup> Consultant, interview, June 2014.

<b>Decisions</b>	<b>#</b>	<b>%</b>
Approved	208	86
Withdrawn	28	12
Denied	6	2
<b>Total</b>	<b>242</b>	<b>100</b>

**Table 5: Decisions on Class A Licences 2001-2014 as reported on the provincial Environmental Registry**

An overwhelming majority of the applications are approved. In many cases, this is despite substantial public participation in planning processes and tribunal hearings and strong objections by the community and sometimes planning agencies as well. Community activists often provide alternative expert evidence at their own expense, even in areas covered by explicitly “environmentally focused” development plans such as the Niagara Escarpment in southern Ontario. Table 6 shows the range of public commentary or objection for each category of decision, based on the Environmental Registry data.

<b>Decision</b>	<b>Range of Numbers of Comments Filed</b>
<b>Approved</b>	<b>0-1108</b>
<b>Withdrawn</b>	<b>0-1563</b>
<b>Denied</b>	<b>0-441</b>

**Table 6: Comments and Objections filed by members of the public and/or government agencies (local, provincial and federal)**

While the Minister has discretion to grant an aggregate extraction license despite outstanding public objections, in practice almost all cases in which the proponent does not “resolve” all concerns, the adjudication is referred to the Ontario Municipal Board where the planning process is transformed into a quasi-judicial adjudicative process. Table 7 below shows the breakdown of decisions referred to the Board by decision makers. Seventeen percent of applications are adjudicated, with 83 percent being dealt with directly by the Ministry. However, it is important to note that Ministry approval does not necessarily imply that objections have been resolved from the perspective of the more-than-owner parties. As described below, while the applicant has two years to attempt to resolve concerns, once they notify the Ministry, parties have only 20 days in which to affirm their objection, or it is deemed withdrawn. Technical expertise, capacity, and financial resources may be as important in determining whether a party will maintain an objection as their substantive

concerns, particularly in light of the near certainty that the application will be referred to the Board. Hearings for contentious applications can be quite lengthy and expensive, particularly if an individual or group obtains legal advice. For example, the Duntroon quarry extension hearing lasted 169 hearing days.<sup>20</sup> One interview participant observed the limitations of poorly funded local groups directly, having worked in environmental departments of government for many years, noting how success was linked to financial resources rather than substantive issues:

Obviously many of them had very legitimate issues but unfortunately they were ... driven by bake sale funds, could not afford the scientific studies ... that were needed, so it became very difficult for them to argue their cases.<sup>21</sup>

Interview participants almost uniformly viewed success before the Board to be unlikely.

Decision Maker	Approvals		Denials	
	#	%	#	%
<b>MNR</b>	<b>178</b>	<b>82</b>	<b>1</b>	<b>&lt; 1</b>
<b>OMB</b>	<b>28</b>	<b>13</b>	<b>3</b>	<b>1</b>
<b>Joint Board</b>	<b>2</b>	<b>&lt; 1</b>	<b>2</b>	<b>&lt; 1</b>
<b>Total</b>	<b>208</b>	<b>96</b>	<b>6</b>	<b>2</b>

**Table 7: Outcomes for approved and denied applications by decision maker for decisions on Class A Licence Applications under the Ontario Aggregate Resources Act 2001-2014 as reported on the provincial Environmental Registry**

The discussion below considers the finding that legal outcomes are skewed towards applicants, in this case aggregate extraction companies, from a relational perspective. I first examine the types of claims about what was at stake in the disputes and then explore how the legal and policy frameworks governing the application process structures the people-place relationships involved.

### **Structuring Legal Relations**

While aggregate decisions engage a complex network of law and policy, the ARA and its regulations and Ministerial policies, the *Planning Act* and the guiding planning policy, the PPS, largely determine the structure of relations. The discussion examines the work that law does to structure people-place relations in the context of aggregate extraction. First, more-than-owner perspectives on the people-place relations at the heart of the disputes studied are examined to demonstrate that amidst the messy complexity of the place-claims involved,

<sup>20</sup> More-than-owner party, Interview, September 9, 2014.

<sup>21</sup> More-than-owner party, Interview, April 23, 2014).

assertions of alternative relationships with the more-than-human world emerge and have the potential to disrupt legal property relations. It then details three ways in which the people-place relations of aggregate extraction are shaped through legal texts and processes to uphold the legal property relations of private ownership: (1) the relative positions of the potential parties during the application and adjudication stages; (2) the presumptive right to development and approval; and, (3) mitigation-based rather than a precautionary approach to ecological impact.

### Connection, Responsibility, Dependence: The Messy Story of Places at Stake

Participants in the study expressed complex and sometimes contradictory relationships with the places identified for extraction in the disputes studied for this project. As noted above, the interests asserted by these more-than-owner parties are neither uniformly environmentally motivated nor are they merely instrumental NIMBYism. They are messy – all at once instrumental and affective, conservative and transformative, exclusionary and reciprocal. Here I am focused on such openings to consider whether the places at stake in aggregate disputes can serve as the “literal common ground” for essential conversations and negotiations about how we want to live together as human communities embedded in the social and ecological complexity of particular material places (Haluza-Delay et al. 2013; Scully 2012). Environmental concerns were not the only concerns expressed by the participants in this study and few of them identified primarily, or at all, as environmentalists; however environmental concerns were consistently raised as a central issue in both interviews and the texts examined.<sup>22</sup> In this paper, I have focused on these concerns because of the challenge they present to the enduring legal primacy of the landowner in land use planning decision-making, often arising in unexpected places. It is not meant to romanticize a particular community or way of life or to simplify the messy and contradictory nature of the disputes. Rather my aim is to unsettle the notion that such disputes can ever be neatly

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<sup>22</sup> For example, see the “Resident Comments, Questions and Responses by Key Topic” from the Nelson Quarry Joint Agency Review Team Report, available online: [http://www.halton.ca/planning\\_sustainability/planning\\_applications/applications\\_under\\_review/nelson\\_aggregate\\_quarry/](http://www.halton.ca/planning_sustainability/planning_applications/applications_under_review/nelson_aggregate_quarry/). Halton Region, in which the Nelson Quarry was proposed, has a unique Joint Agency Review Team (JART) process that brings local and regional planning authorities together to review proposals. The JART Reports attempt to provide an accessible summary of key elements of the proposal and reviews of the technical information to the public. The Nelson JART Report also breaks down public comments. In this case 70 comments were received and organized into the following categories: Natural Environment (22), Water (18), Noise and Air Quality (16), Blasting (22), Traffic (22), Existing Quarry (8), Rehabilitation (8), UNESCO Biosphere Reserve (10), JART Process (3), and, Other (24). While no thematic organized summary is available, the author’s assessment of the public comments of the 2012 legislative review reflects a similar mix of issues, although several additional concerns were raised in the province-wide hearings, such as First Nations jurisdiction and the constitutional Duty to Consult Indigenous communities.

categorized as either NIMBY or environmental in order to better engage with the “complex relations of attachment, belonging, exclusion and otherness that permeate such conflicts” (Woods et al. 2012:568).

Some participants explained their motivations or their role in the process through concepts of advocacy, stewardship or responsibility. One member of a local environmental group involved in a licensing appeal pointed to both an interspecies and intergenerational sense of obligation:

One of the problems you have is the Niagara Escarpment can't stand up for itself; it is mute. You and I and all of us have to stand up and defend and that is what we are trying to do.”<sup>23</sup>

A sixth-generation farmer on land adjacent to a proposed mine site whose family rejected repeated offers to buy-out his land reflected on his relationship to the surrounding lands and waters:

...we realized when these guys came along, they could destroy all that stuff. We didn't realize what a great spot we have here. We didn't want to see that done. It is deeper than just the money part, eh. A lot deeper.”<sup>24</sup>

One submission on the Nelson Quarry stated, “we are so fortunate to be stewards of this scenic, special land.” (Appendix C, JART Report, 2009, 14). Another noted, “[A]s humans we bear an enormous responsibility. While we look for ways to improve our lives through development, we must respect all that nature provides us and must use its resources responsibly.” (Appendix C, JART Report, 2009, 24). A farming couple collectively pointed to the need for a sustainable relationship with the soil:

Participant 1: The big thing is you can't create soil to grow food in.

Participant 2: No, it is not a renewable resource but produces a renewable crop every year and that is the difference. You can't take aggregate and produce a new crop every year. ...

Participant 1: Yes, look at the cod industry. You spoil it, it doesn't come back in a few days.<sup>25</sup>

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<sup>23</sup> More-than-owner party, Interview, August 8, 2014.

<sup>24</sup> More-than-owner party, Interview, August 8, 2014.

<sup>25</sup> More-than-owner party, Interview, August 8, 2014.

Human-environment interdependence was sometimes discussed in the context of environmental health. One participant reflected that she was surprised that public concern about the quarry proposal was quite limited until people were informed of the environmental health issues:

We started off strong as a group on traffic impacts and property devaluation ...and it doesn't seem to have much of an influence...even with blasting...but you can't breathe and your water is contaminated, people start to listen.<sup>26</sup>

This type of framing was seen by other participants as narrowing the ecological perspective to centre human concerns. One participant lamented that the “average person” was more concerned about their own water and real estate values than the rare bats, butterflies, and orchids found on the site, “they are creatures succumbing to the destruction of the environment.”<sup>27</sup> Another viewed the ecological impact as more of a “case-facing” issue than a “community-facing” concern such as traffic.<sup>28</sup> For others, the connection between human wellbeing and ecological integrity became important to the shift beyond a site-specific campaign to engagement with broader debates about land use. One group shifted their focus from the particular site to advocating for a regional environmental plan that would recognize “the whole region [as] a system of environmental features and functions that work together.”<sup>29</sup> A leading member of another group talked about rejecting the site-specific approach for the “common denominator” of food and water: “Our water is not for sale, our water is sacred and not to be polluted, and our foodlands are there for the betterment of this province.”<sup>30</sup> He reflected on successfully shifting the local fight to support a more broadly focused campaign, “It is one of those issues in life that is just the right thing to do.”<sup>31</sup> Interview participants simultaneously emphasized their own knowledge of the places involved and a sense of humility about how much they had learned about the complexity of ecological systems and connectivity through involvement in the disputes. For several participants the relationship to the place at stake in the dispute changed or deepened through engagement with the planning process. One farmer reflected on his new understanding of the role of the complex groundwater and hydrogeological features in the area:

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<sup>26</sup> More-than-owner party, Interview, July 18, 2014.

<sup>27</sup> More-than-owner party, Interview, July 28, 2014.

<sup>28</sup> More-than-owner party, Interview May 23, 2014.

<sup>29</sup> More-than-owner party, Interview, May 7, 2014

<sup>30</sup> More-than-owner party, Interview, March 12, 2014.

<sup>31</sup> More-than-owner party, Interview, March 12, 2014.

I never knew about the reach of water. I never knew that changing cold water fisheries by a couple degrees in temperature could be an issue. I never knew that fish that spawned in the Nottawasaga sturgeon became game fish in Lake Michigan. We were just farming there doing our stuff. We just don't understand the reach of impact things can have. We learned. We talked.<sup>32</sup>

One participant talked about the proposed mine site beside her long-time family home, and having only recently learned about species of rare butterfly that depends on this unique alvar habitat:<sup>33</sup> “This is a beautiful little alvar that should be saved, part of a disappearing globally rare habitat. You would find at least as many alvar indicators to save it [as another protected area]...but nobody is looking. The rare species are there but nobody is looking.”<sup>34</sup> In several cases this learning was, at least partially, the result of engaging with highly technical proponent data personally, and often through experts, and finding it lacking. One participant described the process of learning about the complex hydrogeology of the site:

As we were looking it just became more and more gripping because of the fact that we found these species, that it was designated provincially significant...how precious and vulnerable this aquifer was... The fragility of the system became more and more apparent as we learned more.<sup>35</sup>

For many participants this complexity was not reflected in the complex modelling provided by proponent experts, abstracted from the day-to-day experience of a particular place. One member of an environmental group familiar with the detailed and time-consuming processes of ecological science noted that the ability to contest the expert reports was limited by little or no opportunity to collect alternative data about the physical and biological environment on the proponent's property:

They won't let you walk around in your rubber boots and eat some sandwiches and try to figure out what is going on ... You are in there for three hours and then you get the hell out.<sup>36</sup>

Connection to place was also evident in participants' descriptions of the impact of aggregate mining as fundamentally transformative, in marked contrast with its legal construction as an

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<sup>32</sup> More-than-owner party, Interview, March 12, 2014.

<sup>33</sup> An alvar is a rare biological landform caused by shallow exposed limestone or dolostone bedrock forming a plain with thin or no soil. Alvars support rare plants and animals, particularly mosses, lichens and birds, and are found mostly in northern Europe or in the Great Lakes region of North America. More than half of remaining alvars occur in Ontario. See the *Conserving Great Lakes Alvars: Final Technical Report of the International Alvar Conservation Initiative* (1999), online: <http://lakehuron.ca/uploads/pdf/Conserving.Great.Lakes.Alvars.pdf>.

<sup>34</sup> More-than-owner party, Interview, August 28, 2014.

<sup>35</sup> More-than-owner party, Interview, August 11, 2014

<sup>36</sup> More-than-owner party, Interview, August 8, 2014

“interim use” in the PPS. The sense that a particular material place would be lost was evoked through the image of the “hole” or “crater” that would be left behind:

...[Y]ou are taking a natural feature which is an escarpment and you are creating a gigantic hole which later becomes a deep lake which is not natural on the escarpment. There [are] no lakes on top. You are destroying wetlands, you are destroying creeks, you are destroying woodlands, habitats...and farmland.<sup>37</sup>

The loss of something was linked to the particularity of specific places through the rejection of highly technical adaptive management plans and environmental compensation mechanisms increasingly incorporated into licensing conditions in Ontario. Ambitious plans for the rehabilitation of a quarry site to agricultural production were rejected based on experience with the particular ecosystems involved: “My experience is it can’t happen....Once it is disturbed it is never as good.”<sup>38</sup> Another participant distinguished between the “synergistic” relationship between the current agricultural use on the site and its “ecologically pristine features” and spread of ecological degradation that results from the “wasteland” or “moonscape” created by the “dry, barren, dust” landscape of the aggregate mine.<sup>39</sup> The legal emphasis on the interim nature of the use, and on the requirements for rehabilitation, was seen by many as obscuring the material impact of extraction as a loss not simply to a right to a particular use or activity, but of a complex and relational place (Graham 2010). This legal move reinforces the primacy of property-ownership at the expense of the range of more-than-ownership relations that might otherwise make such decisions even more complex.

#### Owners as Planners and Participation as Objection

There is no other sector that has the ... same type of preferential treatment as the aggregate sector.<sup>40</sup>

Legally the process of siting an aggregate mineral mine begins with the Aggregate Resources Act. However, the process of land assembly preparation likely begins many years before an application is filed. One participant described this pre-planning phase:

I am confident that the quarry owners were planning this quarry years before knowledge of the application surfaced. Whether it is in acquiring the land or preparing the plans - the profit is such that the investment is very long term on the part of the industry. So they are light years ahead in their planning and their

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<sup>37</sup> More-than-owner party, Interview, May 7, 2014.

<sup>38</sup> More-than-owner party, Interview, August 8, 2014

<sup>39</sup> More-than-owner party, Interview May 23, 2014.

<sup>40</sup> More-than-owner party, Interview, April 23, 2014)



understanding of the citizens before the citizens become aware there is going to be a quarry in their back yard.<sup>41</sup>

The application is premised on the selection of a site by the project proponent, who also usually owns the land in question. Unlike other siting disputes, such as landfills, where alternative locations are considered through a public environmental assessment process, aggregate mine locations are generally fixed by virtue of private ownership. In the words of one planner, “the aggregate is where it is; and also, it is private sector owners [who] don't really have the opportunity to look at alternatives.”<sup>42</sup>

The Act positions the private landowner as the primary actor who initiates the process at a time of their choosing through an application to the Ministry.<sup>43</sup> The process is proponent-driven and as the Provincial Standards and Manual sets out, the Applicant has control of the knowledge base upon which the technical, legal and factual decisions are made. The licensing process is informed and driven by the information and expertise provided by the proponent, with the express purpose of having the application approved. Any subsequent litigation is based on this same data, subject only to any independent technical or legal expertise and documentation that may be provided by Indigenous governments, municipal actors or planning authorities, and third party groups or individuals, likely at their own expense. However, independent expert evidence and review of the Applicant's documentation is both logistically and financially onerous, particularly for Indigenous communities, small local governments and community groups. It is also risky, given that they may or may not be accepted by the Board at a hearing and that access to the proponent's land may not be granted for direct investigation and data review.<sup>44</sup> At least one participant noted difficulty retaining technical consultants due to expert firms' relationships with the proponent companies.<sup>45</sup>

The result is that the story about what is at stake and which relationships matter is effectively determined in advance of any adjudicative process. Once the proponent has established the narrative – politically, economically, and technically – it is very difficult and onerous to change. In at least two of the six denied applications, the more-than-owner parties linked their

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<sup>41</sup> More-than-owner party, Interview, September 9, 2014)

<sup>42</sup> Planner, Interview, March 7, 2014

<sup>43</sup> Ontario, 1997, “Provincial Standards of Ontario – Category 2 – Class A Quarry Below Water”, at 10-11, s. 4.1.3

<sup>44</sup> Re Town of Richmond Hill, PL990303, r'vd by Ontario (Ministry of Municipal Affairs and Housing) v Ontario (Municipal Board) 2001, 41 OMBR 257, 20 MPLR (3d) 93.

