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THE MYSTERIOUS CASE OF THE ATTACKS AGAINST THE HALIFAX PUBLIC GARDENS: THE ENCLOSURE OF “COMMON” PROPERTY, PUBLIC ACCESS TO NATURE, AND SUSTAINABILITY IN THE CITY

Dr. Sara Gwendolyn Ross*

I. Introduction

Located within Halifax, Nova Scotia’s downtown core, the Halifax Public Gardens are a local landmark and popular attraction both for tourists visiting the city as well as the city’s local urban denizens. Featuring seasonally changing flower beds, heritage trees, monuments, fountains, ponds, curated walking paths, ducks, a bandstand, and other landscaped attractions, this Victorian-era public garden and National Historic Site is a piece of curated nature surrounded by the busy sounds and movement of Nova Scotia’s provincial capital and largest municipality. The Public Gardens are enclosed by a gated wrought-iron fence and are open to the public daily between 8:00 AM until one half hour before sunset.¹

In July 2022, after the Halifax Public Gardens had closed for the night, a group of afterhours intruders harmed thirty-two trees in the Gardens through tree girdling, a practice designed to kill trees without fully removing them.² A few months later, fire crews rushed to extinguish a fire that broke out at night at the Gardens’ historic Horticultural Hall and café, which police treated as a case of arson.³

While the building then underwent repairs over the next seven months, shortly after completion, it was again damaged by another suspicious fire in April 2023.\(^4\) Over the years the Gardens have had some prior cases of minor vandalism, but this more recent series of anonymous attacks was unique — especially the calculated and precise nature of the tree girdling — and quickly became the subject of local news and concern.

While the reasons for the harm carried out within the Gardens were never established, this Article will consider the acts through the context of public spatial regulation as well as the enclosure of urban common and public property. The attacks within the Halifax Public Gardens permit a case study and framework within which to discuss the role and conflict surrounding public spatial regulation, enclosure, and exclusion, as well as broader sociolegal issues arising within the fabric of and interactions within the contact zones in which people experience hierarchical access constraints to urban space, including the spatiotemporal regulation of use and enjoyment of these spaces; and the expressions of resistance, protest, and claims to a right to the city that may result through urban interventions and disruptions in the urban experience, daily habitual behavior, and perceptions of individuals as they go about their lives.\(^5\) Where property can be understood as a system of relationships (including relationships of belonging and exclusion), the hierarchical experience of property, ownership, access, and belonging within a city can be amplified by the enclosure of shared public resources and purportedly common space — such as the Halifax Common within which the Public Gardens are located — and the natural assets of a city.

Regardless of the degree of enclosure or access and use restrictions of these spaces of urban property, hierarchical governance relationships and interactions within the contact zones of urban common and public space can damage the sense of place, connection, belonging, and equitable access to a city experienced by people and can also contribute to processes that disembed social relations from


\(^5\) See generally Ben PARRY, MYRIAM TAHIR & SALLY MEDBAY, CULTURAL HIJACK: RETHINKING INTERVENTION (2011) (describing different forms of critical urban intervention and do-it-yourself urbanism (also known as “tactical urbanism” or “guerilla urbanism”).
settings for local interaction. This hierarchy, alongside disembedding processes, can contribute to a sense of powerlessness — as well as accompanying reactions and resistance to powerlessness — through an (at least perceived) imbalance in accounting for divergent spatiotemporal and property interests in a city. Situating an analysis of interventions, behavior, and actions taken against and within urban common and public space through the framework of the urban commons provides a helpful context for understanding overlapping and contested claims to these spaces by people.

This Article will first describe the “thick” textured approach and methodological tools of urban legal anthropology applicable to researching and analyzing urban contact zones, which is then applied as the Article proceeds with the case study of the Halifax Public Gardens and the tree girdling and arson incidents that took place in 2022 to 2023. To situate the category of property within Halifax and within which the Halifax Public Gardens are found in order to move further into a discussion of property access and enclosure in the city, the Article then provides a description of the categories of urban property involved in and surrounding the case study of the Gardens as well as Halifax more broadly. Through the use of this case study, the Article then explores a number of questions surrounding what the development, enclosure, and application of stringent local bylaws to a slice of urban nature such as the Public Gardens can mean within the interactions and reactions of a city’s urban denizens within such a space. Next, there is an analysis of various considerations, justifications, and problems engaged when determining governance frameworks, structures, and degrees of urban common and public property access and use restrictions. Here, the Article draws on the right to the city and the notion of the urban commons alongside a discussion of urban “contact zones;” spatiotemporal (in)equality and the “time zoning” of use and access to urban common and public space; property and “belonging;” and processes of “disembedding” that can be implicated by degrees of horizontal versus vertical urban governance frameworks. Finally, the Article moves from the Halifax Public Gardens case study to briefly offer the broader context of other concurrent local conflicts and

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Interventions with regard to parks, people, and access in Halifax in terms of the proliferation of encampments in parks fueled by the housing crises taking place in Halifax as well as other cities across Canada and North America. While property in Halifax remains situated within a dominant structuring logic and colonial infrastructure of property, property relations, access to property, property enclosure, and forms of property, this Article will specifically narrow in on questions surrounding the structure and legitimacy of these existing dominant forms of urban public and common property.

II. Approaching the “Thickness” of Urban Space Through the Lens of Urban Legal Anthropology: Methods, Stories, and the Urban Commons

Before entering the case study at the heart of this Article, this section provides a brief orientation to the value and rationale for approaching research and analysis of the common, shared, and public spaces in a city with the methodological tools of legal anthropology. Researching and building an understanding of the rich life of urban places — beyond their tangible, factual space on a map — benefits from a research approach and tools designed to access the overlapping, often conflicting, underlying intangible sociocultural meanings or purposes that they carry for the many communities, groups, and individuals present within a city. Analyzing common spaces, for example, benefits from what Bonnie McCay and Svein Jentoft — drawing on the anthropologist Clifford Geertz’s term “thick description” — explain as a thicker more textured approach employing ethnographic methods and accounts. McCay and Jentoft emphasize the importance of research engaging common property resources that narrows in on the specifics of local and community contexts. Similarly, Maja Hojer Bruun underlines the underrepresentation of approaches centering the people and communities who live in or are otherwise interconnected with the

8. See generally Max Liboiron, Pollution Is Colonialism 77-79 (2021) (calling on academics to “look at the structuring logic of your own discipline and forms of knowledge creation to see what its land relations are, what might be colonial about it, and which naturalized and seemingly benign techniques grant access, moralize maximum use, universalize, separate, produce property, produce difference, maintain whiteness”).

9. See McCay & Jentoft, supra note 6, at 23-24; see also Nicholas Blomley, Enclosure, Common Right & the Property of the Poor 17 SOC. & LEGAL STUD. 311, 320 (2008) [hereinafter Enclosure].