<sup>45</sup> More-than-owner party, Interview, March 12 2014.

success to having intervened at the early stages of the application by developing positive relationships with local planners and representatives and providing them with independent technical information and reviews of proponent data directly. In some cases they had provided expert reports before the proponent had even submitted data. Participants described this as “driving the agenda” and providing local decision makers with a “counter viewpoint.”<sup>46</sup> In contrast, one participant in an approved quarry hearing noted that their community group was “considered hostile by everybody at [Township].” She noted that the company, who already had an existing quarry adjacent to the new site, had successfully positioned themselves as ‘local’ and ‘good citizens’: “[They] had all of their ducks in order. They invite the community to barbecues, they are the good people, they do things for the community centre.”<sup>47</sup>

However, these parties also identified their success as related to a very specific framing and presentation that specifically excluded the affective dimensions of their relations with the places at stake. As one more-than-owner party noted, “We have to be as professional, frankly, if not more so than the proponent and that has to be our front in everything we do...”<sup>48</sup> This was described by other participants as focusing on the “facts” or the “science.”<sup>49</sup> One participant with past government experience linked a lack of success amongst community-based groups on environmental issues to a failure to adopt this frame: “Many of them spoke simply by emotion and not enough by fact and substance.”<sup>50</sup>

More-than-owner parties are characterized in Ministerial policy as “objectors” with no formal relationship with the land.<sup>51</sup> Their relationship in the proponent-led process is with the private Applicant – the owner and holder of the rights related to the land. Despite the protection of aggregate resources as a matter of “provincial interest” for the benefit of the public, the consultations about aggregate application are conducted and controlled by the proponent. The Ministry has no role in addressing objections made by citizens and can therefore issue a license without formally addressing concerns expressed through either the ARA or the

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<sup>46</sup> More-than-owner party, Interview, May 23, 2014.

<sup>47</sup> More-than-owner party, Interview, September 9, 2014.

<sup>48</sup> More-than-owner party, Interview, May 23, 2014)

<sup>49</sup> More-than-owner party, Interview, May 7; More-than-owner party, Interview, August 23, 2014

<sup>50</sup> More-than-owner party, Interview, May 2014.

<sup>51</sup> ARA, s. 11(3).

Environmental Registry process.<sup>52</sup> *There is no public assistance to interpret and assess the application information and little time to do so is provided, with a 45-day window for commentary.*<sup>53</sup> *While the Provincial Standards require the proponent 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 or to ensure compliance. In fact, the Policy Manual directs Ministry staff not to attend meetings unless there are “special circumstances.”*<sup>54</sup> One participant described the proponent-led process this way: “Aggregate has had its way forever and a day. They are firmly entrenched and implanted. They can do the things they do because they own the process.”<sup>55</sup>

Multiple participants expressed frustration with the lack of access to Ministry experts and decision makers. Despite the designation of aggregate mineral extraction as a matter of provincial interest in 1982 (Ontario Ministry of Municipal Affairs and Housing & Ontario Ministry of Natural Resources 1982), government agencies routinely decline to participate in hearings and in at least one case have refused to provide parties with relevant information about the application and assessment.<sup>56</sup> A participant in that case characterized the Ministry as “in effect a facilitator for mining for quarry in Ontario. We don't have enough agency resources to police the quarry companies.”<sup>57</sup> One planner described the lack of transparency in the planning policy process, particularly the role of various provincial and local decision makers:

[T]hey are making those trade-offs in the back rooms and not necessarily in an open forum. The thing is now that we have this one window planning act process that we have had for quite a while now, it doesn't enable you to identify which ministry said what to government. So you don't really know how these trade-offs were made.<sup>58</sup>

He expressed concerns that community groups were filling the gaps left by under-resourced or conflicted local governments: “Why is the municipality not protecting their own citizens?”

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<sup>52</sup> One recent case indicates that the Minister can make decisions without formal consideration of EBR comments, and prior to the deadline for commentary, see *Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, 2014 ONSC 2826

<sup>53</sup> Ministry of Natural Resources, Natural Resources Management Division, *Aggregate Resources Provincial Standards*: 1997, at ss. 4.1.1., 4.2.

<sup>54</sup> A.R. 2.01.02.

<sup>55</sup> More-than-owner party, Interview, March 12, 2014

<sup>56</sup> More-than-owner party, Interview, July 5, 2014.

<sup>57</sup> More-than-owner party, Interview, July 5, 2014.

<sup>58</sup> Planner, Interview, March 7, 2014.

Why do they [citizens] have to spend thousands of dollars to bring their own consultants in?” He also noted the imbalance given that aggregate companies can “afford to get the kind of expertise they want.”

The proponent continues to set the terms and pace after the initial comment period. Within two years, they must “attempt to resolve” objections and 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>59</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>60</sup> While it is difficult to measure, it is possible that without the time, political support, and financial resources to obtain legal representation and technical expertise, parties with ongoing concerns may allow their objections to be deemed withdrawn. Conversely, one professional conservationist in an area of high aggregate development noted that once a proponent has triggered the process they have a great deal at stake and become much less likely to withdraw despite the need for ongoing consultation: “Once they start they start the licensing process then they become very attached to it and they have invested a lot of money, a lot of money.”<sup>61</sup>

Where they do go forward, parties tend to focus on narrow grounds that have received some legal recognition in the past, limiting their ability to articulate what is really at stake. This could include for example focusing on a specific endangered species habitat rather than a responsibility to respect the physical limits of particular ecological systems and obligations to future generations. Tribunal members routinely thank more-than-owner parties for sharing their “concerns” and for participating, while overwhelmingly accepting the “facts” provided by the proponent’s privately hired consultants and rarely challenging unsupported assertions about social and economic benefits.<sup>62</sup> In the words of one planner, “[T]he boards tend to kind of fudge on the side of the proponent a lot of the time.”<sup>63</sup>

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<sup>59</sup> Manual, ss. 4.3.6, 4.3.3.1.

<sup>60</sup> Manual s. 4.3.3.3.

<sup>61</sup> More-than-owner party, Interview, July 18, 2014.

<sup>62</sup> See for example the majority decision in the *Walker Brothers* case; Van Wagner, 2013.

<sup>63</sup> More-than-owner party, Interview, March 7, 2014.

## Presumptive Development, Approvals, and Saying No

“[T]he issue was never about gravel or limestone, the issue was always about planning.”<sup>64</sup>

Technically, in the context of aggregate extraction, if the land for which a quarry is proposed 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>65</sup> However, the local planning requirements are constrained by provincial policy. The Policy Statement serves as the guiding document for all land use decisions in the province and the Planning Act stipulates that all policy and decisions of municipal governments and land use tribunals, including the Ontario Municipal Board and the Environmental Review Tribunal, shall be consistent with the Policy Statement (*Planning Act*, s. 3). Since the first version was approved in the 1990s, the Policy Statement has consistently prioritized aggregate resource “preservation” and development. This prioritization has been maintained through to the recently revised 2014 policy. In 2005, the Policy Statement was revised to explicitly exclude consideration of the need for the resource to be extracted (PPS, S. 2.5).<sup>66</sup> The Board itself has noted the exceptional nature of this presumption: “[a]ggregate extraction is the only use in the wide ranging Policy Statement where need is not required” (*Capital Paving Inc v. Wellington (County)*, 2010). Planning and urban studies scholars have drawn attention to the operation and control of specific discursive frames that influence land use and environmental governance. Patano and Sandberg specifically note the ‘need’ or ‘demand’ narrative as a frame used by the aggregate industry to appeal to decision makers (Patano & Sandberg 2005).

The effect is to limit the ability of local authorities to regulate exploration, extraction and operation, including the potential to prohibit extraction, to impose a needs-based analysis into the assessment of applications, and to protect features not deemed provincially “significant”

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<sup>64</sup> More-than-owner party, Interview, March 12, 2014.

<sup>65</sup> ARA, ss. 12.1(1), 34(1); *Planning Act*, s.22.

<sup>66</sup> The PPS Aggregate Mineral Extraction section now reads as follows: “As much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible. 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.”

(Bull & Estrela 2012). One participant described the surprise when community members learned about the lack of jurisdiction at the local level: “Whose jurisdiction is it? Why can't our local council have a say in a potential industrial development that would totally change this community that has been built for five generations? How come we don't have a say? This is not okay. What can you do about it to make it okay? Nothing.”<sup>67</sup> One planner also expressed a concern that the Board often adopts lower ARA standards as compared to the more rigorous official plan requirements.<sup>68</sup>

More-than-owner parties have found that there is no meaningful opportunity to say “no” within the licensing process. In the words of an individual involved in one highly contested dispute:

The industry often argues that companies need efficiency, transparency and certainty. What about efficiency, transparency and certainty for communities...? Surely when all agencies and stakeholders are saying no, the process should be able to come to a “no” outcome. To us, it unfortunately seems that the philosophy of presumptive development and entitlement prevents this company from accepting a no position.<sup>69</sup>

Presumptive rights to transform and destroy the land at stake are embedded in the guiding policy, severing the “resource” from both human and other ecological communities. 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>70</sup> This protection extends even to operations that have ceased, despite the repeated and ongoing assertion by a range of parties that land containing aggregate deposits is of value for agricultural uses, subject to ongoing Indigenous claims and rights, and ecologically critical habitat. Indeed, some participants expressed frustration at the lack of recognition that the rock to be extracted was an integral part of the ecological system on which the agricultural and/or conservation values depend.<sup>71</sup> The narratives of exclusivity and the inevitability of growth discipline the messy complexity of competing and overlapping claims to land and ecological relations.

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<sup>67</sup> More-than-owner party, Interview, March 12, 2014.

<sup>68</sup> Planner, Interview, March 7, 2014.

<sup>69</sup> More-than-owner party, Submissions to ARA Legislative Review, 2012. On file with author.

<sup>70</sup> ss. 2.5.2.4, 2.5.2.5.

<sup>71</sup> More-than-owner party, Interview, March 12, 2014; More-than-owner party, Interview August 11, 2014; More-than-owner party, Interview, July 18, 2014.

A specific place with complex networks of relations is transformed into an abstract space to be ‘temporarily’ disappeared and then rehabilitated to some other form of ‘use’ when its extractive value has been exhausted. The aggregate regulatory regime specifically provides for greater exemptions from rehabilitation requirements where quarries are developed in ecologically or agriculturally valuable land, based on concerns about efficiency and technical feasibility. For example, 2013 amendments to the *Endangered Species Act* specifically exempt aggregate licenses from the permitting regime.<sup>72</sup> The sense that approval is presumed leads to a feeling that the process was not getting to the ‘right’ decisions because the relations considered were so narrow. There is no space for an articulation of a loss of place, something different and more profound than the loss of an abstract right. The “public interest” protected by the Ministry of Natural Resources, which oversees the licensing process, is explicitly linked to economic growth.

One of our big themes when we talked to the government was the idea of presumptive development. One of the things with Hamilton that we kept getting scared about over, particularly a city who is trying to encourage industrialization and get the corporate tax base up so that the tax pressure is off the resident, is all this theme about business is good. We hear it in our politicians all the time. It doesn't matter what it is, business is good.<sup>73</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 clearly prioritized by the PPS. Participants expressed a view of aggregate sites as places with eco-social relations. But for the purposes of law, they are divided into different kinds of space - agricultural fields, ‘natural’ heritage, such as forests or wetlands, recreational sites such as trails, and subsurface resources such as mineral deposits and groundwater sources. The policy is currently constructed in such a way that even where recognized, these other types of relationship to place are trumped by the protection of the mineral resource value and economic relations.

#### Mitigation, Prevention and Self-Regulation

This whole business of adaptive management plan is rooted in the approach by the aggregate industry that if I don't do all my assessment work ahead of time to get an approval, then when I uncover a problem that I haven't anticipated, I will solve it then. I don't know what it is. I didn't know how to approach it. But I will solve it.

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<sup>72</sup> 2007, S.O. 2007, c.6 [ESA]. O. Reg. 242/08, s. 23.14(1).

<sup>73</sup> More-than-owner party, Interview May 23, 2014.

How ridiculous is that? That is what an adaptive management plan is about. It is a non-plan.<sup>74</sup>

Finally, the recent trend towards approvals on the basis of proponent-designed ‘Adaptive Management Plans’ also obscures the relationships of interconnection and dependence between the human and more-than-human communities in particular places. While not required by law or policy, proposals to mitigate rather than prevent potentially catastrophic harm, such as the depletion of the water table, through Adaptive Management Plans have been supported and even promoted by the Ministry and the Tribunal while they have largely rejected a precautionary approach (Van Wagner 2013). As critics have argued, this type of reactive approach to risk in extractive contexts waits until problems reveal themselves and attempts to resolve them by trial and error (Randall 2012). Arguably, this voluntary and industry-led approach compounds the proponent-driven nature of the licensing process. While adaptive management plans have been incorporated into site plans and licensing conditions as “an additional layer of oversight,” (Bull & Estrela 2012:29), their enforceability has been questioned, as has the potentially improper delegation of the Board’s authority to the Ministry (*James Dick Construction Ltd. v. Caledon (Town)*, 2010) However, this concern has also been dismissed by other decision makers (*Jennison Construction*, 2011).

The promotion of mitigation in place of precaution is further complicated by the almost universally recognized inability of the Ministry to enforce regulatory requirements and increasing reliance on self-monitoring (*James Dick Construction* and the dissenting opinion in *Walker*), concerns which are routinely dismissed as beyond the scope of the legal decision-making process (majority in *Walker*). As noted above, 2013 amendments to the *Ontario Endangered Species Act* exempt pits and quarries from the requirements to obtain a permit for activities that would otherwise be prohibited, including damaging or destroying species habitat, instead requiring only mitigation measures and registration of activities with the Ministry and without independent monitoring requirements and enforcement capacity. Aggregate extraction operations are also exempt from other environmental legislation, including any regulations of a local conservation authority under the *Conservation Authorities Act*. Such agencies are empowered to regulate development impacts on wetlands, shorelines and watercourses; however, in the context of aggregate they play only an optional

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<sup>74</sup> More-than-owner party, Interview, May 7, 2014.



advisory role to municipalities on issues related to natural heritage and water.<sup>75</sup> One participant recalled that potential lawyers they interviewed focused on mitigation rather than opposition by asking questions such as: “What did we want as our compensation? What did we want for a framework document for how the operation would operate?”<sup>76</sup> However, to many of the participants the stakes were too high to settle for mitigation despite the risks and the costs.

## **Conclusion**

As the above analysis makes clear, the current land use regime in Ontario structures people-place relations to uphold the primacy of the landowner as planner in the context of aggregate extraction. In doing so, law obscures ‘more-than-ownership’ relations with the land. An ecological-relational perspective reveals this structural orientation as excluding the complex range of relationships in particular places from the decision-making process. This limits the transformative potential of planning as alternative articulations of property relations are managed in the interests of a narrowly defined public interest in economic growth. By examining the use of planning tools and forums by more-than-owner parties in a specific setting, I argue that the legal rights to speak, write, appeal and contest land use decisions are not enough to reorient land use planning law away from abstract and anthropocentric property rights without the creation of space for performances of reciprocal relations with place.

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<sup>75</sup> RSO 1990, c C.27, 22(11); O. Reg 97/04 Content of Conservation Authority Regulations Under Subsection 28(1) of the Act: Development, Interference with Wetlands and Alterations to Shorelines and Watercourses.

<sup>76</sup> More-than-owner party, Interview, April 23, 2014.

## Chapter Eight – Law’s Rurality: Land Use Law and the Shaping of People-Place Relations in Rural Ontario<sup>1</sup>

### 1. Introduction

Land use law in Ontario constructs the rural as residual – a boundary space between the urban and the natural, between the industrial extractive and protected ecological zones. The working landscapes of rural places serve as a buffer to legally protected environmental landscapes, but are also offered up as a potential sacrifice zone where resource demands can be satisfied. As the space between industrial and environmental zones, rural places serve as the spaces in which the ‘balance’ between environmental values and economic growth can be established through the promotion of appropriate development and good planning. This residuality reinforces the value of rural places as either preserved amenity spaces or sites of industrial and extractive development rather than the inhabited sites of ongoing negotiated relations between human communities and with ecological systems. Further, it forecloses opportunities for the articulation and performance of transformative ecological relations that might otherwise emerge as parties negotiate the people-place relations of living with the ‘more-than-human’ world in rural places.

Decisions about land use are sites of political and legal contestation about social and environmental justice in both rural and urban contexts. This paper specifically considers the rural context by examining aggregate mineral mining in the Niagara Escarpment region of Ontario, Canada, a rural and peri-urban region that borders the Greater Toronto Area.<sup>2</sup> Aggregate extraction provides a strategic context in which to explore rurality as a dimension of environmental justice because of both the transformative material impacts of extraction and the spatially fixed nature of mineral resources. In this sense, mining can be distinguished from many of the other types of siting and locally unwanted land use issues traditionally considered by environmental justice scholars. Mining necessarily occurs in particular locations where resources are found (Keeling and Sandlos, 2009). As well, extraction is

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<sup>1</sup>Originally published as (2016) Law’s Rurality: Land use law and the shaping of rural people-place relations in rural Ontario. *Rural Studies* 47, 311-325.

<sup>2</sup> Section 1 of the *Aggregate Resources Act* (RSO 1990, c. A.8), defines “aggregate” as, “gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock or other prescribed material”. Depending on the specific material, a mine is classified as either a “pit” or a “quarry” in Ontario. Mines are further classified according to private or Crown lands, tonnage of extracted material, and extraction above or below the water table.

transformative – a particular place is lost and another is created. While large-scale industrial aggregate mining in Ontario takes place largely on private land at the initiative of private land owners, the impact of extraction extends to a much wider range of human and more-than-human communities with relationships to the particular places at stake. In this paper, I specifically examine interests asserted by parties without ownership interests in the land involved. These ‘more-than-ownership’ interests complicate legal and cultural constructions of property as the defining relationship between people and places. Disputes about aggregate mining provide one example of the how land use planning law attempts to balance such interests with the protection of private property ownership in Anglo-Canadian law.

In the context of Ontario, the fixed location of aggregate mineral resources overlaps with networks of conflicting relationships with land: environmental preservation and ecological integrity; agricultural and recreational land uses; local and regional infrastructure and economic development; and, Indigenous rights and legal orders with respect to land and resources. Such relationships are produced through complex and interdependent people-place relations that are always being contested and negotiated through political, social, and material interactions within and between human and more-than-human communities. The specific hydrogeological features of valuable mineral deposits create the conditions for high quality agricultural land, historically inhabited and used by Indigenous communities displaced from their land through the establishment of settler farming communities and now characterized by a growing population of amenity-seeking exurbanites and second home owners. Elsewhere the rare species habitat of an alvar landscape, protected by an Indigenous legal order for its cultural and spiritual significance and subject to ongoing land claims, may be popular as a recreational destination, valuable as pastureland leased to local ranchers, and simultaneously privately owned by aggregate developers with plans to extract the uniquely accessible mineral resources. This paper examines the role of legal constructions of rurality in determining the ordering of these relations. In particular, the legal privileging of an extractive model of property over people-place relations that fall outside the boundaries of private property ownership is critically examined in the context of rural Ontario. The work that law does in structuring relationships with land shapes and constrains the range of ‘more-than-ownership’ relations that are articulated and recognized in planning processes. In doing so, it plays an important role in shaping opportunities for just and equitable environmental relations in particular places.