10. See McCay & Jentoft, supra note 6, at 23-24; see also Enclosure, supra note 9, at 320.
commons within current theoretical debates regarding the urban commons.\textsuperscript{11}

Since the common, public, and shared spaces of a city are characterized by overlapping and often divergent claims to rights to and within these spaces, narrowing in on people and their local interaction and engagement with these claims and associated spaces through an anthropological lens can grow an understanding of not only the nuanced fabric of urban common and public spaces and property but also of the affected groups and communities and the broader context of urban “commoners” themselves.\textsuperscript{12} Beyond examining tangible physical space and material resources, the “thickness” of the intangible cultural, social, and community value and meanings bound up within a physical space provides an important dimension for understanding their contribution to the viability and \textit{buen vivir} of a place and the communities and individuals engaged within the space.\textsuperscript{13} A “multi-textured, open-ended and discursive” understanding can be built by applying an ethnographic approach to analyzing contact zones where law, culture, and community intersect in the spaces of a city in order to account for the overarching historic and sociopolitical context of the spaces in question.\textsuperscript{14} In this way, a thick,

\begin{itemize}
\item \textsuperscript{11} See, e.g., Maja Hojer Bruun, \textit{Communities and the Commons: Open Access and Community Ownership of the Urban Commons}, in \textit{Urban Commons: Rethinking the City} 155, 154 (Christian Borch & Martin Kornberger eds., 2015).
\item \textsuperscript{12} See id. at 154, 162.
\item \textsuperscript{13} \textit{Id.} at 154-55. On “place” versus “space,” see, for example, Giddens, supra note 6, at 18-19, which emphasizes the importance of distinguishing between these two notions as they are often used synonymously. For Giddens, “Place” is best conceptualized by means of the idea of locale, which refers to the physical settings of social activity as situated geographically.” \textit{Id.} at 18. On the other hand, Giddens describes that, with the “advent of modernity,” space is increasingly torn away from place “by fostering relations between ‘absent’ others, locationally distant from any given situation of face-to-face interaction” and may be established “as ‘independent’ of any particular place or region.” \textit{Id.} at 18-19. For discussion of \textit{buen vivir}, see, for example, Eduardo Gudynas, \textit{Buen Vivir: Today’s Tomorrow} 54 Dev. 441, 441, 444-46 (2011); Eduardo Gudynas, \textit{Buen Vivir, in Degrowth: A Vocabulary for a New Era} 201, 201-02 (Giacomo D’Alisa, Federico Demaria & Giorgos Kallis, eds., 2015); Boaventura de Sousa Santos, \textit{Epistemologies of the South: Justice Against Epistemocide} 2-16, 175, 212-13 (2014) [hereinafter \textit{Epistemologies of the South}]; Aníbal Quijano, ‘Bien Vivir’ para Redistribuir el Poder: Los Pueblos Indígenas y su Propuesta Alternativa en Tiempos de Dominación Global, 13 Revista Yachaykuna-Sareres 47, 62 n.1 (2010); Sara gwendolyn Ross, \textit{Buen Vivir and Subaltern Cosmopolitan Legality in Urban Cultural Governance and Redevelopment Frameworks: The Equitable Right to Diverse Iterations of Culture in the City and a New Urban Legal Anthropological Approach}, 5 City U. Hong Kong L. Rev. 55 (2015).
\end{itemize}
textured approach provides a way of understanding sociocultural behavior and patterns as well as current and future potential local responses to local urban design and planning policies, proposals, and alternatives. In-depth research and analysis of sociolegal processes benefit from “accounts of real events, struggles, and dramas that [take] place over space and time,” such as through extended case study methodology, that builds out the disconnect that can exist between a normative view of the reactions, responses, and behaviors of people versus the actual, everyday practices or interventions.

III. THE HALIFAX PUBLIC GARDENS

A. The Attack(s) on the Halifax Public Gardens: Tree Girdling, Intrusion, and Arson

One rainy night in July, after the Halifax Public Gardens had closed for the evening, a group of individuals (at least more than one) breached the closed, fenced-off Public Gardens. Equipped with axes, they proceeded to hack away at the bark at the base of thirty-two trees. Of these trees, most were between fifty and two hundred years old. The axe attack involved targeted bark-cutting carried out in a specific manner, known as tree girdling or ring-barking, which damages the cambium layer of the portion of the tree that produces new wood, causes a tree to starve to death, and is designed to kill a tree without cutting it down. Many months after the attack, the contrasting yellowy-white bands around the dark bark at the base of each injured tree remained obvious. Workers removed at least four trees immediately after the attack, and the others remain at a high risk of a slow death over the next few years despite the ongoing care of trained staff.

In early September 2022, exactly one week after the Friends of the Public Gardens announced a fifty-thousand-dollar reward for any

15. See Low, supra note 14, at 32.
17. See Cooke, supra note 4. Note also that under the Halifax Regional Municipality By-Law Number T-600, “[n]o person shall, without first obtaining a permit or written consent from the Director, do or cause or permit any of the following: . . . (c) mark, break, remove bark from or deface any public tree.” Halifax Regional Municipality By-Law Number T-600, By-Law Respecting Trees on Public Lands, s 3(2) (2008) (Can.).
information related to the girdling attack alongside the announcement of a new Halifax Regional Police “tip” line dedicated to any information related to the incident, the Gardens were again the target of another incident. This time, a fire — a suspected case of arson — engulfed the back side of the single building located within the Gardens.\textsuperscript{19} Officially the oldest human-constructed part of the Gardens and the only remaining built structure from the days of the original Horticultural Society’s garden, the Horticultural Hall/Canteen/Tea Room, a c.1876 white, wood building features a sizable deck that, at the time of the fire, housed a visitor center on one side and a popular local café serving ice cream, drinks, and snacks during the summer on the other side.\textsuperscript{20} The building is listed as one of the character defining elements of the Halifax Public Gardens National Historic Site within the Canadian Register of Historic Places for “its original placement, modest scale and classical vernacular manner distinguished by its symmetrical three-bay street facade, gable roof, original heavy timber construction, and wood cladding.”\textsuperscript{21} The café is called Uncommon Grounds, the second location of a popular local coffee shop. The fire began where two of the outside walls intersect, and travelled upwards in a V-shape, leading to damage to the building’s exterior walls, two of its windows, and its roof.\textsuperscript{22} Just over six months later, another suspicious fire damaged the front façade of the building and a portion of the deck.\textsuperscript{23}

These incidents are not the first time the Gardens have experienced different forms of vandalism, but it is the first time that vandalism has been orchestrated in such a precise and deliberately strategic manner. Past instances of vandalism have, for example, involved an apprehended fifteen-year-old boy and his friend who smashed in the windows of the Horticultural Hall housing Uncommon Grounds and tipped over a large planter in the Gardens in the summer of 2013.\textsuperscript{24} In 2012, immediately after the more-than-a-century-old Victoria Jubilee Fountain had undergone

\begin{itemize}
\item \textsuperscript{19} Police Suspect Arson, supra note 3.
\item \textsuperscript{20} See also The Friends of the Public Gardens, The Halifax Public Gardens 64-66 (2008).
\item \textsuperscript{22} See Humphreys, supra note 2.
\item \textsuperscript{23} See, e.g., Suspicious Fire, supra note 4; Cooke, supra note 4; Petracek, supra note 4.
a one-hundred-thousand-dollar restoration, four decorative pieces, including one of the cast iron golden lion’s heads were removed from the fountain sometime between when the Gardens closed for the night and opened the next morning. While the theft took place not even twenty-four hours after workers had removed the scaffolding from the fountain, the pieces were subsequently returned just after 9:00 PM the following evening when, after the Gardens had closed for the day, a box containing the stolen pieces of the fountain was thrown over the fence into the Gardens near one of its entrances. In terms of damage due to natural causes, the Public Gardens suffered significant damage in 2003 due to Hurricane Juan and will sometimes be closed for a short time after major weather events so that any damage sustained can be managed.

A recurring discussion in relation to cases of vandalism including the most recent attacks at the Gardens has been to emphasize the importance of building greater respect for the history of the Gardens through education as well as an increase in security measures. But, at the core of local dialogue and outcry surrounding the tree-girdling and arson incidents was the question of why. Why would anyone do such a thing? Why would anyone want to harm trees?

Before offering further context regarding the Halifax Public Gardens and before entering into an analysis of animating factors surrounding the interaction and intervention of people within the contact zones of a city, the question of why someone would harm the trees led some to recall the infamous 1997 chainsaw attack on the over-three-hundred years-old Golden Spruce in Port Clemens in Haida Gwaii (formerly known as the Queen Charlotte Islands), British Columbia, Canada. The spruce was cut by an individual — Grant Hadwin — in a manner deliberately designed such that it would fall with the next strong wind. Hadwin was a former logger then employed as a forest surveyor and used this expertise to...

26. Id.
29. See Vaillant, supra note 28; see also The Story of the Golden Spruce, supra note 28.
harm the tree.\textsuperscript{30} This unique tree carried a great deal of meaning for the local community and the Haida People more generally, and its loss had a significant impact.\textsuperscript{31} The attack also led to significant local outrage alongside bewilderment at the motivation behind the act. As Hadwin described his actions in a letter at the time: “I mean this action, to be an expression, of my rage and hatred.”\textsuperscript{32} He also described that the motivation behind his actions was fueled by a frustration with what he viewed as unacknowledged public responsibility, inaction, and response amongst the various entities involved in regulating, governing, and carrying out logging: “I didn’t enjoy butchering, this magnificent old plant, but you apparently need a message and wake-up call.” Hadwin disappeared soon after missing a court date.

B. Setting the Scene: An Introduction to the History and Characteristics of the Halifax Public Gardens

The Halifax Public Gardens are a locally cherished gem and tourist attraction that bring a seasonally evolving, dynamic, and free experience of curated nature to Halifax’s downtown core. They are a reminder of Halifax’s Victorian-era past and colonial history. As the Friends of the Public Gardens, a non-profit volunteer organization formed in 1983 to advocate for the support, safeguarding, and ongoing restoration of the Gardens, describes: “[s]ince 1836, through good times and bad, the people of Nova Scotia, and particularly those of the City of Halifax, have taken immense pride in showing off these glorious Gardens, and in preserving their horticultural legacy for those that come after them.”\textsuperscript{33}

The Gardens are characterized by paths that wind by ponds, ducks, floral displays, soaring trees, a bandstand that sometimes features concerts in the summertime, films on summer evenings, and an array of scenic nooks and crannies to explore. Designated as a National Historic Site in 1983, the Gardens are distinguished by their original and still-intact formal Victorian-era design in the Gardenesque style.\textsuperscript{35} A dominant idea behind the Gardenesque

\begin{itemize}
  \item \textsuperscript{30} See \textit{The Story of the Golden Spruce}, supra note 28.
  \item \textsuperscript{31} See Vaillant, supra note 28; see also \textit{The Story of the Golden Spruce}, supra note 28.
  \item \textsuperscript{32} See Vaillant, supra note 28.
  \item \textsuperscript{33} See id.
  \item \textsuperscript{34} \textsc{The Friends of the Public Gardens}, supra note 20, at v; see also \textsc{TFPG Constitution: Memorandum of Association, The Friends of the Public Gardens}, www.halifaxpublicgardens.ca/tfpg-constitution (last visited Mar. 2, 2024).
  \item \textsuperscript{35} \textsc{The Friends of the Public Gardens}, supra note 20, at v, 6; see also CoLab, \textsc{HTFC & UPLAND, Halifax Common Master Plan}, 158-59 (2021), https://cdn.halifax.ca/sites/default/files/documents/recreation/parks-trails-gardens/Attach-
style — originally devised and described by John Claudius Loudon, the first horticultural journalist — was that for “[a]ny creation, to be recognized as a work of art, [it] must be such as can never be mistaken for a work of nature.” Loudon developed rigorous rules guiding how to apply this principle which included, for example, the replacement of all indigenous vegetation with “foreign vegetation of a similar character,” the careful arrangement, display, and labeling of exotic plants, an emphasis on circular flower beds that endures to this day in urban gardens and public parks, and the “changeable flower garden” model where plants are to be reared in pots in a nursery or reserve area until they flower and are then “plunged in the borders of the flower garden, and, whenever they show symptoms of decay, removed, to be replaced by others of the same source.”

The Statement of Significance Description of Historic Place that accompanies the listing of the Halifax Public Gardens National Historic Site within the Canadian Register of Historic Places describes the Gardens as follows:

The Halifax Public Gardens National Historic Site of Canada is one of the rare surviving Victorian gardens in Canada. Located in the heart of downtown Halifax, Nova Scotia, it is a [favorite] place for Haligonians and visitors to stroll and relax. Despite natural changes and occasional storm damage, the original nineteenth century design remains essentially intact, including bedding patterns, exotic foliage, [favorite] Victorian flowers, subtropical species and tree specimens, serpentine paths, geometric beds, commemorative statuary, and a bandstand that continue the traditions of the era.