## 2. Methods<sup>3</sup>

*This paper presents a case study on the unique environmentally-focused Niagara Escarpment planning regime that is part of a larger research project examining the law and policy governing disputes about aggregate extraction in Ontario between 2001 and 2014.<sup>4</sup> An initial review of the Provincial Environmental Registry identified 242 decisions on large-scale industrial aggregate mines, including approvals, withdrawals, and denials.<sup>5</sup> A database of the decisions was constructed, including chronologies, location, depth of extraction, volume of extraction, objections filed, key issues identified, and, decision makers.*

*Detailed documentary analysis of legal texts was undertaken, including formal laws and regulations, policy and regulatory guidance documents, public submissions, and legislative review documents. Specific cases for detailed documentary analysis and in-depth interviews were selected through a review of key documents to identify the level of participation by members of the public and governmental and non-governmental organizations in the regulatory process and the types of issues and concerns about the impact of extraction raised by such parties. Cases with high levels of participation or those that presented particularly significant concerns, such as unprecedented size, experimental or untested extraction methods, or high levels of social and environmental impact were considered for interview-based qualitative case studies. In selecting specific cases, I focused on applications resulting in, or likely to result in, a hearing before the provincial land use tribunal.*

*Based on the documentary analysis, 18 unstructured in-person interviews were conducted with 25 participants involved in aggregate extraction disputes. All the disputes were in places deemed 'rural' by local or regional plans with the exception of one case study in Northern Ontario. For the purposes of this paper, rurality is defined in relation to the legal classification of the place involved rather than personal identification as rural or as belonging to a rural community. Participants were largely activists in local or regionally-*

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<sup>3</sup> This section summarizes portions of Chapter Three, from pages 119-128. Repeated text is italicized.

<sup>4</sup> In May 2012, an all-party review of the *Aggregate Resources Act* was initiated at the Standing Committee on General Government (Legislative Assembly of Ontario, Orders and Notice Paper, 1<sup>st</sup> session, 40<sup>th</sup> Parliament, March 22, 2012). The review included the consultation process, siting, operations, and rehabilitation, best practices and industry developments, fees and royalties, and, aggregate resource development and protection, including conservation and recycling.

<sup>5</sup> The Environmental Registry is a public online database governed by the *Environmental Bill of Rights* (1993, SO 199s, c 28), where *Aggregate Resources Act* (R.S.O. 1990, c. A. 8 [the "ARA"]) applications are publicly posted,

*based organizations formed to respond to a specific application or pre-existing organizations who chose to become involved with a particular quarry application based on a particular set of environmental or social concerns. Participants included farmers, residents of communities close to proposed mine sites, non-resident home owners in communities close to proposed mine sites, and members of local environmental and conservation groups.<sup>6</sup> In addition, two lawyers, one scientific consultant, one policy analyst, one professional naturalist, and two planners were also interviewed. All but one of the participants were white, 15 were men and 10 were women.*

*Interviews took place in both one-on-one and small group settings. Where possible, interviews took place in the area that was the subject of the conflict. Subsequent site visits were made by the author in order to achieve a place-based understanding of the participants' perspectives. In two cases, participants provided an extensive guided tour of the proposed site following the interview. In other interviews participants provided or referred to maps and pictures of the location. In two cases the author is personally familiar with the area.*

*The data was analyzed through an eco-relational analysis developed by the author to bring together the relational analysis of law proposed by Canadian legal scholar Jennifer Nedelsky with the relational-place approach proposed by Pierce et al. Based on this hybrid framework, the data was analyzed to identify "the place-frames central to the conflict" (Pierce et al., 2011), the place-based relationships and values "at stake" (Nedelsky, 2012) and law's role in shaping and defining the people-place relationships in particular places. .*

*As explored here, rurality was one of several themes that emerged across these analytical categories. This paper specifically considers the legal structuring of rural people-place relations in the Niagara Escarpment. As a particular and material place in which*

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<sup>6</sup> At the time of writing, the larger project includes the development of a conceptual framework and an ongoing process of relationship building aimed at working with an Indigenous community facing quarry development proposals in Ontario, including in the Niagara Escarpment Development Plan Area where enduring Indigenous relationships to the land and place-based legal systems are critically components of realizing just sustainability. The goal of this work is to engage with Indigenous experiences, perspectives, and legal principles for land use governance in the larger project, which requires distinct legal and methodological considerations for the author as a white, settler, legal academic. This aspect of the project was not complete at the time of publication and is therefore not included in this paper. The discussion below does consider questions and implications related to Indigenous land and legal orders as a critical part of a broader discussion about rurality and environmental justice in Ontario and Canada and an essential element of ongoing and future research. However, it is not reflected in the empirical data discussed below.

*interdependent human and ‘more-than-human’ interests are engaged by extraction, the Escarpment provides a useful case study in which to analyze how law structures people-place relations as well as defines and contextualizes what is at stake in land use conflicts. While it draws on the larger project’s analysis of generally applicable legal texts and on the themes identified in the interviews as a whole, the case study is grounded in the specific legal, political, social, and ecological context of the Escarpment through its focus on the Niagara Escarpment planning framework.*

### **3. Placing Law: Preserving and Extracting the Niagara Escarpment**

Ontario’s Niagara Escarpment and its distinctive planning framework provide a particularly interesting example of law’s construction of rurality. The region is both ecologically significant and legally unique. Indeed, the development of the province’s first environmental planning regime under the *Niagara Escarpment Development Planning and Development Act* [“The Niagara Escarpment Act”] (RSO 1990, c N.2) was specifically motivated by the impact of the aggregate mining industry on the landscape of this peri-urban and rural region of the province (Chambers and Anders Sandberg, 2007; Whitelaw et al., 2008). Rurality is one of the defining land use categories through which competing claims to land are negotiated through the Niagara Escarpment Act and the policies that flow from it. There is however a lack of consistent or explicit definition of the ‘rural’ in planning law and policy. General definitions of rurality outside of the planning context tend to construct rurality as a residual category – the territory “outside” or “that remains” outside urban or population centres (“Rural area (RA) - Census Dictionary”).<sup>7</sup> Here I consider how rurality is constructed as a residual category in legal decision-making about land use. I consider whether it is conceptualized in relation to the ecological relations of particular places; or conversely, whether rurality serves to obscure or dismiss ecological relations in contentious land use disputes about rural places.

#### **A. Seeing Law’s Relational Work in Place**

Building on relational approaches to place (Amin, 2004; Massey, 2005, 2004; Pierce et al., 2011) and relational legal analysis (Nedelsky, 2012), the analysis below examines the role of the legal system in Ontario, including formal laws and regulations as well as the daily operation of regulatory planning processes. These processes structure the relationships that

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<sup>7</sup> One of the few contexts in which rurality is defined in Ontario is health care planning, where an “index of rurality” focused on population and distance has been developed (Kralj, 2000).

constitute rural places and uphold particular values about the more-than-human-world. In particular, I build on the relational theory of Canadian legal scholar Jennifer Nedelsky to foreground the specific ways in which land use law operates to constitute our relationships with the ecological networks of particular places and sustain particular values in relation to the more-than-human world. In order to extend Nedelsky's analysis to more-than-human relations, I adopt the language of 'place' and 'people-place relations' to understand the overlapping and nested relationships within the ecology of specific landscapes inhabited by human communities alongside complex and layered networks of materials and entities (Amin, 2004; Haluza-DeLay et al., 2013; Massey, 2005, 2004; Pierce et al., 2011). In doing so, I apply an eco-relational analysis of land use law to foreground the complex interdependence of relations between human and more-than-human interests at stake, as well as the embodied experience of living in particular places.

When we better understand what kind of decisions about our relationships with our environment are being made through planning and land law, we are better prepared to critically intervene to shape them differently. Through this eco-relational analysis, I aim to make visible the values upheld by current legal relationships to place, predominantly defined through private-property ownership. In the context of this paper, the eco-relational approach also supports moves to shift environmental justice from its anthropocentric roots towards the more-than-human elements of places at stake in land use conflicts (Agyeman and Evans, 2004; Agyeman et al., 2003; Haluza-DeLay et al., 2013). As Neimanis et al. argue, the capacity of an ecosystem to self-regulate its ability to support all forms of life is essential to the realization of social and environmental justice (Neimanis et al., 2012). The integration of ecological integrity and environmental justice avoids shifting between anthropocentric and ecocentric hierarchies, instead acknowledging more-than-human interests while drawing attention to the relational interdependence of human life and ecological systems.

Drawing attention to law's role in the hierarchical privileging of particular types of relationships with land within settler-colonial societies is also an essential part of understanding when and how place-connection claims and place-protective behaviours serve to reinforce colonial patterns of land use and contribute to social exclusion and patterns of environmental inequality (Foster, 2010). Exposing the ways in which legal constructions of rurality shape the types of claims asserted and recognized in land use conflicts is central to identifying the "way that power works through places to limit the possibilities for human and

non-human others” (Gruenewald, 2003, p. 315; Haluza-DeLay et al., 2013). Where law obscures embodied experiences and excludes relations of ecological interdependence to reinforce hierarchical and exclusionary constructions of place, it operates to limit the potential to realize environmentally just people-place relations (Graham, 2010).

The romanticization of farm life and agricultural practices, erasure of Indigenous histories and legal orders in rural places, glorification of the rural landscape as an amenity space for urban recreation, and the preservation of the rural as an empty or untouched wilderness, all impose a problematic binary, colonial, and anthropocentric worldview in which particular human bodies exist as separate and apart from ecological relations. Not only does this foreclose opportunities to account for the interests and relationships of and with the ‘more-than-human’ world (Gilbert et al., 2009a; Sandberg et al., 2013; Whatmore, 2002), it also upholds the colonial and Eurocentric property relations that justify the dispossession of Indigenous lands and the exclusion of Indigenous legal orders, one of the key sites of ongoing social and environmental injustice in Ontario and Canada (Agyeman et al., 2010; Alfred, 2009; Borrows, 1997; Chien, 2010; Porter, 2012; Scott, 2013). While I adopt the view in this paper that mining is a uniquely transformative land use in which a relational place is removed from the social and ecological networks in which it was once embedded, I neither presume nor reject the possibility that other land uses, such as agriculture, residential development, or recreational uses are (potentially) appropriate and just in particular places. Rather, my aim is to examine the ways in which rurality is invoked in law and interpreted through legal processes in the specific context of aggregate mining. In doing so, I hope to consider opportunities for the articulation and practice of alternative and just ecological relations with, and within, rural places. Further, I seek to identify strategic opportunities to heed Haluza-Delay et al.’s call to learn how to “live well together in the land” (2013). In my view, critically examining the complex and often contradictory nature of relationships with place is crucial to engaging in meaningful debate about how we live together as human communities embedded in rich and complex networks of relation in particular material places. Here I argue that rurality is one way in which law structures people-place relations that must be considered if we are to work towards “a compassionate sense of place as well as a politicized sense of justice” (Haluza-Delay et al., 2003, 235).



## B. Environmental Justice

The context of competing claims for particular rural places presents a unique opportunity to consider whether and how rurality emerges as dimension of environmental justice. My focus on parties without legally recognized property interests in the land at stake complicates the reductive labeling of rural land use conflicts as NIMBY-ism (Burningham, 2000; Hubbard, 2006; Mcclymont and O'Hare, 2008; Wolsink, 2006) and avoids the binary of development versus preservation towards critical engagement with the “complex relations of attachment, belonging, exclusion and otherness that permeate such conflicts” (Woods, 2012, 568).

Without suggesting a fixed definition of environmental justice, I interpret it as including both procedural and substantive dimensions and as attending to positive entitlements to ecological integrity alongside concerns about the distribution of environmental harms (Agyeman and Evans, 2004; Agyeman et al., 2003; Draper and Mitchell, 2001). From an eco-relational perspective, human dimensions of environmental justice are embedded in just relations with the ‘more-than-human’ world. A number of scholars have argued persuasively that environmental justice scholarship must broaden its scope – in particular the need to move beyond race and class as the central analytical categories and sites of injustice. Canadian environmental justice scholarship has called for the broadening of voices, worldviews, and methodological approaches (Agyeman et al., 2010), as well as the need to shift away from anthropocentric notions of justice (Neimanis et al., 2012) to integrate environmental and social dimensions of justice and sustainability (Agyeman et al., 2010, 2003; Haluza-DeLay et al., 2013). Here, I consider how rurality as a dimension of environmental justice contributes to such a broadening in the Canadian context as people in rural places inhabit, negotiate, and contest their relationships with land and the more-than-human world.

In debates about regional planning, opposition by farmers to development controls on rural land has been characterized as “rooted in the ‘traditional producers’ discourse of individualism and property rights” (Bartel et al., 2013; Pond, 2009). Environmental concerns expressed by urbanites and rural homeowners have also been characterized as self-interested claims to amenity and property values by both proponents and decision makers (Gilbert et al., 2009b; Sandberg et al., 2013), while dominant environmental narratives have been shown to perform the “work of social exclusion and xenophobia” and reinforce colonial narratives of land use and landscape (Foster, 2010). These are all valid concerns about the political nature of planning and crucial demonstrations of the operation of power through land use decisions.

Exclusionary politics of property rights and narrowly framed arguments for environmental preservation do emerge as part of land use disputes in Ontario and they do serve to obstruct discussion of environmental justice and ecological integrity and even perform or reinforce social exclusion and colonialism (Foster, 2010). At the same time, disputes about aggregate mineral extraction in rural Ontario reveal the complexity of relationships between agricultural land users, property owners, other rural land users, and rural places themselves. As parties invoke relationships with the ecological in their opposition to extractive development and form unlikely alliances across ideological, territorial, and political boundaries, strategic opportunities to contest dominant people-place relations and generate legal change emerge (Gilbert et al., 2009b; Sandberg et al., 2013). Careful and critical attention to the range of environmental and place-based interests asserted in the context of land use conflicts may also provide opportunities for more effective and successful dialogue about progressive environmental planning (Bartel et al., 2013; Foster, 2009; Sandercock, 2000). While parties can, and often do, express competing and contradictory claims in the context of contentious land use conflicts, I argue that nuanced and critical examination of expressions of respect for Indigenous histories and legal orders, assertions of place-attachment and place-based experiential knowledge, and acknowledgment of shared ties to particular places reveal strategic openings for a restructuring of rural people-place relations through law (Bartel et al., 2013; Foster, 2009; Sandercock, 2000). In this sense, I argue that it is possible to remain attuned to the danger of depoliticization and parochialism of place, while simultaneously exploring opportunities to build relations of reciprocity with the land (Graham, 2011, 2010) and foster progressive planning (Foster, 2010, 2009) as we “learn to live well together in the land” (Haluza-DeLay et al., 2013, p. 236).

#### **4. Locating Law: Aggregate Extraction and Environmental Planning in Ontario<sup>8</sup>**

These are the landscapes of a special place. There is a special legislation to protect this area and it means a lot to them and they don't want it treated lightly. (Planner 2, Interview, September 3, 2014)

*In 1962, blasting from the Dufferin Aggregates Milton Quarry accidentally blew a hole in the Niagara Escarpment, one of Southern Ontario's most prominent landscapes. The Escarpment is a major limestone outcrop running through a large part of Southern Ontario from Niagara*

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<sup>8</sup> This section summarizes portions of Chapter Three, from pages 210-213. Repeated text is italicized

*Falls to the Bruce Peninsula. It is simultaneously a site with unique ecological systems (Jalava et al., 1996; Kelly and Larson, 2007), prime agricultural lands, high scenic and amenity value, proximity to urban centres, and valuable aggregate mineral deposits, as well as being the traditional territory of Indigenous communities with particular legal, spiritual and historic significance (Borrows, 2001, 1997; CONE, 1998). The visibility of the transformed landscape was a catalyst for the development of a fledgling environmental movement in the province and the public construction of the Escarpment as a specific and valuable landscape (Whitelaw et al., 2008). Growing public awareness of the unique ecological and aesthetic features of the area and the impact of aggregate mineral development led to a 1968 government-commissioned expert report that mapped and documented the entire Niagara Escarpment area (Niagara Escarpment Study Group, 1968). In 1973, the resulting landmark Niagara Escarpment Act was approved, bringing about the first regional and, “at least symbolically” environmentally focused land use protection plan in Canada (Cullingworth, 1987, 230). In 1990, the area was designated as a UNESCO World biosphere reserve.<sup>9</sup>*

The Niagara Escarpment Act passed into law with the express purpose of maintaining the Niagara Escarpment as a “continuous natural environment” and allowing only for “compatible” development (s.2). The Act was significant in that planning decisions that had previously been made at the local level were now regionally determined (Whitelaw et al., 2008).<sup>10</sup> The Niagara Escarpment Plan [“the Plan”], drafted under the Niagara Escarpment Act sets out the specific policies related to the management of land and water resources, location of industry and commerce, identification of major land use areas, provision of major parks and open space, control of pollution and the natural environment, and ensuring compatibility of private sector development (s.9). The sense of loss of place following the Milton Quarry accident informed the Plan’s unique attention to the preservation of the visual landscape alongside the natural and cultural features of the area.