The Gardens are enclosed by a perimeter wrought-iron fence constructed in the early twentieth century, and the main entrance features an ornate set of twenty-one-foot-wide cast-iron gates that display the City of Halifax’s coat of arms that reads “E Mari Merces” (“Wealth from the Sea”). A sixteen-foot iron arch with the words “Public Gardens” stretches above the large gates. The Gardens open to the public at 8:00 AM and close a half hour before sunset.

37. Turner, supra note 36, at 147, 151, 153.
38. Halifax Public Gardens Statement of Significance, supra note 21. The Gardens were formally recognized and included on the list on November 18, 1983. Id.
The first portion of the Gardens was established as a private Nova Scotia Horticultural Society garden in 1837 and depended on admission fees, which was followed by the addition of a public civic garden in 1867. Both of these gardens were eventually merged in 1874 after the insolvency of the Nova Scotia Horticultural Society and purchase of their garden by the city council. The merged gardens now comprise the current site of the Halifax Public Gardens and stand as the oldest Victorian Garden in North America.

Other than due to storm damage, such as from Hurricane Juan, and significant upgrades to the pond’s banks due to the damaging effects of an overpopulation of ducks, not much about the Gardens has changed since the 1870s when the first superintendent of the Gardens — the late horticulturalist and landscape gardener Richard Power — first took over the responsibilities of caring for and developing the City’s new garden and public space initiative. He was the one that transformed the space into its currently recognizable landscape including details such as the labeling of the various plants found in the Gardens. Despite a rocky start that involved city council and public oversight alongside criticism of Power’s management of the Gardens, the Gardens soon came to be a source of local pride as well as a much-lauded example of an English landscape garden. Part of the premise of the English garden tradition was to provide a publicly accessible space for the “mind, body, and soul” and to improve the quality of life within the city, which includes space for relaxation, health, cheerfulness, and wellness to meet the needs of working-class individuals as well as a space where “members of the leisured class could pursue the study of botany, an ‘enticing’ science which led to a sense of ‘the design, the wisdom and the benevolence of the Creator’” reminiscent of the Garden of Eden.

The heyday of the Gardens during the 1880s and 1890s saw the development of intricately manicured pathways, lawns, shrubs, trees, and flowers complimented by a provincially celebrated collection
of native ferns and rare tropical plants as well as regimental band concerts, a playground for kids, a skating rink, and a dance hall.\textsuperscript{45} In addition to a space of civic pride, the Gardens also hosted celebrations for distinguished visitors to Halifax as well as for national occasions and monuments, including the bandstand, that were also built to commemorate various imperial events.\textsuperscript{46} The twentieth century, however, saw a gradual decline in the popularity of the Gardens, its events, and capacity for its upkeep, which also coincided with pressures on its operating grant as demand grew for the development and beautification of other green spaces in Halifax.\textsuperscript{47} Power retired from the superintendent position in 1917.\textsuperscript{48}

C. Situating the Gardens: The Halifax Common

While the space surrounding the Halifax Public Gardens is rich with historic, architectural, and cultural interest, many of these elements are beyond the scope of this Article. Nonetheless, this section will provide an overview of the broader spatial and historical context in order to situate the Gardens within Halifax. The Halifax Regional Municipality (Kjipuktuk) is located in Mi’kma’ki — home to Mi’kmaw communities for thousands of years. The ancestral and unceded territory of the Mi’kmaw People is covered by the “Treaties of Peace and Friendship,” which refer to a series of treaties signed between 1725 and 1779 by the Wabanaki Confederacy (Mi’kmaw, Wolastoqiyik (Maliseet), Abenaki, Penobscot, and Passamaquoddy Peoples) and the British Crown. These treaties were not land cession treaties, did not address the surrender of land resources, and instead focused on establishing the terms for an ongoing relationship and coexistence between nations.\textsuperscript{49} The Halifax Public Gardens are located centrally within Halifax, which is the capital city of Nova Scotia. The Gardens also represent sought-after land that is surrounded by the burgeoning development of a rapidly densifying city that is currently facing a housing crisis.

The Gardens are additionally located within what remains of the Halifax Common, which originally consisted of 235 acres of land

\textsuperscript{45} See \textit{The Friends of the Public Gardens}, supra note 20, at 18, 22.

\textsuperscript{46} See, \textit{e.g.}, Yorke, \textit{supra} note 39; \textit{see also} \textit{The Friends of the Public Gardens}, \textit{supra} note 20, at xvi-xviv.

\textsuperscript{47} See Yorke, \textit{supra} note 39; \textit{see also} \textit{The Friends of the Public Gardens}, \textit{supra} note 20, at xi.

\textsuperscript{48} Yorke, \textit{supra} note 39.

\textsuperscript{49} For a summary of the Peace and Friendship Treaties and the broad context within which they were developed, see, for example, \textit{Fact Sheet on Peace and Friendship Treaties in the Maritimes and Gaspé}, Gov’t of Canada, www.tcaanc-cirnac.gc.ca/eng/1100100028599/1539609517566 (last visited Mar. 2, 2024).
granted by King George III in 1763 “for the use of the inhabitants of the Town of Halifax as Common forever.” The remaining intact portions of the Common represent a small segment of the initial Common, bordered by Robie Street and Cunard Street on the north side and the corner of South Park Street and South Streets on the south side. The Common initially comprised pastureland for grazing cattle and horses, military grounds, and open public space, but sanctioned developments intended for the “public good” were permitted over time. These developments included the construction of public institutions on the southern side of the Common including hospitals, high schools, public television studios, a cemetery, Dalhousie University’s Medical Campus (Carleton Campus), Victoria Park, the Museum of Natural History, a cathedral, parking, and the Halifax Public Gardens.

As the Halifax Common Master Plan describes the transformation in the use and shape of the Halifax Common over time, it grew “from a boggy pasture to a Victorian pleasure ground, to a military parade ground, to a temporary housing site after the Halifax Explosion, and through a period of urbanization and encroachment in the last century, to the mixed-use green space of today.” The use of the northern half of the Common was initially primarily dedicated to military purposes and, as a result, this segment of the Common ultimately remained a public park that would eventually be developed into a center for outdoor urban sports activities that it is presently. The central and northern portions of the Common remain open public space and feature various recreational facilities including tennis courts, baseball diamonds, a swimming pool and splash pad, a fountain, football and soccer fields, a cricket field, a playground, and an oval skating rink as well as a skatepark.

D. Garden Governance and the Gardens Today

From the time that the Gardens came into their current form under the watch of Richard Power, use guidelines for the Gardens

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51. See History, supra note 50; see also The Friends of the Public Gardens, supra note 20, at 79-85.

52. Halifax Common Master Plan, supra note 35, at 68; see also The Friends of the Public Gardens, supra note 20, at 68.

53. Halifax Common Master Plan, supra note 35, at 106; see also History, supra note 50; Halifax Common: Canada’s Oldest Urban Park, supra note 50.

were developed primarily in order to balance the protection of the Gardens and overuse with public demand for access and use of the Gardens.55 These framework use guidelines for the Gardens address matters such as security provision and monitoring, nighttime closure hours, winter use, and monitoring, free entrance and open access for the public, which includes the prohibition against private events and restrictions on the types of activities permitted within the Gardens.56 For example, pets, bicycles, scooters, jogging, smoking, weddings, feeding the birds, and lawn activities (outside of the designated Family Lawn Area) are disallowed in the Gardens. Access to the Gardens is also regulated by the design of the Gardens. The internal paths within the gates of the Gardens wind through curated ever-evolving seasonal flower beds, such as the carpet beds designed per the Victorian garden tradition and tropical display beds dedicated to exotic plants, statues, bridges, towering heritage trees, streams, a pond, a bandstand, memorials, a café housed in the Horticultural Hall, fountains, and ducks.57 While these winding paths contribute to the overall aesthetic and experience of the Public Gardens, they also discourage the use of the Gardens as a functional shortcut — belying the perspective that the Gardens should be treated as a destination.

An array of legislation and urban policies govern and protect the Halifax Public Gardens. As the new Halifax Common Master Plan describes the land encompassed within the Common space: “[l]and in the Halifax Common is managed through a hierarchical framework that provides users different levels of access to its spaces.”58 The *Halifax Public Gardens Protection Act*, “ensure[s] that development in the protected area surrounding the Halifax Public Gardens is not incompatible with the character of the Halifax Public Gardens;” and “protect[s] the Halifax Public Gardens and surrounding area for an interim period to enable the Province to develop provincial land-use policies applicable to the protected area pursuant to the *Planning Act*.”59 While this piece of temporary provincial legislation was drafted in 1991 to address the need to protect the Gardens from adjacent development that, it was predicted, would result in strong winds or shadows that would affect the Gardens,60 subsequent legislation — the *Downtown Halifax Secondary Municipal Planning Strategy* (August 5, 2009), the *Halifax Municipal Planning Strategy* (September 3, 2016), and the new Halifax Centre

55. See id. at 158.
56. See id.
57. See generally *The Friends of the Public Gardens*, supra note 20.
59. Halifax Public Gardens Protection Act, S.N.S. 1991, c 3, s 2(a)-(b) (Can.).
60. See *Halifax Common Master Plan*, supra note 35, at 158.
Plan (November 27, 2021) — also addresses the potential effects of adjacent development to ensure the compatibility of developments with the long-term sustainability of the Gardens.

Further, By-law P-600, “Respecting Municipal Parks” (June 5, 1999) provides the following relevant guidelines for park use and access more broadly:

Protection of Park

3. (1) While in any park, no person shall do, cause or permit any of the following: (a) add to, remove, destroy, defile, or damage any fauna or flora, or any park facility, structure, equipment, or sign; (b) indulge in any riotous, boisterous, violent, or threatening conduct or use profane or abusive language; (c) play any game in an area where signs have been erected pursuant to this By-law prohibiting such use; (d) create a nuisance by spying, accosting, frightening, annoying or otherwise disturbing other persons; (e) abandon any animal or plant any tree; or (f) foul or pollute any foundation or watercourse.

Hours of Operation

13. (1) The Director may post signs respecting the hours during which a park is opened or closed. (2) No person shall enter or use a park where the entry or use is prohibited by notice. (3) No person shall be in a park at any time during the period 10:00 p.m. till 5:00 a.m. without permission.61

The treatment of the heritage value and character-defining elements of the Gardens also fall under the best practice rules for protection and conservation as laid out in Standards and Guidelines for the Conservation of Historic Places in Canada,62 as well as the Commemorative Integrity Statement for the Gardens (1999), and the Conservation Plan by McIvor Conservation (2010).63

61. Halifax Regional Municipality, N.S., Respecting Municipal Parks, By-law P-600, ss 3, 13 (1999) (Can.).
63. See Halifax Common Master Plan, supra note 35, at 159.
IV. Gradients of Exclusion Within Urban Property Categories: Private, Public, Common, and Quasi-Public Spaces

The various types of property found within a city feature different characteristics. Of particular relevance for this Article are the variances in the right to exclude that characterize different property categories. The following section provides a brief comparative overview of the different types of property and the degrees of exclusion that they feature in order to contextualize the setting within which the Halifax Public Gardens are situated.  

A. Private Property

Of the various categories of property, private property provides an owner with the most clear-cut power to exclude others from entering or otherwise using their property. This characteristic of private property is often seen as the “gold standard” of what private property entails and provides the owner with a monopoly over all rights of use, access, transfer, income, and so on. Alongside the right to exclude, private property also importantly enables the owner to set the agenda for the use of the resource in question. In contrast, as the following brief sections will describe, public property and common property have a more complex engagement of the right to exclude and levels of access and permissible use than forms of private property. While public property and common property may perhaps appear superficially similar within the spaces of a city, they feature important distinguishing elements, some of which is shaped by the degree of exclusion that they engage.

B. Common Property

Common property, at least in theory, provides each member of the ownership group with an equal right to access and use of the common property in question along with an obligation not to

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64. My use of this categorization is for the benefit of the particular case study this Article undertakes and is largely influenced by the “thick,” or deep, approach to researching, understanding, and describing the experience of urban denizens and urban space. See supra Section II for a description of this “thick” approach. There are certainly other ways of categorizing urban property. See Sarah E. Hamill, Private Rights to Public Property: The Evolution of Common Property in Canada, 58 McGill L.J. 365, 371-72 (2012) (summarizing conventional typologies of property and how they have changed over time and contextualizing link between these typologies and different legal systems).


66. See, e.g., id. passim.

The Mysterious Case of the Attacks

contravene access and use rules. In a city, the ownership group consists of the different affected parties — including the so-called public and the state — where all theoretically benefit from equal use and access to the common property. Where the ability or right to exclude is seen as a key attribute of private property that enables a clear hierarchy of permissible access and use in favor of the owner, common property instead centers the right for all members of the ownership group not to be excluded from use and access to the property such that all benefit from “some expression of equality or equitability in the allocation of rights.”

While members of the ownership group can exclude non-members, there is no right to exclude members of the ownership group. The identity of these “non-members”, however, is not always clear. As Greg Nielsen asks: “who are the uncommon against which the common resources are named and imagined?” “[w]ho exactly are ‘the people’ who own the commons and who are the ones that fall out?” The existence of non-members of an ownership group means that “someone is always left outside or marginal to the commons” — whether this is the climbing number of unhoused individuals, urban poor, or as Nielsen bluntly describes: “the exploited worker, the criminal, the psychotic, the addict, the racialized, religiously orthodox, or sexually different subject.” While at first glance it might seem that everyone is a member of the ownership group and permitted to use and walk in a street or enjoy and sit in a park, in reality “many of these actors are harassed in parks, streets, and shuffled out of hospitals into prisons and other repressive facilities” and ultimately find themselves excluded from and “either marginal to or removed from many common resources.”