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<sup>9</sup> See details at the UNESCO website: <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/europe-north-america/canada/niagara-escarpment/>

<sup>10</sup> The Act created the 18-member Niagara Escarpment Commission [the “Commission”], made up of the appointment of a chair, 8 members from escarpment municipalities and 8 members of the public, which is responsible for the creation of a land use plan and is now responsible for its implementation, at ss. 5. There are no appointments designated for Indigenous governments and representatives. One member of the NEC is a representative of the aggregate industry. The current 2005 *Niagara Escarpment Plan* is available online: [http://www.escarpment.org/\\_files/file.php?fileid=fileuRdJDqEnAp&filename=file\\_NEP\\_Intro.pdf](http://www.escarpment.org/_files/file.php?fileid=fileuRdJDqEnAp&filename=file_NEP_Intro.pdf)

While the process through which the original Plan was developed was neither collaborative nor participatory, environmental groups, community organizations, and aggregate and other industry groups were involved in the “adversarial” hearings on the proposed land use plan from 1980 to 1983. Critics of the new planning regime, including the aggregate industry, private land owners and residential developers, were successful in limiting the scope of the plan by over 60% and influencing the planning rules to allow for extractive development within the Plan area (Whitelaw et al., 2008).<sup>11</sup> As will be discussed below, the legal construction of “rural” places within the Niagara Escarpment Plan Area [the “Plan Area”] is crucial to the ongoing role of extraction in shaping the Niagara Escarpment, both within the boundaries of the Plan Area and outside. Aggregate mining has been, and continues to be, one of the most contentious land uses in Ontario, and particularly on the Escarpment.

## **5. The Legal Creation of Rural Spaces of Extraction: Defining Rurality Residuality**

In 2001 a Statistics Canada *Rural and Small Town Canada Analysis Bulletin* noted, “[A]most every social, economic and environmental policy issue has a rural dimension” (du Plessis et al., 2001). Yet there is little treatment of the concept of rurality in Canadian legal scholarship and the role it may play in the legal treatment of land use issues. In part, this is reflective of a broader neglect of land use planning in legal scholarship in Canada; however, even within the limited legal and socio-legal scholarship in this area, the focus is decidedly urban (Blais, 2011; Blomley, 2004; Valverde, 2012, 2005).<sup>12</sup>

As will be explored in detail below, the legal and policy framework regulating land use simultaneously presents the rural as a space of resource extraction, economic growth, and as a source of essential ecological services. The ‘balancing’ exercise between these potentially contradictory roles and values is performed through the legal processes of land use planning

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<sup>11</sup> The NEPDA requires the government to review the Plan regularly and now requires that it be reviewed at the same time as the Greenbelt Plan under the *Greenbelt Act* (2005). In 2015 the government undertook a coordinated review of these and other Provincial Plans, including the *Oak Ridges Moraine Conservation Plan* and the *Greater Golden Horseshoe Growth Plan*. More information about the coordinated review can be found on the Ontario Ministry of Municipal Affairs and Housing website: <http://www.mah.gov.on.ca/Page10882.aspx>. See the guiding document for public consultation, (*Our Region, Our Community, Our Home*, 2014).

<sup>12</sup> For a discussion of the urban-centric focus of legal geography, see (Pruitt, 2013). Canadian socio-legal scholar Deborah Curran recently noted the “paucity of academic interest in land use in Canada” in a blog post noting Blais and Valverde as important exceptions: [http://lawprofessors.typepad.com/land\\_use/2014/11/destined-to-be-classic-land-use-books-from-canada.html](http://lawprofessors.typepad.com/land_use/2014/11/destined-to-be-classic-land-use-books-from-canada.html).

as parties shape and contest the nature of rurality and rural land. The project of defining rurality is fraught and contentious, and its extensive debates are beyond the scope of this paper (Halfacree, 1993; Phillips, 1998; Woods, 2012). Rather than engaging in a definitional exercise, I adopt the position that rurality is not a fixed category or territorial space, but rather a site of contestation and complex interconnection between the social, the temporal, and the material more-than-human world. My aim here is to consider the specific role that law plays in creating and upholding “structural obstacles to developing mutually enhancing land relationships” by upholding particular relationships with place and excluding others (Plumwood, 2002). In other words, how does the legal construction of ‘rurality’ in Ontario’s land-use planning process shape and constrain the ongoing and contested ordering of the social and ecological interests of people-place relations in rural spaces?

*i. The Provincial Policy Statement*

The provincially governed and policy-led regime of land use planning in Ontario relies on overlapping and sometimes conflicting constructions of the rural to shape and contain the complex relationship between people and places - the rural, urban, northern, and increasingly, suburban and peri-urban places, made up of the social, ecological, and political networks of human and more-than-human life. Constitutionally, planning falls within provincial jurisdiction over municipal institutions and property and civil rights in Canada (*The Constitution Act, 1867*). Though the day to day operation of land use planning falls to local and regional governments, the Province provides broad guidance and maintains considerable power to constrain local government action through both the Ontario *Planning Act* (The Planning Act, 1990) and the Provincial Policy Statement [the Policy Statement], a policy document that “sets the policy foundation for regulating the development and use of land” (Ministry of Municipal Affairs and Housing, 2014).<sup>13</sup>

The Policy does not define “rural” or “rurality” in the text or in the extensive definitions appendix. However, it does define *rural areas* as “a system of lands within municipalities that may include rural *settlement areas*, *rural lands*, *prime agricultural areas*, natural heritage features and areas, and resource areas.” ‘Rural lands’ are also defined as “lands

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<sup>13</sup>The PPS is available online: <http://www.mah.gov.on.ca/Page215.aspx>. In April 2014 the Ministry of Municipal Affairs and Housing released the 2014 Policy Statement, which took effect on April 30, 2014. However, the cases considered here are governed by the earlier PPS from 2005, which can be found here: <http://www.mah.gov.on.ca/Page1485.aspx>.

which are located outside *settlement areas* and which are outside *prime agricultural areas*.” Of the 42 references to ‘rural,’ in the PPS, half are to *rural lands* or *rural areas*. However, the remaining references are to undefined terms, including “character” or “characteristics”, “amenities”, “assets”, “land uses”, and “landscape.” This leaves significant scope for contestation and interpretation about rurality and land use.

Section 1, ‘Building Strong and Healthy Communities,’ permits and encourages resource-related uses on rural lands. In fact, it explicitly protects resource-based use and uses requiring separation from other uses, invoking the key land use logics of separation and incompatibility to secure rural lands for industrial, infrastructure, and extractive developments (ss. 1.1.5.6, 1.1.5.7, 1.1.6.1). While development “compatible with the rural landscape” is promoted, the “rural landscape” is not defined in the Policy (s.1.1.5.4) and read in conjunction with the above sections, it appears to include typical infrastructure, locally unwanted, and resource-based uses. The Policy goes on to link rural communities with the “quality of life” and “economic success” of the Province (s. 1.1.4) and to associate the development of a “sustainable economy” to leveraging rural assets and amenities and protecting the environment as a foundation for a sustainable economy. Under Section 2, separate subsections deal with Agriculture (2.3), Natural Heritage (2.1), Cultural Heritage and Archeology (2.6), Water (2.2), Minerals and Petroleum (2.4), and Aggregate Mineral Resources (2.5).

***ii. The Niagara Escarpment Framework<sup>14</sup>***

*The Niagara Escarpment Act and the Plan also play a central role in conceptualizing rurality through the creation and maintenance of seven land use designations: Escarpment Natural, Escarpment Protection, Escarpment Rural, Escarpment Recreation, Minor Urban, Urban and Mineral Resource Extraction. These designations govern the types of uses and activities individuals or corporations can engage in as of right, those which require specific permission, and those which are prohibited. Each designation is described in detail in the Plan, including the “Objectives,” “Criterion for Designation,” and “Permitted Uses” associated with such a designation (Niagara Escarpment Plan, 2005, ss. 1.3-19). Through these designations, the Plan mediates and controls extraction and industrial land uses based*

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<sup>14</sup> This section repeats portions of Chapter Four, in particular pages 193-201. Repeated text is indicated is italicized.

*on a particular construction of rurality. Escarpment Natural and Escarpment Protection designations prohibit any mineral resource extraction. For Escarpment Rural lands, an amendment to the Plan is required for extraction over 20,000 tonnes. Such lands are described as “essential” yet also peripheral, with their key role being to provide a “buffer to the more ecologically sensitive areas of the Escarpment” (s. 1.5). While not an as of right land use, extraction is specifically contemplated for Escarpment Rural lands. In this way, particular places – complex networks of eco-social relation designated by the plan as ‘rural’ –become the central objects of political and legal decision-making about extraction.*

*The Plan designates Escarpment Rural areas as an “essential component of the Escarpment corridor,” serving this buffer role for protected environmental spaces. It sets out five Objectives for Escarpment Rural areas (s 1.5):*

- 1) To maintain scenic values of lands in the vicinity of the Escarpment corridor;*
- 2) To maintain the open landscape character by encouraging the conservation of the traditional cultural landscape and cultural heritage features;*
- 3) To encourage agriculture and forestry and to provide for compatible rural land uses;*
- 4) To provide a buffer for more ecologically sensitive areas of the Escarpment;*
- 5) To provide for the designation of new Mineral Resource Extraction Areas which can be accommodated by an amendment to the Niagara Escarpment Plan.*

*Therefore, while the Plan does explicitly contemplate extraction, it requires an amendment to be approved. As noted above, extraction is not an as of right land use in Escarpment Rural areas and section 8 of the Niagara Escarpment Act sets out seven “objectives” that are “to be sought in the consideration of amendments to the Plan”:*

- a.) to protect unique ecologic and historic areas;*
- b.) to maintain and enhance the quality and character of natural streams and water supplies;*
- c.) to provide adequate opportunities for outdoor recreation;*
- d.) to maintain and enhance the open landscape character of the Niagara Escarpment in so far as possible, by such means as compatible farming or forestry and by preserving the natural scenery;*
- e.) to ensure that all new development is compatible with the purpose of this Act as expressed in section 2;*
- f.) to provide for adequate public access to the Niagara Escarpment; and*
- g.) to support municipalities within the Niagara Escarpment Planning Area in their exercise of the planning functions conferred upon them by the Planning Act.*

*Amendments must be consistent with these objectives and the purpose of the Act – maintaining the Niagara Escarpment as a “continuous natural environment” and allowing only for “compatible” development – and the Plan. Amendments must also be justified by the Applicant (ss. 6.1(2.1) and 10(6), NEP, s 1.2.2). Further, an applicant must demonstrate the purpose and objectives of the Niagara Escarpment Act will not be adversely affected (NEP, s 1.2.2).*

*The Niagara Escarpment Planning Area has been designated by regulation (O Reg 826) as a ‘development control area’ and specific developments must be approved under a permit or exempted by regulation.<sup>15</sup> The Plan sets out both general and specific Development Criteria in Part 2, which must be considered in the permit application process; however, not all criteria are applicable to all situations.<sup>16</sup> Section 2.11 specifically considers mineral resources, with the objective of minimizing the impact of new mineral extraction and accessory uses. The Plan requires that operations shall not conflict with the following criteria:*

- a.) The protection of sensitive ecological, geological, historic and archaeological sites or areas.*
- b.) The protection of surface and groundwater resources.*
- c.) The maintenance of agricultural areas, in accordance with the Agricultural Policies of the Provincial Policy Statement (PPS).*
- d.) The minimization of the adverse impact of extractive and accessory operations on existing agricultural or residential development.*
- e.) The preservation of the natural and cultural landscapes as much as possible during extraction and after rehabilitation.*
- f.) The minimization of the adverse impact of extractive and accessory operations on parks, open space and the existing and optimum routes of the Bruce Trail.<sup>17</sup>*

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<sup>15</sup> Lands licensed continuously since 1975 under the *Pits and Quarries Control Act, 1971*, are exempted from requirements for a development permit by regulation, which remains significant since aggregate licenses do not expire (O Reg 828/90, s 19).

<sup>16</sup> This was also emphasized by the majority of the Board in *Walker*.

<sup>17</sup> The Section also includes requirements for setbacks from the brow of the Escarpment, screening, progressive rehabilitation, the use of off-site material for rehabilitation, accessory uses, and restrictions on new adjacent development. The following specific criteria outlined in the Plan may also be applicable to an aggregate application: 2.5 New Development Affecting Steep Slopes and Ravines; 2.6 New Development Affecting Water Resources; 2.7 New Development Within Wooded Areas; 2.8 Wildlife Habitat; 2.9 Forest Management; 2.10 Agriculture; 2.12 Heritage; 2.13 Recreation; 2.14 Areas of Natural and Scientific Interest (ANSIs); 2.15 Transportation and Utilities; 2.16 The Bruce Trail.



*“Protection” is defined in the Plan as “ensuring that human activities are not allowed to occur which will result in the unacceptable degradation of the quality of an environment (Appendix 2, at 127). This protective stance differs from proponent-driven approach in the Aggregate Resources Act and the presumptive development approach to mineral extraction in the Policy Statement.*

## **6. Structuring Rural Relations for Extraction: The Aggregate Resources Act<sup>18</sup>**

“Agriculture, forestry, mining and manufacturing sectors contribute greatly to the quality of life in Rural Ontario.”

Ontario Ministry of Agriculture, Food and Rural Affairs Website

*The Aggregate Resources Act [ARA] governs aggregate extraction in the majority of the province, including pits and quarries in the Niagara Escarpment Planning Area (1990). The ARA came into force in 1990 replacing the former, and highly criticized, Pits and Quarries Act 1971. As with the Niagara Escarpment planning protections, the aggregate industry lobbied against the passage of the ARA (Baker et al., 2001). Notably, while the ARA received first reading in 1979, it was not proclaimed until 1990. During this period the extraction rate in the province rose from 131 million tonnes to 197 million tonnes, resulting in “heightened awareness of the overall costs of the industry and weaknesses in the policy framework” (Aggregate Resources Program: Statistical Update Aggregate Resources Section, 1990; Baker et al., 2001). The new 1990 Act did respond to some of the concerns raised by the public and municipal governments and brought in a more detailed set of requirements for site planning and rehabilitation of quarries and pits. However, amendments to the Act in 1997 raised further concerns about the regulation of aggregate mining in Ontario (Aggregate and Petroleum Resources Statute Law Amendment Act, 1996). The amendments aimed to increase industry accountability through the introduction of requirements for public notice and circulation of applications and mandatory public consultation. Yet, a central objective of the Bill was also to reduce the government’s role in the regulation of aggregate licensing and operations by shifting towards a self-monitoring system and the creation of an industry-led Aggregate Resources Trust that would be responsible for the rehabilitation of abandoned pits and quarries, research activity and fee collection and distribution (ss. 4, 12, 36). This*

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<sup>18</sup> This section summarizes material included in Chapter Four, pages 134-142, 162-192. Repetitive text is italicized.

*proponent-driven approach has persisted, and arguably increased, to the present-day. While the Act governs extraction licensing, conflicts are largely focused on the planning approvals and amendments required prior to a license being granted. Therefore, the focus on most conflicts is on the Provincial Policy Statement.*

#### *A. The Provincial Policy Statement*

*While the Policy Statement is to be read as a whole to balance social, economic, and environmental values, it has consistently prioritized aggregate resource “preservation” and development since the first version was approved in the 1990s. The balancing of social and environmental impacts of extraction in the Policy Statement must be considered in light of its protection of mineral aggregate resources and operations from “incompatible” development. Section 2.5.2.5 requires municipalities to protect known deposits, areas adjacent to known deposits, strictly limiting development that would “preclude or hinder” access and extraction. Mineral aggregate operations, even those operations that “cease to exist”, must be protected from incompatible development (s. 2.5.4.2.) while earlier versions of the Policy Statement maintained that “mineral resource needs” should be considered in the licensing process. In 2005, the Policy Statement was revised not only to remove consideration of need, but to explicitly exclude it: “Demonstration of need ... 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.” Formerly, opposing parties and governments used the needs analysis to argue that the material to be extracted was not currently required and therefore the site in particular cases should not be approved (Bull and Estrela, 2012). After the amendments, those arguments are no longer available.*

*This presumptive need analysis remains controversial and the NEC along with the provincial Environmental Commissioner, amongst other commentators, argued that supply/demand analysis should be reintroduced during the most recent five-year-review of the Policy Statement and the legislative review of the ARA in 2012.<sup>19</sup> While the Board has concluded that a needs analysis is not required under 2005 (and now 2014 PPS) language, it has*

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<sup>19</sup> For example, Niagara Escarpment Commission. 2010. *Re: Five Year Review of the Provincial Policy Statement*. Toronto: Queen’s Printer for Ontario; 111 of 166 comments on the Provincial Policy Statement Review can be accessed on the Environmental Registry, Registry Number 011-7070; (Ontario, Legislative Assembly, Standing Committee on General Government and Standing Committee on General Government, 2012); Statements on file with Author, transcripts of the legislative review hearings can be accessed online.

nonetheless been a live issue in several cases.<sup>20</sup> As noted by the Board in a recent decision to turn down an application, “[a]ggregate extraction is the only use in the wide ranging Policy Statement where need is not required.”<sup>21</sup>

In contrast, a close examination reveals that protection of natural and social-cultural features in the Policy Statement is largely limited to features formally deemed “significant” by provincial policy and is subject to important exemptions (s 2.5.0). While it provides for absolute protection of aggregate resource supplies and existing operations, social and environmental impacts are to be “minimized” rather than avoided (s.2.5.2.2). This despite s.2.1.1, which states, “[n]atural features and areas shall be protected for the long term”, s.2.2.1, which states, “[p]lanning authorities shall protect, improve or restore the quality and quantity of water,” and s.2.6.1, which states that significant built heritage resources and significant cultural heritage landscapes shall be conserved.<sup>22</sup> In 2013, the Ontario Endangered Species Act was amended to specifically exempt pits and quarries from the requirements to obtain a permit for activities that would otherwise be prohibited, including damaging or destroying species habitat. Instead it would only require mitigation measures and registration of activities with the Ministry and without independent monitoring requirements and enforcement capacity.<sup>23</sup> Exemptions for aggregate extraction, such as those newly introduced under the ESA, have been the subject of strong criticism from the provincial Environmental Commissioner.<sup>24</sup>

The Policy Statement attempts to resolve the apparent conflict between the protection of natural features and cultural heritage by classifying aggregate extraction as an “interim” activity and requiring rehabilitation to “accommodate subsequent land use” (s 2.5.3.1). The 2014 Policy Statement now encourages “comprehensive rehabilitation” in areas with a concentration of mineral aggregate operations. However, the standards for rehabilitation are

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<sup>20</sup> OMB Case No: PL101197 decision issued 16 December 2011, 2011 Carswell Ont 14192, at para 117-118 [“Jennison Construction”], but see also *James Dick supra* note 13, and the dissenting opinion in *Walker supra* note.

<sup>21</sup> *Capital Paving* at para 16, *supra* note 13.