68. McCay & Jentoft, supra note 6, at 22, 24; see also Hojer Bruun, supra note 11, at 160; Enclosure, supra note 9.


70. Greg M. Nielsen, Mediated Exclusions from the Urban Commons, in Urban Commons: Rethinking the City 127, 129 (Christian Borch & Martin Kornberger eds., 2015).

71. Id. at 136.

72. Id. at 129.

73. Id. at 130.
C. Public Property

Public property can be understood as a type or subset of common property that might be perceived as providing co-equal access and use rights to all. In reality, however, the state or public authorities hold the right to determine, enforce, and set the agenda for access and use to the property in question while typically managing it for the so-called public or common good. As a result of this managerial right held by the state, individual members of the public must observe the access and use parameters developed by the governing entity, which may or may not provide full access to the property in question and may result in differential access based on any number of factors.

Within the category of public property, where the state holds the right to regulate, determine and enforce exclusion, access, and use for the “public good,” there is a spectrum as to whether the state enacts this role in a manner that is analogous to an owner or to that of a trustee. Comparatively, the treatment of the public interest under the state-as-trustee analogy is closer on the spectrum to that of common property while the treatment of the public interest under the state-as-owner approach is more similar to what would be expected of private property. As Sarah Hamill highlights regarding the difference in how the public interest is represented within these two approaches: “[w]hile it is true that the government as owner analogy still leaves room for that property to be held in the public interest, the public interest appears as a burden on the property rather than a defining feature of the property as it is under the trust analogy of common property.” Nonetheless, regardless of where the governance of the Halifax Public Gardens falls along this spectrum of state-as-trustee or state-as-owner within the category of public property, considering the inclusion of the Gardens within the Halifax Common and the original land grant from King George III to the people of Halifax, the treatment of the Gardens does not fully reflect categorization as common property as described above. This brings us to another category of property that is frequently encountered in cities: quasi-public spaces.

D. Quasi-public Property

Quasi-public property is a “hybrid” space of private property where ownership rights and the right to exclude are also centered

74. Hamill, supra note 64; see also Cole, supra note 69, at 225.
75. Hamill, supra note 64, at 393-94.
76. Id. at 385.
around the inclusion and “welcoming in” of the public and public activity.\textsuperscript{77} It deviates from the dichotomy of public versus private property and is instead located along the spectrum between public and private property and corresponding degrees of inclusion and exclusion.\textsuperscript{78} Frequently cited examples include sites of “mass private property” such as shopping malls, airports, and university campuses.\textsuperscript{79} Drawing on \textit{R. v. Layton}, Kevin Gray and Susan Gray explain that:

\begin{quote}
The term “quasi-public” is widely used, particularly in North America, to denote land which, although nominally subject to private ownership, has been so opened up to public use, through general or unrestricted invitation, that it can no longer be regarded as a purely private zone. The implied liberality of the invitation to the public has caused the land to lose its purely private quality and become instead “private property having an essential public character.”\textsuperscript{80}
\end{quote}

Quasi-public spaces may be the same as the public or common spaces of a city,\textsuperscript{81} but are regulated through an entirely different private framework of enclosure, security, surveillance, and enforcement that is more similar to private property than public property.\textsuperscript{82}

Despite the grant of the Commons by King George III to “the inhabitants of the Town of Halifax as Common forever,” and despite the categorization of the Gardens within the spectrum of public property, the governance framework of the Public Gardens, as examined above, instead displays many of the characteristics of quasi-public property. For example, the Gardens exhibit highly restricted access hours limited to daylight hours, physical enclosure with a wrought-iron fence and cast-iron gates, a significant focus on permissible use regulations, high surveillance and security presence, and rigorous


\textsuperscript{78} Button, supra note 77, at 229-30; Kanellopoulou & Ntounis, supra note 16, at 12; \textit{see also} Harrison v. Carswell, [1976] 2 S.C.R. 200, 202-03 (Can.).


\textsuperscript{80} Kevin Gray & Susan Francis Gray, \textit{Civil Rights, Civil Wrongs and Quasi-Public Space}, 4 Eur. Hum. Rts. L. Rev. 46, n.65 (2006); \textit{see also} R v. Layton, [1986], 2 S.C.R. 540 at 568 (Can.); Harrison, 2 S.C.R.

\textsuperscript{81} \textit{See} Gray & Gray, supra note 80.

\textsuperscript{82} \textit{See}, e.g., Button, supra note 77.
enforcement of use and access regulations that are more similar to what might be expected within the mass private urban environment of quasi-public properties rather than within the public, and especially, the common spaces in a city.

V. Resistance to the Enclosure of Nature, Urban Common Space, Property, and Hierarchical Use and Access

Having now laid out some of the characteristics of the above categories of urban property — in theory as well as in fact — and their comparative degrees of the right to exclude, and having situated the Commons and the Public Gardens within these categories, the following section turns to some of the reactions to how these categories are — correctly or incorrectly — governed and engaged in the city. In so doing, this section will delve into the relationships between people, communities, urban property and city spaces, the notion of a right to the city and of the urban commons, vertical versus horizontal urban governance, and will explore the Public Gardens as a contact zone in the city that reveals asymmetrical sociospatial and temporal relationships. This section will also situate the damage to the Halifax Gardens in relation to other local urban conflicts involving use and access to parks and urban space.

A. A “Right to the City”, Coexistence, and “Being-Together-In-Place”\(^83\): The Halifax Public Gardens as Urban Planning Contact Zone

As Mark Purcell describes the objectives of Henri Lefebvre’s well-known work on the “right to the city” that has been enshrined in international frameworks for developing and maintaining — at least in theory — sustainable and equitable cities, such as UN-Habitat’s \textit{New Urban Agenda} and UNESCO’S \textit{Recommendation on the Historic Urban Landscape}\(^84\):

\[\text{Lefebvre} \] advocated relentlessly for a more holistic understanding of social life, one that is always attentive to the many aspects of human experience. One way he tried to do this . . . was to foreground the question of space in general and the city in particular. He hoped that an analysis of space, and

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specifically of the “lived spaces” that people actually experience, would be able to apprehend human life as a complex whole and avoid reducing our understanding of experience to small fractions of life, such as class status, gender, race, income, consumer habits, marital status, and so on. 85

The spatial analysis that Purcell refers to speaks to the thickly descriptive textured approach to urban space noted earlier in the Article and that “[i]n claiming a right to the city, inhabitants take urban space as their own, they appropriate what is properly theirs.” 86