<sup>22</sup> The 2014 PPS now draws attention to and explicitly distinguishes between “positive directives” such as *shall* and “limitations or prohibitions” such as *shall not* which do not allow for discretion and “enabling or supportive language” such as *should*, *promote*, *encourage* which, they state, allows for “some discretion,” making the close-examination of such language essential to decision-making at the application and adjudicative stages.

<sup>23</sup> , 2007, S.O. 2007, c.6 [ESA]. O. Reg. 242/08, s. 23.14 (1).

<sup>24</sup> Environmental Commissioner of Ontario. 2013. “Laying Siege to the Last Line of Defence: A Review of Ontario’s Weakened Protections for Species at Risk”: [http://www.eco.on.ca/index.php/en\\_US/pubs/special-reports/2013-special-report](http://www.eco.on.ca/index.php/en_US/pubs/special-reports/2013-special-report).

*limited to the promotion of “land use compatibility” obscuring the specific and unique relationships that adjacent ecological and human communities may have with the land and its current use.*

*This emphasis on one feature of the land, disconnected from its wider ecological and social networks, as is compounded by the requirement that “as much of the mineral aggregate resources as is realistically possible shall be made available as close to markets as possible” (s.2.5.2.1.). The majority of aggregate is used within the Greater Toronto Area and the surrounding Greater Golden Horseshoe region. As will be discussed below, the resulting concentration in surrounding regions and the cumulative effects of extraction are exacerbated both by the Plan’s focus on designated rural places to accommodate extraction and the vulnerability of those places left outside of the contested boundaries of the Plan itself. The close to market requirement is subject to the “realistically possible” limitation and the Ministry has taken the position that this should be considered on a case-by-case basis and include consideration of other Policy Statement policies and “other considerations.” There has been limited analysis of the section by the Board; however, one case did point to social and environmental impacts as part of the “realistically possible test,” finding that the proposal was, “not realistic given that the possible environmental impacts have not been minimized.”<sup>25</sup> Bull and Estrela point out that this is consistent with the purposes of the Act to minimize adverse impacts. However, they note that the close to market analysis also suggests that some impacts are acceptable (Bull and Estrela, 2012). The focus on mitigation rather than avoidance is reflected in the legal analysis, which has been focused on deciding on which impacts are acceptable and at what threshold rather than examining the assumptions behind claims of economic benefit or considering the ecological and social costs of development.<sup>26</sup>*

## **7. Finding Balance in Rural Places**

In 2011, the first denial of an *Aggregate Resource Act* license in the Plan Area was hailed as a historic victory for PERL (Protecting Escarpment Rural Lands), a group of current and

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<sup>25</sup> *Capital Paving*, at para 30.

<sup>26</sup> See *Capital Paving*, and *Jennison Construction*.

former residents and environmentalists, as well as the local governments and planning authorities who had opposed the application, including the Niagara Escarpment Commission [“the Commission”].<sup>27</sup> Nelson Aggregates had proposed the large, below the water table quarry near Mount Nemo in the Burlington area outside of Toronto, Ontario.<sup>28</sup> PERL opposed the mine based on the ecological, agricultural, and cultural significance of the site and provided substantial evidence to decision makers through their own expert reports, resulting in the designation of an endangered species habitat for the Jefferson salamander and recognition of a watershed complex, and ultimately rejection by the Board.<sup>29</sup> However, on the heels of the victory in *Nelson*, the Niagara Escarpment Commission and a locally organized group of residents, environmentalists, and second home-owners, suffered an equally significant defeat when the Walker Aggregates large-scale quarry extension was approved within the Escarpment Plan Area.<sup>30</sup>

When the Commission and a coalition of community members and organizations formally opposed Walker’s proposal for a large quarry adjacent to a quarry grandfathered under the ARA in Duntroon, the vulnerability of rural escarpment lands in the Plan Area was exposed. At one of the highest points of the escarpment, the site is hydrogeologically significant, is home to habitat for endangered species, and is adjacent to recreational use areas. After the Commission denied the Plan amendment and development permit applications, the proponent

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<sup>27</sup> *Nelson Aggregate Co., Re*, 2012 CLB 29642, [*Nelson*]. See (Van Wagner, 2013) for a detailed discussion of the *Nelson* decision.

<sup>28</sup> The Application materials and reviews by the Joint Agency Review Team (JART), a unique collaborative review model in Halton Region, are available on the Halton region planning website: [http://www.halton.ca/planning\\_sustainability/planning\\_applications/applications\\_under\\_review/nelson\\_aggregate\\_quarry/](http://www.halton.ca/planning_sustainability/planning_applications/applications_under_review/nelson_aggregate_quarry/). JART Report lists the following PERL Consultant submissions as having been considered: PERL Consultant submissions: Natural Resources Solutions Wetland Evaluation; Letter from Wilf Ruland (P. Geo.) to PERL dated April 23, 2005, Re: review of October 2004 report titled “Hydrogeological and Water Resources Assessment of the Proposed Nelson Quarry Co. Extension; Letter from Wilf Ruland (P. Geo.) to JART dated December 23, 2006 Re: further review of the May 2006 submission from Golder Associates titled “Additional Work Programs, Proposed Nelson Aggregate Co. Extension, Burlington, Ontario”; Blackport Hydrogeology Inc., prepared by Ray Blackport, P. Geo. for PERL, Re: Review of Hydrogeology and Water Related Issues Proposed Nelson Quarry Expansion (December 17, 2007); Ray Blackport powerpoint presentation to JART on water hydrogeological issues.

<sup>29</sup> PERL maintains a website and Facebook group: < <http://www.perlofburlington.org/>>. A Toronto-based environmental group Lake Ontario Waterkeeper who formally objected to the Nelson proposal maintained a blog with links to the reports and notes from the hearings: < <http://www.waterkeeper.ca/wordpress-import-blog/19261?rq=Aggregate>>

<sup>30</sup> *Re Walker Aggregates Inc. (Re)*, 2012 CLB 16274 [*Walker*], *aff’d* Niagara Escarpment Commission v Ontario (Joint Board), 2013 ONSC 2496, 12 MPLR (5<sup>th</sup>) 51 [*Walker Appeal*], 4, 18.

land owner appealed.<sup>31</sup> A two member majority of the three-person Joint-Board in *Walker* rejected the “environmentally-focused” approach set out in the Plan. They interpreted the role of the Niagara Escarpment Act and the Plan as “balancing” or “resolving” the conflict between “the protection and development of aggregate resources” and the “protection of the Niagara Escarpment.” Based on the lack of “definitive guidance” and definition in the Plan, the majority chose to apply the Policy Statement standard of “no negative impact” to environmental impacts rather than the “protection” of “unique ecological areas” required by the Plan. While provincial plans like the Niagara Escarpment Plan prevail in the event of a conflict with the broadly applicable Policy Statement, the majority characterized their decision as a preference for the Policy Statement test rather than finding it conflictual, thereby bypassing the higher standard.

This finding, and the result, was upheld on appeal to the Ontario Divisional Court despite a lengthy and detailed dissent by the sole ERT member at the hearing (Van Wagner, 2013). While decisions at the tribunal level do not bind the Ontario Municipal Board, Environmental Review Tribunal and the combined Joint Board as administrative decision makers, the findings of the judicial review in *Walker* do set a precedent for future cases. By upholding the majority decision in *Walker*, the Divisional Court has signaled a move away from a precautionary and environmentally-focused approach to planning adopted in some notable recent decisions,<sup>32</sup> and has placed a substantial burden on those seeking to establish the non-extractive value of rural places and work towards a just sustainability in people-place relations (Van Wagner, 2013). *Walker* demonstrates how the residuality of rural areas in the Plan area creates an opening for the lower standard that reinforces the primacy of both private

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<sup>31</sup> Review of planning decisions in Ontario is divided between the Ontario Municipal Board (OMB) and the Environmental Review Tribunal (ERT), ostensibly dividing “land use” from “environmental” decisions despite the environmentally-focused nature of many objections to planning decisions (Sandberg et al., 2013; Van Wagner, 2013). Notably the two quasi-judicial administrative bodies have recently been formally linked as part of the Environment and Land Tribunals cluster but it is too early to determine any substantive outcomes of the restructuring, See, (Sossin and Baxter, 2012). However, in the context of the NEPA, appeals related to aggregate development are heard by a Joint-Board made up of three members from the two appellate bodies, *Consolidated Hearings Act*, RSO 1990. c C.29. As administrative ‘expert’ decision makers, the Joint Board, the OMB and the ERT are all given considerable deference by reviewing courts and it is very difficult to overturn their findings as appeal is granted only on errors of law.

<sup>32</sup> Nelson, supra note 27; *James Dick Construction Ltd. V. Caledon (Town)*, [2010] OMBD No. 905 [James Dick Construction]; *Capital Paving Inc v. Wellington (County)*, 2010 Carswell, Ont 697, OMB Case No: PL080489, January 19, 2010, [Capital Paving].

ownership and extractive land uses in the interests of finding ‘balance’ between the environment and economic growth.

The places at stake in aggregate disputes are embedded in and constituted by complex networks of eco-social relations, but for the purposes of Ontario’s guiding planning policy, they are divided into different kinds of space - agricultural fields, the natural heritage zones of forests or wetlands, recreational sites such as hiking trails, and subsurface resources such as mineral deposits and groundwater. While the land may be recognized as having natural, social and cultural features, its value as a commodity is clearly prioritized by the Policy Statement. The structure of the Policy Statement provides basic recognition of ecological and social relationships with places. However, the hierarchical protection of the mineral resource value and economic relations to land lead to a presumption of development which ultimately undermines people-place relations. In the *Walker* decision, the Board’s ‘balancing’ exercise was enabled by the adoption of the Policy Statement rather than the more protective and precautionary environmentally-focused Plan framework. The resulting reductionist account of the complex eco-social places of Escarpment Rural lands fails to account for the embodied people-place relations of particular places. By narrowly defining the story about what is stake in disputes about places, the structure of relations upheld by the legal process limits the nature of people-place relations that can be realized through land use planning. The research examined below explores alternative articulations of the place-relations engaged by aggregate extraction disputes from the perspective of parties with more-than-ownership interests in the land. By critically examining these alternative accounts of what is at stake, I consider the strategic potential for a shift towards an environmentally just construction of rural people-place relations.

## **8. Discussion and Results**

### **A. Extraction, Compensation and the Transformation of Place**

Relational legal analysis aims to expose what is really at stake in a particular dispute in order to determine whether law can, and should, structure relationships differently (Nedelsky, 2012). Interview participants in aggregate extraction conflicts consistently expressed concern about the environmental harms resulting from the transformative nature of extractive land use. This is consistent with submissions to ARA licensing processes and to the legislative

review process by a range of parties. The sense that a particular, material place would be lost was repeatedly captured by the image of the ‘hole’ left behind by extraction: “... [T]he loss of natural habitat which is caused by the new Quarry [Duntroon] is an absolute loss and the lake provides no significant replacement except as visual compensation instead of a great hole in the earth” (BMWTF, 2011). One participant characterized the impact of a proposed quarry on the Escarpment as “unavoidable destruction of the landscape”:

[S]o you are taking a natural feature which is an escarpment and you are creating a hole which later becomes a lake which is not natural on the escarpment. It is up on the top. There [are] no lakes on top. You are destroying wetlands, you are destroying creeks, you are destroying woodlands, habitats. And farmland (Interview, May 7, 2014).

For some participants environmental concerns were linked with a sense of connection with, obligation to, or dependence on, the land. One farming couple collectively pointed to the need for stewardship of the soil to ensure an ongoing and sustainable relationship:

Participant 1: No, it is not a renewable resource but produces a renewable crop every year and that is the difference. You can't take aggregate and produce a new crop every year. ...

Participant 2: Yes, look at the cod industry. You spoil it, it doesn't come back in a few days. (Interview, August 8, 2014)

A member of an environmental group involved in opposing a licence application expressed a sense of intergenerational and interspecies obligation:

“The Niagara Escarpment to me is a thing that I meant to protect for my kids. One of the problems you have is the Niagara Escarpment can't stand up for itself; it is mute. You and I and all of us have to stand up and defend and that is what we are trying to do” (Interview, August 8, 2014, Collingwood).

Connection with the land was sometimes linked to experiential knowledge and living or working with the land, particularly for farmer participants (Interview, August 8, 2014; Interview July 18, 2014). However, it was also described by many participants as the result of the rich learning about the ecological, historical, or cultural features of a particular place through their engagement in the decision-making process. In particular, several participants described learning about the connectivity and interdependence of the social and ecological systems within and between places. One farmer reflected on his new understanding of the role of the complex groundwater and hydrogeological features in the area:



I never knew about the reach of water. I never knew about changing cold water fisheries by a couple degrees in temperature could be an issue. I never knew that fish that spawned in the Nottawasaga sturgeon became game fish in Lake Michigan. We were just farming there doing our stuff. We just don't understand the reach of impact things can have. We learned. We talked. (Interview, March 12, 2014)

One participant pointed to the alvar ecosystem in the proposed site beside her long-time family home, and having only recently learned about species of rare butterfly and bat that depend on this unique habitat (Interview, August 28, 2014). Another participant whose childhood home was impacted by a proposed mine described gaining a renewed appreciation for the place she grew up through her involvement with a local residents group:

It [the proposed site] become more of a presence to me the more I learned about it, and before they put the “no trespassing signs on it, the more I walked around it and thought more about it...It's just beautiful and I had a distinct memory of coming home when this just started to unfold and seeing it, and going, ‘that's as good as it gets’. (Interview, August 11, 2014)

One submission to the 2012 legislative review stated: “The soil can't be separated from the substrate or from the atmosphere or from the water or anything else. This is something we understand” (ARA Submission, June 2012, on file with author). In some cases, participants also linked learning about Indigenous history, worldviews, and relationships with the land at stake with a deepened connection to place (Interview, August 11, 2014; Interview, August 8, 2014; Interview August 28, 2014). These participants reflected on the need to learn from Indigenous approaches to environmental issues and cited the importance of working with Indigenous communities based on their experiences in opposing aggregate applications. One participant went on to actively support Indigenous opposition to other types of development based on her experience opposing a local aggregate mine (Interview, August 11, 2014).

Participants also strongly refuted the idea that extraction could be a “temporary” land use, as it is characterized by the Policy Statement. One naturalist characterized the impact as “a transformation of the landscape” (Interview July 18, 2014), while another participant reflected that something “precious and vulnerable” would be lost (Interview, August 11, 2014). The sense of loss was linked to the idea of compensation for negative impacts on ecological features, which was rejected by those participants who discussed it. As one planner noted, in the context of the Niagara Escarpment:

We don't use net gain: ‘sorry, I took that away but I am giving you this.’...Ours is maintain and enhance, not take away and compensate. But

with the quarry, there is not much you can do other than compensate because you are obviously losing what was there.” (Interview, September 3, 2014, NEC)

A key concern about the *Walker* decision is that it opens the door to the net gain compensation approach, even in the context of the environmentally focused Plan. This raises serious concerns about the capacity for the legal process to account for the specificity of ecological systems and the materiality of particular places and to appreciate the transformative impact of mining. Viewed in the context of the prioritization of aggregate under the Policy Statement, the significance of the *Walker* decision extends beyond the loss of the socio-ecological place at stake to concerns about the integrity of the Plan itself. As noted by the NEC staff report to the Commission:

The concern and issue is not with respect to the Majority preferring the evidence and opinions of the witnesses of the Applicant, but rather that in staff’s opinion, the Majority appears to disregard key terms and objectives of the NEP related to the protection of natural features and areas on the basis that they are not defined (or not clearly defined), and defer to the Provincial Policy Statement in making their findings (Staff Information Report Re: Joint Board Decision Office of Consolidated Hearings Case No.: 08-094-Walker Aggregates Inc., 2012, p.1).

Concerns about this shift away from the unique environmental focus of the Plan reflect broader concerns about the integrity of the proponent-driven decision-making process.

In the shadow of the loss in *Walker*, the 2015 statutory review of the Plan and the other Provincial Plans began with a series of conversations at the Commission on key issues. In September 2014, the Commission considered a staff report on whether, 30 years later, the aggregate mineral policies had realized the goals and intentions of the Act, or whether changes were required to achieve protection of the Escarpment (Niagara Escarpment Commission, 2014). Many of the groups who participated in this research also made submissions on the aggregate policies, calling for an end to, or moratorium on, aggregate extraction in the Plan Area. Despite the modest recommendation by planning staff to “review and improve existing policies and development criteria”, the Commission voted 7 to 5 to end aggregate extraction in the Plan Area. Commissioners characterized the staff recommended options as “business as usual” and concluded, “[I]t is time to get back to first principles.

There has been a long period of accommodating aggregate extraction. It is time to transition and phase this use out of the NEP.’<sup>33</sup>

#### B. Trust, Power, and Knowledge: Ownership and Control

An overall lack of trust in both the decision-making system and the proponents themselves was evident throughout the interviews. Participants identified concerns related to site selection and alteration as well as a lack of trust in the knowledge base on which decisions were made. In Ontario, aggregate planning is largely determined by private land ownership, such that the siting of aggregate mines is driven by the acquisition of the land rather than an assessment of the relative suitability of alternative sites. Some participants expressed concerns that corporate landowners had acquired lands without being “honest” or “transparent” about the intended land use (Interview, March 12, 2014; Interview, August 8, 2014). Others noted that a change of ownership allowed the new owners and operators to evade the commitments made to neighbours or local governments by previous owners with respect to expansions (Interview, May 7, 2014; August 11, 2014) or the establishment of an asphalt plant (Interview, August 28, 2014). Rather than contesting the appropriateness of private ownership of the land, participants’ concerns indicated a sense of unease about the extent of the proponents’ rights and powers flowing through ownership.

This was particularly evident where interview participants had observed or had knowledge of proponents damaging or altering their land to remove ecological or cultural features that could impact the approval of the licence, such as habitat for endangered species. Participants simultaneously understood this as being legal based on the proponents’ ownership of the land, but nonetheless wrong, as it had the effect of shifting the baseline for assessment of the impact of extraction. An experienced NEC planner observed that there is a suspicion of inevitability by members of the public (Planner, Interview, September 3, 2014). In their submission to the legislative review, Friends of Rural Communities and the Environment (FORCE), which had organized against the Flamborough quarry proposal, questioned whether proponents would accept a ‘no’ in the process (on file with author). Another participant described the perception that it was an approval process rather than a decision-making process:

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<sup>33</sup> Personal correspondence, October 7, 2014. NEC discussion papers and Minutes NEC policy meeting are available online: <http://www.escarpment.org/planreview/NECDiscussionPapers/index.php>. See the September 17 minutes for the decision referenced here.

They had done the political legwork and under the *Aggregate Resources Act* knew they could muscle this thing through. Couldn't care less what the community wanted. This was strictly a play on money because they wanted to be in, get the licence, sell the whole thing and have tremendous shareholder return (Interview, March 12, 2014).

Exploratory excavation and testing are exempted from permitting requirements in the Plan Area, allowing landowners to undertake preliminary studies before making any applications (s.5). In the case of aggregate mineral extraction, such preliminary studies can lead to significant expenditures of money and time and compound a proponent's sense of entitlement to approval, characterized by one participant as "because we want it, we get it done" (Interview, March 12, 2014).

Experiential knowledge of particular places was contrasted with that of proponents' technical experts, which was widely mistrusted by participants as biased or unreliable. In several cases, interview participants had produced or procured alternative knowledge and expert data to counter the factual record established by the application materials for planning authorities and litigation. Notably, in two cases where this third party data was provided to decision makers and planners in advance of legal proceedings, participants saw it as determinative to the ultimate findings that the land was ecologically significant and the risks of the proposal outweighed the benefits (Interview, May 7, 2014; Interview, April 23, 2014). However, the barriers to accessing such expertise are significant and raise important concerns about which communities can, and do, succeed in contesting the proponent's narrative about the place at stake in aggregate conflicts. In addition to the financial barriers, participants pointed to problems retaining the same types of experts that work with proponents (Interview, March 12, 2014). One environmental group participating in a hearing reported being unable to hire a hydrologist who was concerned that it would limit future work opportunities with proponents. Further, they expressed concern that evidence provided by the naturalist they hired was given less weight because he was "just a biologist that has spent 100 years walking through the bushes, a field guy" and not a "scientist" with a PhD (Interview, August 8, 2014). Additionally, as the private land owner, proponents can and do exclude other parties from the site and therefore limit their access to data and ability to review and produce independent data. This is particularly significant where ecological features may be temporally or seasonally variable:

They won't let you walk around in your rubber boots and eat some sandwiches and try to figure out what is going on. They don't let you do that.

You are in for three hours and then you get the hell out. When you are going to do environmental surveys, in my experience anyway, there is timing on this. There [are] times you go in and see stuff and there [are] times you don't see diddly squat. (Interview, August 8, 2014)

The role of this alternative data can be significant in the outcome of particular cases, as it was in the rejection of the *Nelson* quarry. However, as one planner pointed out, this demonstrates the failure of the licensing process when the burden of effective assessment falls to private individuals and groups (Interview, March 7, 2014). This burden is of particular concern in the context of a fixed resource and the concentration of extractive development.

### **9. We've Done Our Share: Concentration and Cumulative Impacts**

The fixed nature of aggregate resources raises particular concerns about concentration and cumulative impacts on specific ecological and spatial communities. Mining occurs where the resource is – “it does not discriminate in terms of place” (Anders Sandberg and Wallace, 2013, 68). When the restrictions on Escarpment Protected and Escarpment Natural lands are layered onto the fixed location of the resource, extractive developments proposals within the NEP are necessarily concentrated in areas designated as Rural. In *Walker* and other decisions within the Plan Area, proponents and decision makers have used existing extractive uses and prior environmental damage on adjacent land to establish the compatibility of new, or significantly expanded, extractive land uses. One naturalist who has observed the aggregate industry for many years noted the “creeping motion” of aggregate licensing:

Somebody comes in for an application ... for a very small site which is relatively easy. And then they come back five or ten years later and say it is already there, the service is already there, let's make it bigger, make it below the water table now. Or in the world of limestone, 'we are only taking off ten feet or something like that... Inevitably when they have done that, they come back and say the service is already there, they have already taken away the environmental features [on] the top. Let's make it a regular quarry,' (Interview, July 2014).

In this sense, the buffer function of rural lands actually creates an opening for further extraction once it is established on adjacent lands. The same participant went on to observe that the issue is exacerbated by the unwillingness of decision makers to contemplate future land use in the legal process: “Even though you may suspect and believe in your soul that is what they are doing, you can't prove it. You can't prove intent,” (Interview, July 2014). While this narrowing of focus on the current proposals may be legally correct, it is notable that decision makers do rely on prospective planning by proponents in Adaptive Management and Rehabilitation Plans put forward in the application process. In the face of scientific

uncertainty both are at least somewhat speculative by definition. Neither of these preclude current or future owners from applying for extensions or permission to use the site for other controversial uses, such as a landfill or sewage site, and yet they may substantially influence approval in a particular case where mitigation is determined to resolve environmental or social impacts.<sup>34</sup>

Despite the imposition of a development control system, Patano and Sandberg found that the NEC approves the overwhelming majority of overall development applications (2005). In the case of large-scale aggregate extraction, while the NEC has turned down a handful of high profile applications in recent years, only the decision in *Nelson* has survived appeal. When *Walker* was being argued, the Ontario Municipal Board was approving another down the road, just outside the Plan boundaries.<sup>35</sup> Several interview participants pointed to the ‘close-to-market’ requirement as a major factor in the concentration of extraction in particular areas. This implicitly places the burden of aggregate resource protection and development on a specific geographic area within the province, including rural areas in the Plan Area. An Ontario Bar Association presentation by a leading proponent council summarized the justification for the policy as follows:

Transporting aggregates longer distances increases the cost to the user and the cost of the final products that use aggregate as inputs, such as public infrastructure projects and housing. Therefore, there is a public interest in ensuring that aggregate resources are extracted as close to market as possible in order to support the Provincial economy (Bull and Estrela, 2012).

The aggregate industry has also emphasized the environmental benefits of this requirement in reducing production-related emissions and contribution to climate change (Sandberg and Wallace, 2013; Bull and Estrela, 2012). However, several interview participants were critical of industry’s environmental claims and connected climate change and environmental crisis with the presumption of perpetual growth

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<sup>34</sup> At the time of writing an appeal of a decision to allow industrial sewage dumping in a lake created in an old quarry site by Oxford County and a residents’ group, Oxford People Against the Landfill (OPAL) was rejected by the Ontario Environmental Review Tribunal: “Appeal by County and OPAL Rejected”, 104.7 HeartFM News, 29 October 2015, <<http://www.1047.ca/news/local-news/appeal-by-county-and-opal-rejected/>>

<sup>35</sup> The MAQ quarry was approved by the Ontario Municipal Board in 2013: *MAQ Aggregates Inc., v Grey Matters*, OMB Case No. MMO90038.

and development and ongoing demand for aggregate resources (Interview, July 5; Interview July 17, 2014; Interview August 8, 2017).

While some concentration of extraction is inevitable with a fixed resource like aggregate, the clustering of this type of transformative land use makes a cumulative impact assessment relevant, particularly where exacerbated by policy requirements (Interview, May 9, 2014).<sup>36</sup> One community group representative summed up the sentiment in areas with multiple large aggregate developments: “We are doing our share” (Interview, May 23, 2014). Neither the process under the Act, the PPS, nor the municipal amendment processes, require a cumulative impacts analysis. The Provincial Environmental Commissioner has expressed concern about the lack of cumulative impact analysis in aggregate applications (Environmental Commissioner of Ontario, 2012).

Cumulative impacts are of particular importance for communities in Rural Escarpment areas. However, they are also increasingly significant for those that fall outside of special planning regimes like the Plan, the Greenbelt or the Oak Ridges Moraine regimes as proponents attempt to bypass the costly and prohibitive regulatory requirements of Plan areas. For example, the Carden Plain area and parts of Dufferin, Grey, and Bruce Counties adjacent to but excluded from the politically negotiated boundaries of the Plan Area, and First Nations territories in parts of Southern Ontario and Manitoulin Island are all facing increasing pressure from aggregate extraction proposals. Opponents to the now abandoned Melancthon mega quarry proposal, which fell just outside of the Greenbelt and the Plan Area, obtained an internal memo to investors by the American hedge fund land owner stating that they had specifically chosen the site based on the lack of regulatory oversight. Notably the memo also cited the small population, leading some observers to conclude that the proponents did not expect the organized opposition they eventually faced (Interview, March 12, 2014). Just as the rural parts of the Plan Area serve as a kind of sacrifice zone in the search for balance between competing land uses in the Niagara Escarpment, areas outside of the politically negotiated boundaries of provincial planning regimes uphold the protection of the legally

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<sup>36</sup> See also, Environmental Commissioner of Ontario. 2009. “The Swiss Cheese Syndrome: Pits and Quarries Come In Clusters”: [http://www.ecoissues.ca/index.php/The\\_Swiss\\_Cheese\\_Syndrome:\\_Pits\\_and\\_Quarries\\_Come\\_in\\_Clusters](http://www.ecoissues.ca/index.php/The_Swiss_Cheese_Syndrome:_Pits_and_Quarries_Come_in_Clusters) [ECO, “Swiss Cheese”].

protected lands within them. The political nature of these legally enforceable boundaries has significant implications for the relationship between rurality and environmental justice. Further, the desire to protect Plan Area land can result in a desire to shift impacts elsewhere without regard to the consequences for human and more-than-human communities elsewhere. While some aggregate development is likely inevitable in Ontario's future, determining the 'right' place for extraction and its impacts must be part of an inclusive and progressive planning process in which a wide range of rural people-place relations are recognized, challenged, and reconfigured. If place-protective behaviours in rural land use activism serve to compound existing environmental burdens and colonial land use patterns, they will undermine environmental justice and the potential for transformative alliances for just sustainability.

#### A. Put It Up There: Layers of Rurality and the Colonial Potential of Place

Given the likelihood of ongoing demand for aggregate, some participants indicated that they were not opposed to aggregate extraction, instead commenting that it was an appropriate land use elsewhere (Interview, March 12, 2013; May 23, 2014). Some pointed to other proposals that were preferable to their own without reflecting on the consequences for other ecologies and human communities in that place (Interview, August 8, 2014). The potential for this impact shifting has clear implications for places outside the boundaries of the Plan, particularly Indigenous communities and those with less financial resources and political power. From an environmental justice perspective, the potential for particular communities to bear the burden of extraction as a result of reduced regulatory oversight is significant. This is compounded by the relative power of some communities to mobilize opposition and reinforce regulatory boundaries while others are presumed to be willing hosts, or in the case of Indigenous communities, are continuing to fight for recognition of their jurisdiction in relation to lands and resources.

Some participants specifically emphasized a distinction between the role of rural Southern Ontario as agricultural land and the North as the appropriate place for extraction. The drive to protect farmland and agricultural communities in southern Ontario was simultaneously connected to both instrumental interests and to the sense of interdependence and reliance on the land. The desire to shift extraction elsewhere was coupled with a sense that extractive



activity was more “appropriate” on land outside of agricultural areas and the implication that the impacts on people-place relations in such places would be less significant. This desire to shift extractive development ‘somewhere else’ exposes the uneasy relationship between rural agricultural areas and ‘the North’ in Ontario. There are important legal, political, economic, geographical, and cultural reasons to see the southern and northern parts of the province as distinct (Stark et al., 2014). However, unless opposition to aggregate disputes in Southern Ontario includes a rejection of the construction of the North as the “appropriate” site of extractive activity, it will compound the social and environmental injustices faced by Indigenous communities (Agyeman et al., 2010; Stark et al., 2014).

Detailed analysis of the complex issues surrounding extractive industries in Indigenous lands and the role of mining in Northern Ontario are outside the scope of this paper; however, it is essential to note that the Rural-Northern relationship is an important dimension of any consideration of rurality and environmental justice in Canada. The following brief discussion of the legal construction of this relationship points to the need for further research, particularly on the role of Indigenous perspectives and legal jurisdiction in Ontario’s land use planning framework. The *Far North Act, 2010* (SO, 2010, c. 18) now imposes a distinct land use-planning regime for the Far North, which purports to balance the rights of Indigenous communities with environmental conservation and mining interests. In fact it reinforces provincial authority, providing a “public interest” veto for development and resource decisions, and upholds the hierarchical privileging of extractive rights (Gardner et al., 2012; Pardy and Stoehr, 2012; Wilkinson and Schulz, 2012). The construction of the North as the appropriate space for resource development is also upheld in the 2014 Policy Statement which simultaneously presents an inclusive rurality while distinguishing the working agricultural landscapes of the South from the natural North in section 1.1.4: “Across rural Ontario, local circumstances vary by region. For example, Northern Ontario’s natural environment and vast geography offer different opportunities than the predominately agricultural areas of southern regions of the Province.” This resource-based distinction is also emphasized by the Government’s departmental structure – for example, the division between the Ministry of Agriculture, Food, and Rural Affairs, and the Ministry of Northern Development and Mines. While the Ministry of Municipal Affairs and Housing is responsible for the *Planning Act* and planning related issues generally and the Ministry of Aboriginal Affairs guides provincial relationships with Indigenous communities, the Ministry of Natural Resources and Forestry deals with community based land use planning for First Nations.

The *Aggregate Resources Act* itself applies only to very limited and specific parts of the province outside Southern Ontario (O. Reg 244/97). While there may be legitimate concerns that a regime developed for the context of extraction in the South may not serve the needs of the diverse communities and ecosystems of the North, the exclusion of the majority of land in Northern Ontario from regulation under the *Aggregate Resources Act* licensing process means that municipal *Planning Act* approvals are the only mechanism for review in large parts of the province where Indigenous lands and rights may be impacted.<sup>37</sup> In Ontario, the exclusion of the North from the *Aggregate Resources Act* regime has been compounded by the silence in the *Planning Act* and until 2014, the Policy Statement, on the duty to consult and accommodate Indigenous Peoples. At the time of writing it remains unclear what the implications of the 2014 Policy Statement's recognition of the duty to consult and accommodate Indigenous communities are for municipal decision-making in Ontario.<sup>38</sup> Given the powerful role of the Policy Statement in decision-making by both municipal governments and the Ontario Municipal Board, this explicit provincial delegation of the duty to consult and accommodate to municipalities is significant. However, the failure of the *Aggregate Resources Act* and associated policies to clarify *how* the duty to consult should be fulfilled, and by whom, leaves First Nations, municipalities and proponents with many questions about how to proceed with the complex steps of aggregate planning. With the exception of a lawyer working with Indigenous communities, the professional interviewees all declined to comment on the duty to consult as outside their expertise. Pressing concerns about financial support for First Nations to participate in consultations and resources for municipalities to understand and carry out their obligations are evident within the Plan Area. The communities of the Saugeen Ojibway Nation report facing complex and sometimes multiple consultations and have pointed to the need for financial support for staffing and technical expertise for consultation (Ritchie, 2013, pp. 427–428). This remains a significant

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<sup>37</sup> Notably the limited application in Northern Ontario is the direct result of one highly controversial proposal for a large aggregate mine in Michipicoten Bay on the Lake Superior Coast. See the Ontario Municipal Board decision in *Citizens Concerned for Michipicoten Bay v Wawa and Superior Aggregates Company*, PL040025, November 30, 2009.

<sup>38</sup> The duty to consult and accommodate Indigenous Peoples in Canadian law is beyond the scope of this paper, see for example: *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at para. 168 [*Delgamuukw*]; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] SCR 511 [*Haida*], at para. 35; *Taku River Tlingit First Nations v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 (Canlii), 259 DLR (4<sup>th</sup>) 610, [2006] 1 CNLR 78 [*Mikisew*]; *Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014 SCC 48.

challenge facing First Nations involved with the aggregate licensing processes. Similar to other types of mining, it involves the review and interpretation of complex technical reports including planning, natural heritage, hydrology, geology, hydrogeology, archeology and cultural heritage and often air quality, as well as requiring independent expertise to provide advice and expert evidence in any legal proceedings.

The consistent privileging of extractive land uses in the Policy and the *Far North Act* could align Indigenous and non-Indigenous rural interests in efforts to realize a place-based approach to land use planning. However, such opportunities cannot be realized if even the most active and informed opponents of aggregate development elsewhere in the province frame extraction “up there” or “up North” as appropriate or preemptively acceptable (Interview, September 9, 2014). While the 2011 proposal for a mega quarry in the agricultural community of Melancthon Township in Southern Ontario met with international criticism and solidarity from urbanites and First Nations, the massive recent expansion of the Lafarge Meldrum quarry beside Sheshegwaning First Nation on Manitoulin Island was approved with little outcry. The aforementioned quarry will now be the largest in Canada and was approved despite minimal engagement with the First Nation who have a constitutional right to be consulted and accommodated with respect to development on their territory during the licensing process (Interview, September 5, 2014). A just and sustainable dialogue about the ‘right’ and ‘wrong’ places for aggregate mines must not only respect the constitutional rights of Indigenous Peoples with respect to land and resources in the context of land use planning, it must go much further to take enduring Indigenous legal orders as a starting point for a transformative politics of place and relations with land.

### **10. Conclusions: Towards a Just Politics of Rural Places**

The way law structures rurality and rural places has important material consequences for the human and more-than-human inhabitants of particular places. Disputes over aggregate extraction in Ontario’s Niagara Escarpment demonstrate the way law shapes and constrains our relationships with place. I have argued elsewhere that the structural privileging of ownership in the operation of land use law undermines the progressive potential of planning (Van Wagner, 2013). Here, I have demonstrated how the legal construction of the rural as a residual space produces rural places as sacrifice zones between spaces of environmental protection and economic growth. Engagement with the embodied experiences of rural people-place relations demonstrates that they are complex and sometimes contradictory, at once

instrumental and affective, exclusionary and reciprocal (Foster, 2009). In my view, this engagement in those places that are socially and legally constructed as rural can contribute to a broadened conception of environmental justice focused on the mutual interdependence of living in the land. If this broadened notion of environmental justice requires us to learn and practice new ways of living in, working with, and caring for the land as we pursue social inclusion and decolonization, the perspectives explored here serve as a tentative starting point for difficult, unsettling and necessary dialogue about the future of Ontario's rural places.