In reality, a claim to this right might take various shapes, and while Lefebvre highlighted the appropriation by the inhabitants of local space, in terms of how such a right might be represented at a local level, we also find the following description in the New Urban Agenda:

We commit ourselves to promoting safe, inclusive, accessible, green and quality public spaces, including streets, sidewalks and cycling lanes, squares, waterfront areas, gardens and parks, that are multifunctional areas for social interaction and inclusion, human health and well-being, economic exchange and cultural expression and dialogue among a wide diversity of people and cultures, and that are designed and managed to ensure human development and build peaceful, inclusive and participatory societies, as well as to promote living together, connectivity and social inclusion. 87

This description found in the New Urban Agenda calls to mind the underlying objectives originally envisioned within the English garden tradition described previously, which was in theory infused into the design of the Halifax Public Gardens: to provide a publicly accessible space for relaxation and wellness, with a focus on meeting the needs of working-class individuals. 88

Considering the state of enclosure and current governance structure of a space like the Public Gardens it is, however, uncertain whether such a space can

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85. Mark Purcell, Possible Worlds: Henri Lefebvre and the Right to the City, 36 J. Urb. Affs. 141, 145 (2013) (emphasis added) (citation omitted). In situating Lefebvre’s work, Purcell goes on to note that, “[s]imilarly, Lefebvre sought to open up an understanding of the city as a complex whole, as a teeming multitude of different desires and drives that are not reducible to economic imperatives. Here he ran up against criticism from a more economistic view of the city, from scholars like David Harvey and Manuel Castells, who understood the city and urban space as mostly the result of the capitalist production process.” Id. (citations omitted).

86. Id. at 149.

87. New Urban Agenda, supra note 84, ¶ 37.

88. See, e.g., Yorke, supra note 39; see also The Friends of the Public Gardens, supra note 20, at 1-3; Turner, supra note 36, at 9-10; Quest-Ritson, supra note 36, at 203-05.
actually meet the needs of the so-called working-class individuals of Halifax, provide equitable access for all, and whether the Gardens can truly be seen to comprise “common” space. Perhaps, as with the exactlying structured and limited access points into the Public Gardens: “[t]he multiple pathways leading in and out of the commons are structured as are the practices concerning its usage that in turn can be challenged so that new ways of accessing and appreciating a shared resource can be created.”

Robin Wall Kimmerer asks: “[i]s land merely a source of belongings, or is it the source of our most profound sense of belonging? We can choose.” Within existing overarching urban spatiotemporal governance frameworks, however, this choice is limited when it comes to the use of and access to property, land, and urban space. As political spaces of coexistence, cities are places that can lay bare the simmering tensions and challenges of contested visions for the use of space and overlapping occupation of space, which urban land-use and environmental planning must navigate in working towards “sharing space in ways that are more just, equitable and sustainable” rather than asymmetrically sociospatially ordered, especially where “recognition, reconciliation and land justice” are sought after.

Parks, and common spaces such as the Halifax Public Gardens, are contact zones in the city where sociospatial ordering is regulated and enforced through the type of behavior and use that is deemed acceptable within the space, the hours of the day/night continuum within which acceptable behavior and use of the space is allowed, alongside all that is — and all who are — deemed to be undesirable and excluded. As Alexandra Flynn writes of the property tensions embodied by parks and sequestered slivers of nature in cities:

89. Nielsen, supra note 70, at 129.
93. Boaventura de Sousa Santos describes “[c]ontact zones” as “social fields in which different normative [and cultural] life worlds meet [negotiate] and clash.” BOAVENTURA DE SOUSA SANTOS, Toward a New Legal Common Sense 472 (2nd ed. 2002); Epistemologies of the South, supra note 13, at 218; see also Nicholas Blomley, Unsettling the City: Urban Land and the Politics of Property 76 (2004); Mariana Valverde, Taking Land Use Seriously: Toward an Ontology of Municipal Law, 9 L. Text Culture 34 (2005); MARÍANA VALVERDE, EVERYDAY LAW ON THE STREET: CITY GOVERNANCE IN AN AGE OF DIVERSITY (2012). On the valuable incorporation of “time” and temporalization
Parks are an especially important site of city power. Parks serve as a compelling backdrop to a city’s mystique, determining which spaces will be used for particular activities (cycling, walking), but not others (sleeping, urinating). They are demarcated and set aside from the development that permeates urban spaces, yet at the same time sites of social control. Parks also have important economic, social, and political significance to a broad range of people and entities, often including Indigenous communities, and are home to dwellers, visitors, and non-human species, including plants and animals.\(^\text{94}\)

While urban contact zones, such as the Halifax Public Gardens and the Halifax Commons more generally, reveal fundamentally asymmetrical sociospatial as well as sociotemporal ordering of how and who can be within them, these contact zones can also be “fragile marginal spaces where the ideals of radically democratic social relations are far from guaranteed.”\(^\text{95}\) Here, while it is possible that “voices, identities and differences will be manipulated, dominated or categorically ignored,” contact zones also represent sites of potential (re)negotiation of, and resistance towards, urban coexistence.

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\(^\text{95}\) Porter & Barry, *supra* note 91, at 6.
patterns and socio-spatial ordering where urban interventions, such as the events that took place in the Gardens, may arise.96

In their application of the right to the city lens to their work and research regarding the urban commons, Sheila Foster and Christian Iaione suggest that a right to the city could (or should) “include the right to collective political power as it relates to public deliberation and participation . . . [which] entails, at the least, that urban inhabitants should have an increased voice in local decision-making processes and exercise greater control over the forces shaping city space.”97 Following this reasoning, Foster and Iaione explain that, in this sense, “the right to the city must mean . . . the right to governance of the city by its inhabitants” and the minimum accompanying right to actively “reject unjust collective decisions taken by local authorities.”98

B. The Urban Commons

Viewing urban common spaces through the lens of the urban commons centers the shared common interests and access of people to an urban resource in question and decents the privatization and/or commodification of these kinds of resources.99 As Hojer Bruun describes, the “[u]rban commons and the right to the city are about much more than securing public access to physical spaces such as the street, parks and other cityscapes and to social spaces, knowledge, media and information infrastructures such as the internet; urban commons and the right to the city are about securing people a life in the city.”100 Despite its application within an array of different fields, the notion of the urban commons lacks an agreed upon definition or central principles and can be located within a variety of different contexts and forms.101 The notion of the “commons” more broadly