While land use planning conflicts can, and do, result in narrow and exclusionary politics of the 'local', it is cautiously argued that they may also serve as strategic openings for the articulation of alternative social and ecological relationships. As a starting point, participants in rural land use conflicts must strengthen and deepen the transformative potential of their movements through meaningful engagement with the theories and practices of environmental justice. In Ontario, this is particularly relevant to hopes for building relationships of solidarity, respect, and reconciliation between rural land users, environmental movements, and Indigenous communities. Rural land use activism plays a role in redefining rural people-place relations through meaningful engagement with enduring, place-based Indigenous legal orders and a progressive politics of environmental health and social inclusion. However, this requires careful and critical attention to both the structural obstacles and the cultural assumptions underlying narratives of property ownership, appropriate development, and hierarchies of land use, as well as a rejection of colonial and exclusionary place-protective politics. As Alexa Scully argues, places can serve as the "literal common ground" necessary for the kind of "rich dialogue and understanding across perspectives" required for decolonization (Scully, 2012). Ongoing relationships with First Nations that were developed during the Melancthon mega quarry campaign are hopeful developments that should be sustained (Interview, August 8, 2015). As well, the Coalition on the Niagara's Escarpment's policy on working with First Nations, which includes commitments to self-education about Indigenous rights and perspectives and a prioritization of relationships with First Nations was notably developed in collaboration with Indigenous environmental and legal experts Henry Lickers and law Professor John Borrows.<sup>39</sup>

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<sup>39</sup> Aboriginal Policy for CONE:  
<[http://www.niagaraescarpment.org/images/docs/cone\\_aboriginal\\_policy\\_final.pdf](http://www.niagaraescarpment.org/images/docs/cone_aboriginal_policy_final.pdf)> and on file with the author.

Opposition to aggregate extraction in Ontario is often characterized as site- and issue-specific, and this is sometimes the case. However, there are also important examples of parties shifting their focus to broader campaigns about regional land use planning and environmental decision-making. For example, the province-wide Food and Water First campaign evolved from the opposition to the Melancthon mega quarry and continues active engagement in law and policy reform and electoral politics. One organizer described the evolution as follows, noting the opportunity for solidarity and transformative politics:

The way this conversation changed from a potential [...] quarry application to engaging tens of thousands of people on the common denominator that our water is not for sale, our water is sacred and not to be polluted, and our food lands are there for the betterment of this province, this food and water first in our thinking tore away all other lines of difference. It is to me the sleeping giant in elections from here on forward, federally or provincially, the protection of water and food lands is raising up what people are willing to take action on (Interview, March 12, 2014).

Organizing the *Nelson* quarry opposition included efforts to bring the regional communities together to articulate a proactive and long term “community vision” for the region. That grassroots exercise became the basis for local government efforts to develop a regional rural vision:

That had enough influence on the city that they came after a couple years later and had council create what they call the rural vision. They did the same process as we had done and workshops and all that and had people design how the rural area would look in the future vision. This work is to form part of the municipal Official Plan, thus formally identifying the value of preserving rural agricultural and natural areas (Interview, May 7, 2014).

These campaigns serve as strategic opportunities to link rural land use activism with environmental justice goals in order to negotiate and articulate alternative conceptions of rurality. The 2015 Plan review serves as another key moment for intervention to remove structural obstacles and foreground relationships with place. At the time of writing, the review is ongoing and ultimately the Province will determine the revisions to the Plan regardless of the Commission’s recommendations. Nonetheless, the Commission’s strong affirmation of an environment-first and values-led interpretation of the Act should be seen as an opening for the assertion of alternative and transformative relations with rural places. In particular, it creates conceptual space in which a critical politics of rural place could shift the way law structures rural people-place relations. This requires rejection of exclusionary and individualistic site-specific opposition to development in particular places. Instead, it must be

replaced with an active, humble, and critical engagement with a wide range of the human and more-than-human actors inhabiting, or seeking to inhabit, the conceptual and literal common ground of rural places.

## Chapter Nine: Conclusion – An Eco-Relational Approach to Land Use Law

### 1. A Summary of Research Findings: Placing Private Property in Ontario's Land Use Law

This final chapter weaves the findings and arguments in the preceding chapters together to set out an eco-relational approach to land use law, built on my study of Ontario's quarry conflicts. This dissertation has examined aggregate mineral extraction in order to understand how we might transform the way we resolve disputes about how we use, and live with, the more-than-human world. Here I summarize the findings of the study by returning to my ecological adaptation of Jennifer Nedelsky's relational rights analysis introduced in Chapter Five as a framework to think through how we might start to "live well together in the land."<sup>1</sup> Informed by critical ecological property theorists, particularly Nicole Graham, and legal geographers, such as Nicholas Blomley and Sarah Whatmore, I apply my eco-relational analysis to foreground the people-place relations at stake in aggregate extraction conflicts. Informed by the articulations and assertions of alternative people-place relations uncovered through this research, I consider the potential for an eco-relational approach to land use disputes to bring about transformative change in Ontario's land use law.

First this section summarizes the existing legal relations of aggregate mineral extraction in Ontario. Based on the documentary and interview data collected in this project, I then consider the place-based values at stake for the more-than-owner parties involved in aggregate conflicts and discuss how the people-place relationships uncovered in this research uphold these values. Finally, in considering the "institutional and rhetorical means of expressing, contesting, and implementing" that could uphold these place-based values and relations, I propose specific changes to the legal and policy framework, and argue transformative changes are required to the way we make land use decisions in Ontario.<sup>2</sup> This research demonstrates that participatory rights are not enough to realize environmental justice and just sustainability. Without meaningful opportunities to negotiate, contest, and shape the

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<sup>1</sup> Randolph Haluza-Delay, Michael J DeMoor & Christopher Peet, "That We May Live Well Together in the Land...: Place Pluralism and Just Sustainability in Canadian and Environmental Studies" (2013) 47 J Can Stud Détudes Can 3 226.

<sup>2</sup> Jennifer Nedelsky, *Law's relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2012) at 236.

values and assumptions at the heart of property and planning law, the process remains closed to the full range of people-place relations at stake in aggregate mineral extraction conflicts. Rather, we require a fundamental reorientation of property relations in which ownership is not only decentred but also reconceived as one of a broader range of people-place relations with private land. Finally, I observe that future research about the role of Indigenous jurisdiction over land use decisions, as well as substantive engagement with Indigenous legal concepts in land use law, are a necessary part of re-shaping Ontario's people-place relations towards just sustainability.

#### A. Enacting the Ownership Model: Understanding the Legal Relations of Ontario's Aggregate Minerals

This dissertation has examined the relationship between private property and public land use planning. I have demonstrated how, despite participatory opportunities for a range of parties in the planning process, private ownership remains a powerful and central force in shaping Ontario's land use law. The chapters above examine why and how the ownership model of property-relations is achieved and sustained in the province.

As demonstrated in Chapter Four and discussed in Chapters Five through Eight, the structure of Ontario's land use law and policy gives priority to particular forms of use and development. Chapter Four provides a detailed description of how aggregate mineral extraction is constructed as one such privileged land use. It demonstrates how aggregate minerals are produced as resources, severed from and valued above all other physical, ecological, social, and cultural features of a particular place. Chapter Six demonstrates how the people-place relations of ownership are enrolled to uphold a utilitarian vision of the public good as development and economic growth while the much broader range of more-than-owner relations with the land at stake are severed, and therefore excluded, for the purposes of legal decision-making. This structure of legal relations has consequences that extend beyond the boundaries of a particular site-specific dispute, and even beyond the particular case of aggregate mineral regulation, as the messy socio-materiality of people-place relations is "placed outside the frame" of land use law.<sup>3</sup> The dominant ownership model

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<sup>3</sup> Nicholas Blomley, "Disentangling Law: The Practice of Bracketing" (2014) 10 *Annu Rev Law Soc Sci* 1 133 at 136.



of property is upheld and successfully performed despite the ongoing and creative assertion of alternative people-place relations.<sup>4</sup>

An emphasis on the exclusivity and alienability of private property underpins the narrow view of the state evidenced in the proponent-driven land use regime governing aggregate extraction and the increasing reliance on self-compliance and monitoring. As demonstrated in Chapter Six, in addition to the temporal privilege to initiate the events in the application process, the owner has the spatio-temporal power to shape the site prior to extraction and determine what more-than-human entities and material relations will or will not exist for the purposes of the legal process. The severability of land from its wider relations is reinforced by the primary role of the legal land owner in the consultation process through which the more-than-ownership relations engaged by the proposed development are asserted and shaped for the purposes of the subsequent litigation. As demonstrated in Chapters Seven and Eight, the material and social consequences of transformative extraction are trivialized or even deemed irrelevant to decisions about how private land should be used. The documentary analysis and interviews set out in Chapters Six through Eight expose a significant discontinuity between the more-than-ownership people-place relations at stake and the legal regulation of the places produced as sites for aggregate development.<sup>5</sup>

As I contended in Chapter Four, the work of hierarchically ordering land uses is done through the guiding planning policy in the Provincial Policy Statement and by the inversion of the broader municipal planning inquiry and the provincial licensing approvals regime. Chapter Six described how this inversion shifts the primary analysis from a broad planning inquiry into *whether* a particular development should proceed to a managerial aggregate licensing inquiry and about *how* it should proceed. The mandatory protection of the resource and aggregate operations from other land uses in the Policy Statement is compounded by the explicit exclusion of analysis about whether and where the resource is needed, the close-to-market requirement, and the treatment of extraction as interim use regardless of the impacts and the form of rehabilitation. By hierarchically ordering both the physical features and uses of a particular place, the Act and the Policy Statement produce aggregate extraction sites as alienable commodities and attempts to sever more-than-owner and non-instrumental people-

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<sup>4</sup> Nicholas Blomley, "Performing Property, Making the World" (2013) 26 Can J Law Jurisprud 24 23.

<sup>5</sup> Deborah Martin, Alexander Scherr & Christopher City, "Making Law, Making Place: Lawyers and the Production of Space" (2010) 34 Progress in Human Geography 2 175.

place relations for the purposes of land use decision-making. As Chapter Seven argued, the exclusion of these relations upholds a dualistic view of nature and culture that precludes responsibility and interdependence. Further, as Chapter Eight demonstrated, it produces and upholds the legal construction of rural places as residual – the potential sacrifice zones between the urban and the natural. As commodities to be used for the benefit of those exercising the dominium of ownership are enrolled in a vision of the provincial interest privileging extraction, places can be harmed and even destroyed with only minimal requirements for mitigation or reactive ‘adaptive management’ to address the significant and even irreversible transformation or loss of a place and its relations.

### **B. Listening to the Heart: Creating Space for More-Than-Owner Values and Relations in Ontario’s Land Use Planning System**

Chapters Six, Seven, and Eight provide insight into the values at stake for the more-than-owner parties and the relations that can uphold these values. As I note in Chapter Seven, the values and relationships asserted by more-than-owner parties are messy – all at once instrumental and affective, conservative and transformative, exclusionary and reciprocal. As one more-than-owner party reflected: “The water, the land, the air, the alvar, those are important. I don't know which is more important. It depends on whether it is your land.” Few raised concerns about property values directly; however, several did note concerns about traffic and noise or vibration impacts on their property or raised such concerns in the planning process. One planner noted that she often hears concerns related to the “loss of enjoyment of their property” or damage from blasting; however, she simultaneously observed that people engage in Niagara Escarpment planning processes because they “really value that it is a special place.” In this study, all participants raised concerns about ecological impacts during the interviews and in the consultation or litigation materials, both in terms of human dependence on ecological systems and the importance of relations within the more-than-human world. In uncovering what was at stake for the more-than-owner parties who participated in this research, two strong themes emerged which disrupt the dominant legal structure of people-place relations set out above: responsibility and humility.

While these were not the only values and relations articulated, I have emphasized their potential to disrupt dominant property relations and perform alternative people-place relations through land use law. It is necessary, in my view, to foreground these assertions and reject simplistic characterizations of rural land use conflicts while remaining attuned to, and

critically addressing, the exclusionary potential of ‘local’ politics of place in rural land use conflicts. Indeed, as I argue in Chapter Eight, we must do both in order to reshape rural people-place relations towards a practice of environmental justice with ecological integrity at its core.

Responsibility emerged in the context of both intergenerational and interspecies relations. This was linked to a sense of emergent and dynamic sense of belonging to places in relation to other beings, both human and more-than-human.<sup>6</sup> A more-than-owner party involved in litigation over a site on the shore of one of the Great Lakes noted his lifelong passion for the lake.<sup>7</sup> Another lamented the potential industrialization of the “longest stretch of wilderness shore line on any of the Great Lakes.” One more-than-owner party described the interconnected ecological systems and species on her childhood home, adjacent to a proposed extraction site, which include fields and a woodlot, as well as complex hydrogeological systems:

Mostly it's an upland deciduous forest, lots of maple, beech, there's some pine and definitely there are some evergreens. It is the top mountainy ledge above, so it's a recharge zone so there's no water coming from anywhere. It's the high ground and it's an outlier on the top of the escarpment so it relies entirely on snow and rain for its water supply, and yet there are all these springs that are poking out at the top of this plateau. The hydrogeology up there is really impossible to model because of the limestone karst, which is rock that has been worn down for 400 hundred million years and has all these channels and fissures, and caves. [It] is known for its caves. There are springs and there are sinkholes. It's really cool. There are big depressions in the forest floor.<sup>8</sup>

She recalled searching for frogs and snakes as a child and went on to describe the intersection of her family property with the proposed extraction site: “...[W]here all the properties meet at the back there it's paradise-like, it really is.” Reflecting on arriving home after learning of the proposal: “I had a distinct memory of coming home and when this was just starting to unfold and seeing it going, ‘that's as good as it gets.’ That's world-class beauty and nature.”<sup>9</sup>

Several more-than-owner participants talked about particular species, such as the Jefferson salamander, the bobolink, the butternut tree or Hart’s tongue fern, or specific ecological

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<sup>6</sup> Davina Cooper, “Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property” (2007) 32 *Law Soc Inq* 3 625 at 329.

<sup>7</sup> Interview, August 23, 2014.

<sup>8</sup> Interview, August 11, 2014.

<sup>9</sup> *Ibid.*

systems, such as forests, alvars, wetlands, and geological formations. One professional naturalist described how cattle grazing by local farmers maintained boblink habitat because they require short grasses, and had observed that aggregate companies would strategically end grazing arrangements on their land in advance of applications to erase potential obstacles to approval. Another more-than-owner party expressed a sense of awe about the bat habitat created by the fissures in the karst rock system and the pristine alvar environment on the proposed site. That alvar is home to an endemic silver butterfly species and several rare plant species, such as the ram's head lady slipper, which grow in very few other places in the world. Others emphasized the importance of connectivity between various parts of wetland complexes within or adjacent to the proposed extraction sites, for example one more-than-owner party noted: "The property in total is a very rich ecological myriad of wetlands and rich with species of critters, flora and fauna." Another lamented how two simultaneous quarry applications on nearby lands failed to consider the interconnected wetlands running through and between each site. As one more-than-owner party put it when describing the wetlands and forests adjacent to the proposed extraction site, as well as the species that rely on them, "[i]t is an ecosystem. You have to look at it as an ecosystem." Farmers who participated in the study emphasized the relationship between the high quality soil in the area and the hydrogeological functions of the limestone underneath which creates the conditions for crops to survive in both wet and dry weather. To understand this unique soil, one farmer noted, "you have to get out and feel it and smell it."<sup>10</sup> In his view, few proponents or decision makers ever did so.

As noted in Chapter Eight, at times social responsibility was also linked to solidarity with other communities built through alliances as urban and rural or Indigenous and settler parties came together. These alliances were often new and unexpected, as a specific place became "the common ground" for an alternative story of what was at stake in the dispute.<sup>11</sup> In my view, these have the potential to serve as key starting points for conversations and negotiations we need to have about how we want to live together as human communities embedded in the social and ecological complexity of particular material places.<sup>12</sup> As Graham notes, it is the landscapes themselves, so long deemed invisible and irrelevant to law, we

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<sup>10</sup> Interview, August 13, 2014.

<sup>11</sup> Alexa Scully, "Decolonization, reinhabitation and reconciliation: Aboriginal and place-based education" (2012) 17 *Canadian Journal of Environmental Education* 148.

<sup>12</sup> *Ibid.*

must look to in order to remind ourselves of our interdependence and our limitations as we negotiate the complex socio-materiality of place.<sup>13</sup> A southern Ontario farm may simultaneously reveal the grid of the colonial survey and Crown land grants, ongoing contestation about the jurisdiction of an Indigenous legal order over land use decisions, and the licenced extraction area for a future quarry that will one day become a lake on top of the Niagara Escarpment. When we see the materiality of legal relations as continually produced, and contested, through places we are better positioned to shape and reshape law to reflect relations of care, connection, and interdependence with the more-than-human world.

In my view, relations of guardianship or stewardship have the potential to decentre ownership within people-place relations and to uphold articulations of responsibility towards places, even those constituted by private land. While the specific content of these concepts must be developed and contested in relation to place, by emphasizing interdependence and connection with the more-than-human world these relations could foster the necessary humility to account for a much wider range of relations, both human and more-than-human. In my view, humility is required both with respect to our ability to know and change the more-than-human world, and therefore to manage it; but, also to develop a much richer conception of need that accounts for the embeddedness of a particular resource in ecological and physical systems. In this way, the needs of owners, as well as those of more than owners and more than humans, are understood as part of an interdependent network of relations, but are not given presumptive primacy by virtue of legal ownership. As with Arnold's web of interests, the point is not to erase human activity from the landscape nor prohibit use of the more-than-human world, but to make visible the material consequences of particular people-place relations, and make possible a contextual place-based assessment of sustainability. Ownership, therefore, would emphasize particular responsibility to attend to the people-place relations, rather than the unilateral power to shape them.

A shift towards having relationships *with* places rather than *to* others in relation to place, or even *to* the land itself, has the potential to centre foreground relations of responsibility and reciprocity. This requires us to contemplate what the legal relations of land use planning would look like if, in James Penner's words, we were "condemned to having to deal" with

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<sup>13</sup> Nicole Graham, *Lawscape: Property, Environment, Law* (New York: Routledge, 2011) at 206.

“things.” What if, in contrast to Penner, we understood the things as having much to say about their relations, and us as having the responsibility to take this into account?<sup>14</sup> Notably this research revealed that the process of engaging in a planning conflict changed, and often deepened participants’ instrumental relations with the places at stake. In the context of the potential or actual loss of place, people described a renewed sense of wonder and humility as they learned about the complexity and connectivity of ecological systems and came to appreciate the social and material limits of the places at stake. At the same time, they emphasized the value of experiential knowledge developed slowly over time through interaction with the land, contrasting this with the technical expertise procured by the proponent through ‘people from away’ and sophisticated modeling programs. This research revealed not only a sense of responsibility to deal with the more-than-human world, but the possibility that key sources of knowledge and experience were left unrecognized and unheard. Concerns about the neglect of experiential knowledge were linked to new or increased concerns about sustainability and the ecological integrity of specific places. Indeed, descriptions of the impact of aggregate mining as irreversible loss were in marked contrast with its legal construction as an “interim use” as if the unique and complex place-based features and values could be removed and replaced without the integrity of ecological systems and people-place relations being transformed.

### C. Finding our Place: The Institutional and Rhetorical Means of Expressing, Contesting, and Implementing People-Place Relations in Ontario’s Land Use Law

I have taken a critical view of the existing structure of land use law in Ontario in this project. Nonetheless, I maintain land use planning decisions can be strategic sites for the assertion of more-than-owner relations with place. Concepts such as the precautionary principle, stewardship, and place-based analysis of the impacts of land use have emerged to play key roles in recent quarry cases, demonstrating the potential to identify and exploit strategic openings and disrupt dominant people-place relations. However, to face the challenges of the contemporary environmental crisis in just and sustainable ways, we must seek more transformative change of our decision-making structures. An eco-relational approach to land use planning requires both a reorientation of land use decision-making away from the primacy of private ownership and a redefined conception of ownership. This would create space to conceptualize and implement new patterns of relationship with the more-than-human

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<sup>14</sup> James E Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) at 79.

world, including relations based on humility, interconnection, and reciprocity. Thinking this through is a humbling and possibly never-ending, task. In my view, it requires a range of responses from changes to the existing regulatory structure to a fundamental rethinking of ownership in Anglo-Canadian property law.

In the aggregate context, this would start with a very practical shift towards meaningful participation in decisions by making consultation a public process rather than a private duty. This would entail a publically-driven, prospective planning process that explicitly includes place-based analysis of needs and limitations and removes ownership from the site selection analysis. Instead, as called for by commentators,<sup>15</sup> aggregate planning would occur through a publically-driven, open, strategic planning process informed by both independent experts and experiential place-based knowledge. Aggregate mineral resources are deemed required in the provincial interest and should therefore be subject to a site-selection process in which alternatives are formally considered in light of the benefits and impacts and any environmental justice considerations about the distribution of harms and benefits. Without endorsing current “willing-host” and environmental assessment processes, which also exhibit problematic elements of the proponent-driven approach, aggregate extraction siting should include the formal and public consideration of alternatives like other controversial land uses.

Consultation and participation in both the broader aggregate planning process and site specific applications should be the responsibility of provincial and municipal governments rather than the proponent. While proponents should be required to respond to concerns, objections, and critiques brought forward by interested parties, meaningful consultation requires engagement with the decision makers themselves. This would necessarily also include a meaningful opportunity to say “no” to a specific proposal, regardless of the scale or timeline of investment for a proponent. In other words, the process must be a process of decision-making, rather than mere approval. By shifting the work of contestation from a private burden to a public obligation we can also better safeguard against communities with fewer resources shouldering a greater burden of resource production and protection; and, ensure no communities are filling the gaps for under-resourced state actors and enforcement mechanisms. In particular, knowledge production and procurement of expertise must be

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<sup>15</sup> Mark Winfield & Amy Taylor, *Rebalancing the Load: The Need for an Aggregate Conservation Strategy for Ontario* (Toronto: Pembina Institute, 2005); Matt Binstock & Maureen Carter-Whitney, *Aggregate Extraction in Ontario: A Strategy for the Future* (Toronto: Canadian Institute for Environmental Law and Policy, 2011).

publically driven and independent from the outset, both throughout the process and the life of a mine site, such that the narrative about the relationships and values at stake are not predetermined. In addition, funding for participation by a range of parties would guard against artificial narrowing of more-than-owner intervention by reducing barriers to gaining legal and technical expertise and making full party status accessible to all before the Board.

In many ways the nature of the task itself reinforces the role of a precautionary approach because to be humble and responsible we need to slow down and learn, both technically, but also ethically. In this sense requiring a precautionary approach to aggregate decision-making is an appropriate legal means of upholding relations of interdependence and connection. This is relevant in both the scientific sense that fosters respect for ecological integrity and the complexity and limits of the material world, but also in a broader sense that calls for the humility to learn from and with places and each other, even where there is uncertainty and discomfort. Statutorily requiring a needs-based analysis and the application of the precautionary principle to all aggregate licensing proposals would be a critical starting point. In addition, requirements for cumulative effects analysis for all extractive development should be incorporated into the aggregate minerals framework and into planning decisions more broadly.

Beyond these specific suggestions for regulatory changes, an essential component of the centering of responsibility and fostering humility in land use law is a much greater role for Indigenous legal orders. This is both a central part of meaningful commitment to the ongoing project of reconciliation in the Canadian context, but also a practical approach to shifting towards place-based relations with land. Respect for enduring legal principles and tools shaped by relations in particular places can be realized not only through direct jurisdiction over land use decisions but also through collaboration and partnership based on solidarity, intergenerational responsibility and place-based alliances. The recent recognition of the Duty to Consult and Accommodate in the Provincial Policy Statement is a starting point for this work at the day-to-day operational level of land use governance in Ontario. However, this also requires much more transformative work with respect to foundational concepts in Canadian law, including the creative rethinking of property relations and ownership in particular. It must go beyond consultation and participatory inclusivity to affirm and respect jurisdiction over a range of land use decisions, and to create space for a sophisticated engagement with substantive concepts, principles, and processes from Indigenous legal



orders – even, and perhaps especially, when they challenge the dominant settler-colonial property relations.

At the same time, an eco-relational re-structuring of people-place relations in Anglo-Canadian land use law requires us to directly confront the conceptual baggage of ownership in Anglo-Canadian law. It requires a shift to view private ownership of land as including limited contextual rights of private use and benefit. These rights would be part of a broader set of more-than-ownership relations, including duties and obligations with the land itself, as well as with others (both human and other beings) who may also have rights and obligations in relation to the land. In this construction of property relations, there is no full bundle of rights because property could never be understood as simply a private relation. It is always in relation with, and responsible to, place. There could be no presumptive rights to fundamental transformation, substantial harm, or destruction of the land automatically flowing from legal title. Rather, as discussed in Chapter Four, the onus would be on owners to demonstrate how extractive activity would have no negative impact; or, where negative impacts cannot be avoided, how they are demonstrably outweighed by benefits to the place as a whole, not simply presumptive flow-on effects of economic activity such as employment and local taxation income.

Private ownership would not presumptively include rights to exclude others from the shared and interconnected material and ecological aspects of private land, requiring ongoing negotiation and debate about the limits of land uses in particular places. Rather, more-than-ownership relations of guardianship or stewardship could serve to balance rights of access, use, and benefit by centering responsibility and reinforcing ecological integrity as a core element of people-place relations. In this sense, our autonomy would be enhanced by our ability to construct reciprocal and sustainable people-place relations rather than our power to exclude human or more-than-human others from the sphere of our control. Property ownership would constitute a form of negotiated belonging in the more-than-human world – a living together well in the land.

This is necessarily a work in progress. The articulation and identification of values and relationships that matter must be place-based – informed by the complex and negotiated socio-materiality that constitutes a particular place. Reorienting ownership will require transformative change – social and political, as well as legal change, and this will often feel

out of reach. Yet, the messy complexity of disputes over the seemingly mundane extraction of gravel from Ontario's rural places demonstrates that while the primacy of private property in environmental decision-making endures, it is also actively and creatively contested in unsuspecting places. As Carol Rose reminds us, moments of cultural and political recognition of alternative property relations can be transformative.<sup>16</sup> The decisions examined in Chapter Four expose these conflicts as strategic openings through which to engage in the difficult and challenging work of telling new stories about our place in the world. The values and relationships uncovered in Chapters Six, Seven and Eight demonstrate how rural people-place relations can challenge the dominant ownership model of property in surprising and unexpected ways. What I have argued here leaves us with much more work to be done. It will be difficult, uncomfortable and confronting, involving as much unlearning as learning, particularly for those of us who are settlers in the lands that make up Ontario. However, in my view, doing this work provides us with a vital opportunity to tell new stories about ourselves and about who we are as more-than-owners living well, together, with the places we inhabit.

## 2. Coda: Possibility Lives in Places

A relational reorientation of ownership is an essential part of my eco-relational framework for land use law. However, I also acknowledge there may be contexts in which even this reconstituted ownership will not reflect the people-place relations of a particular place. During the final years of this project I have been privileged to live in Aotearoa New Zealand where I have learned a great deal about the potential for legal creativity, and the importance of negotiation and contestation in the context of land use law and Indigenous-settler relations. I have had the honour of teaching natural resource and planning law while the Whanganui River became recognised as a legal person in law,<sup>17</sup> and as a number of creative co-management arrangements with Māori communities unfold under *Treaty of Waitangi* settlements.<sup>18</sup> During the final days of my dissertation, the Te Urewera Board released the draft *Te Kawa o Te Urewera*,<sup>19</sup> the plan created to implement the landmark Te Urewera Act

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<sup>16</sup> Carol M Rose, "Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems" (1998) 83 Minn Law Rev 129 at 141.

<sup>17</sup> Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, (NZ) 2017/7 [Te Awa Tupua].

<sup>18</sup> Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (Vancouver: UBC Press, 2016).

<sup>19</sup> The Te Urewera Board, *Te Kawa o Te Urewera (Draft)* (2017).

enacted as part of the Tūhoe Treaty of Waitangi settlement.<sup>20</sup> Under the Act, the lands cease to be a national park and Te Urewera is vested in itself as its own legal identity, owning itself in perpetuity.<sup>21</sup> The Board, which will eventually be made up of majority Tūhoe members, is empowered to speak as the voice of Te Urewera and act in the interests of the land. At the outset of Te Kawa the Chair, Tāmami Kruger, explains the role of the plan as “about the management of people for the benefit of the land – it is not about land management.” The plan goes on to explain,

Te Kawa is not intended to operate in the same way as a usual management plan which focuses on rules. Rather, Te Kawa records principles as law, and traditions and beliefs as the sense of a better future. As in life, virtues shape our responsibilities and choices guiding Te Urewera Board decisions on appropriate and responsible activities in Te Urewera.<sup>22</sup>

Te Kawa explains the application of Te Urewera’s legal personality as follows:

The Act does not establish the Te Urewera identity rather it liberates it from human speculation in order that nature and the natural world return to its primal role, revered and served by those of her children she has given life to.

The use of property rights by the western legal system has hidden from view the concept of nature; rendered her parts as natural resources now capable of rival priorities competing with other household choices. These human granted rights have displaced our devotion for Papatūānuku with ownership now serving individual advantage. These motives suppress the vision of Te Urewera as distinct life. Yet, property rights do not give life nor do they encourage the connectedness of all living things for life. In this altered relationship people struggle to unify to perceive the whole which is nature collectively. Needlessly our fracturing of nature has sponsored our own fragmentation. The use of property rights to regulate human disputes arising from human society is no longer permissible in and of Te Urewera. Te Urewera may never again be owned by people.<sup>23</sup>

Kawa is a contested term within Maoridom; however, it generally means the customary protocol or procedures to be followed on a particular marae, which is the gathering place for a Maori community – a “place for the feet to stand” in connection with the ancestors and the

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<sup>20</sup> Carwyn Jones, “Tūhoe-Crown Settlement – Tūhoe Claims Settlement Act 2014; Te Urewera Report of the Waitangi Tribunal” (2014) October Maori Law Rev 13; Jacinta Ruru, “Tūhoe-Crown settlement – Te Urewera Act 2014 at Māori Law Review” (2014) October Maori Law Rev, online: <<http://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/>>.

<sup>21</sup> Te Urewera Act 2014, 2014/51.

<sup>22</sup> Te Kawa, *supra* note 19 at 6.

<sup>23</sup> *Ibid* at 17.

land, introduced above.<sup>24</sup> In this sense, Te Kawa is the product of a specific material, social, and historical context. It reflects the unique eco-social personality of Te Urewera, the violent and troubled history of Crown-Tūhoe relations, and Tūhoe tikanga, the ethical framework, customary practices, and legal order developed over generations.<sup>25</sup> As such, I do not present it as a model or blueprint for Ontario or other jurisdictions to adopt. We must all do our own hard work of re-shaping our people-place relations with the more-than-human world in which we are embedded. Rather, it serves as an example of both the recognition of Indigenous legal jurisdiction with an existing and enduring place-based system for land use decision-making, and, of a sophisticated and creative engagement with Indigenous legal concepts offering ways to break with destructive structural legal relations. In particular, the assertion of connection and responsibility in place of the severability of resources from their context and of individual owners from the collective points to the possibility of a structure of legal relations that transcends the dualism of anthropocentrism or ecocentrism to centre reciprocal people-place relations. What possibilities might we uncover if we look to our own places with the humility and creativity required to reshape our people-place relations?

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<sup>24</sup> Hirini Moko Mead & Sidney M Mead, *Tikanga Māori: Living by Māori Values* (Auckland: Huia Publishers, 2003) at 71, 110.

<sup>25</sup> *Ibid* at 19.

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## APPENDIX A

### Interview Guide – More-than-owner parties

1. How did you first learn about the proposal for the quarry?
  - a. Please describe where you found the information.
  - b. Please describe your initial reactions.
  - c. Please describe where you went for help/guidance or to get more information.
2. Please describe why it was important to you to be involved in this process.
  - a. How would you describe what was at stake in this decision?
  - b. Please describe the land where the quarry was proposed.
3. Please describe how you become involved in opposing the quarry.
  - a. Who did you work with?
  - b. Who did you/do you see as the decision maker in the licensing process for the quarry?
4. How familiar were you with the aggregate decision making process prior to your involvement, if at all?
  - a. Please describe your impressions of the decision-making process when you first become involved.
  - b. Has your view of the process changed? In what ways?
5. Please describe what your involvement in the process looked like.
  - a. What avenues of participation/objection/assertion did you use?
    - i. Why did you choose these particular forms of involvement?
    - ii. How effective would you consider these forms of involvement?
  - b. What was the role of legal counsel?
  - c. Please describe how you approached different forums or audiences.
6. What, if any, aspects of the process did you find most challenging?
  - a. Were there particular stages or parts of the process that you felt you could or could not assert your interests as you would have liked?
7. What, if any, aspects of the process did you find most rewarding/satisfying?
  - a. Were there particular stages or parts of the process that you felt your concerns and interests were particularly well understood and responded to?
8. Please describe whether you think your involvement in the process had any impact on the decision. In what ways?
  - a. Please describe whether other factors and influences impacted the decision in your view.
9. What values or priorities do you think the decision reflected?

10. Please describe whether your involvement has had any impact on the way you think about the quarry land.

## APPENDIX B

### Expert Interview Guide

1. Please describe your understanding of the key environmental issues raised by aggregate extraction in Ontario.
  - a. Why are these decisions so contentious in your view?
  - b. What is at stake for the communities involved?
  - c. How would you characterize the groups and/or individuals who get involved in aggregate disputes?
2. Please describe your view of the opportunities for participation in the aggregate extraction licensing process.
  - a. What is the role of the EBR and the ER?
  - b. What, if any, are the challenges that third parties face in participating?
  - c. What do you consider the most successful participation strategies?
3. How do you think the recent Legislative Review and Government Response dealt with the concerns of third parties?
  - a. Do you think the Review's report and the government response dealt with the concerns you raised in the submissions?
    - i. If not, what was missed?
4. What has changed for aggregate planning with the new Policy Statement 2014?
  - a. Endangered species habitat (ESA reforms)
  - b. Agricultural land
  - c. Duty to Consult – First Nations
5. What are the key reforms that could be made to the governance structure?
  - a. Legal & Policy?
    - i. PPS
      1. Interim?
      2. Close to market?
      3. Needs assessment?
      4. Agricultural land?
    - ii. Broad provincial strategy?
  - b. Oversight?
    - i. Role of MNR and resources?
  - c. Participatory?
    - i. Standing and appeal rights?
    - ii. Funding and access to expertise
  - d. Screening-out mechanism?
6. Why are so few applications turned down?
  - a. Role of OMB?
  - b. Role of MNR?
  - c. Role of Municipalities?

7. Recently a few key applications have been turned down by government or the OMB/Joint-Board, what do you think influenced these decisions?
  - a. ERT members?
  - b. Public objection?
  - c. Participation of third parties?
  - d. Municipal involvement?
  
8. What, if anything, do you think the impact of the St. Mary's settlement and/or the NAFTA claim will have on the regulation of aggregate in Ontario?
  - a. On the use of MZOs?
  - b. On role of community groups?
  
9. Should the JART-model be the standard for applications?
  - a. What is the relationship between JARTs and community groups? i.e. invitation to POWER

## APPENDIX C

### Coding Guide

#### 1. The decision making process

- a. Relationships with decision makers;
- b. Organizing/Activism;
- c. Law and legal practices;
  - i. Jurisdiction
- d. Planning policy and practice;
  - i. Balance
- e. Experts and the role of science;
  - i. Knowledge
- f. Enforcement;
  - i. Adaptive management
  - ii. Rehabilitation

#### 2. Place

- a. Descriptions of place
- b. Characterizing participants
- c. Land ownership
- d. Land use
- e. Knowledge about place
- f. Framing
- g. Rurality;
  - i. Definition
  - ii. Law
  - iii. Planning
  - iv. Rural-urban relationship
  - v. Agriculture, economy
- h. Temporality
- i. Indigenous knowledge, jurisdiction, and land use

#### 3. What was at stake: values, rights, relationships

- a. Environmental;
  - i. Water
  - ii. Land use
- b. Economic;
  - i. Jobs
  - ii. Development
  - iii. Property values
- c. Social;
  - i. Health
  - ii. Relationships/community