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98. Id. at 14-16.
99. See also The City as Commons, supra note 7, at 284; Foster & Swiney, supra note 7, at 4; Sara Gwendolyn Ross, View Corridors, Access, and Belonging in the Contested City: Vancouver’s Protected View Cones, the Urban Commons, Protest, and Decisionmaking for Sustainable Urban Development and the Management of a City’s Public Assets, 5 J.L. PROPS. & SOC’y 101, 123 (2020) [hereinafter View Corridors].
100. Hojer Bruun, supra note 11, at 157 (emphasis omitted).
101. See, e.g., id.; Enclosure, supra note 9, at 317-18, 322-23; see also Alexandra Flynn, Business Improvement Districts and the Urban Commons, in THE CAMBRIDGE HANDBOOK OF COMMONS RESEARCH INNOVATIONS 155, 155 (Sheila R. Foster & Chrystie F. Swiney eds., 2021) [hereinafter Business Improvement Districts].
is also not itself a singular concept.\textsuperscript{102} Narrowing in on the people and communities who live in and/or are otherwise engaged within the scope of the commons, however, can build an understanding of the commons. Hojer Bruun, for example, centers the definition of commons “in relation to the people who ‘hold’ the commons and the activities that constitute and reproduce the commons.”\textsuperscript{103} In line with an ethnographic approach to understanding common spaces in a city, as referred to in the early sections of this Article, Hojer Bruun argues that “commons are characterized by overlapping claims to rights in the commons and that focusing on the people and communities who make such claims helps us recognize this important feature of commons.”\textsuperscript{104} Applying an anthropological lens to the urban commons — as well as the communities and affected parties of the commons — places them in a co-constitutive relationship where the meaning of the “[c]ommons refer not only to material resources and physical space but also to social and cultural values and anything that contributes to the material, social and cultural sustenance of communities.”\textsuperscript{105} Zooming in on “the community” or the various affected or invested parties within a common space and the nested or layered rights in and claims to rights in the commons can therefore build a better understanding of the different social groups and “bodies of commoners” who may be asserting power within a given urban space as well as the different interests in and claims to the commons.\textsuperscript{106}

In terms of understanding the applicability of the urban commons as a framework, as Barbara Bezdek describes, “[t]he commons idea provides a metaphor for virtually any environment in which an identified resource is contested by some population of human creators and consumers over rights to contribute and appropriate resources.”\textsuperscript{107} In this sense, then, management and protection may be necessary in order to preserve the common, shared nature of the resource from its vulnerability to enclosure, overuse, and other obstacles.\textsuperscript{108} But the form that management and protection take must then be attune to the contested and overlapping claims within the urban commons. Drawing on the work of Foster and Iaione

\textsuperscript{102} See, e.g., Barbara L. Bezdek, \textit{To Have and to Hold? Community Land Trust as Commons, in The Cambridge Handbook of Commons Research Innovations} 164, 166 (Sheila R. Foster & Chrystie F. Swiney eds., 2021).

\textsuperscript{103} Hojer Bruun, \textit{supra} note 11, at 154.

\textsuperscript{104} Id.

\textsuperscript{105} Id. at 154-55.

\textsuperscript{106} Id. at 162.

\textsuperscript{107} Bezdek, \textit{supra} note 102, at 166.

\textsuperscript{108} Id.
in the context of urban governance redesign through the lens of the urban commons, collaborative management and governance is highly applicable for these common resources.\textsuperscript{109} Here, the language of the commons may be “invoked to lay claim to, and protect against the threat of ‘enclosure’ by economic elites, a host of urban resources and goods which might otherwise be more widely shared by a broader class of city inhabitants.”\textsuperscript{110}

The urban commons framework displaces dominant views of property as a bundle of rights that enables hierarchical ownership privileges.\textsuperscript{111} Instead, the urban commons as a normative claim is understood for its social value rather than simply as a description of property within a typology of property systems and attached use and access rights.\textsuperscript{112} Such an understanding of property may explain or set the stage for urban resistance and public outcry that can result from the enclosure of shared, common urban resources and creeping privatization of urban space, including privately owned public spaces, or quasi-public spaces that might remain, at least at certain times of the day or night, accessible to the public but usually governed by a different set of access and use policies and restrictions than actual common or public shared spaces in a city.\textsuperscript{113}

C. Gardens for Who? Belonging, Power, Exclusion, and Conflicting Interests Within Shared Urban Spaces and the Urban Commons

Where the Halifax Public Gardens provide a case study of the regulation, enclosure, and scope of use and access to a common shared resource in a city, it is not unusual that such regulation, enclosure, and exclusion from a public or, theoretically, common shared resource may strike a nerve and lead to public resistance and protest.\textsuperscript{114} As Greg Nielsen notes:

\begin{itemize}
  \item \textsuperscript{109} The City as Commons, supra note 7.
  \item \textsuperscript{110} Id. at 284; see also Enclosure, supra note 9, at 324.
  \item \textsuperscript{111} See Business Improvement Districts, supra note 101, at 163.
  \item \textsuperscript{112} See The City as Commons, supra note 7, at 288; see also View Corridors, supra note 99, at 123; Nicholas Blomley, Flowers in the Bathub: Boundary Crossings at the Public–Private Divide, 36 GEOForum 281 (2005) [hereinafter Flowers]; Sarah Keenan, Subversive Property: Law and the Production of Spaces of Belonging 77 (2015). For a conventional typology of property systems, see also Cole & Ostrom, supra note 69.
  \item \textsuperscript{113} See The City as Commons, supra note 7, at 288; View Corridors, supra note 99, at 124; Flowers, supra note 112; Keenan, supra note 112. See also Section IV(C) above for an in-depth discussion of quasi-public spaces.
  \item \textsuperscript{114} See View Corridors, supra note 99.
\end{itemize}
To talk about the urban commons . . . means there must be some who do not fit what seems to be normal. In other words, wherever a common place is defined in a city (a street, a park, a school, a clinic), there is a right that is put into place in the form of a law, a regulation, or a rule backed by either civil or penal sanctions.\footnote{Nielsen, supra note 70, at 129.}

Enclosing public common urban resources and excluding urban denizens from such spaces — whether this is full exclusion or the control of access and use of these spaces through, for example, use and access limitations during certain portions of the day and/or night — can damage the sense of place, connection, belonging, and equitable access to a city.\footnote{Keenan, supra note 112, at 40-42.} As a system of relationships that include relationships of belonging and exclusion,\footnote{Id. at 9, 67-78, 93; see also Davina Cooper, Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property, 32 L. & Soc. INQURY 625, 629-32 (2007); Ruth S. Meinzen-Dick & Rajendra Pradhan, Legal Pluralism and Dynamic Property Rights, INT’L FOOD POL’Y RSCH. INST. 22 (2002), https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/127262/filename/127473.pdf.} the enclosure of components of urban property such as shared public resources, purportedly common space, and the natural assets in a city can play a role in the hierarchical experience of property, ownership, access, and belonging within a city.\footnote{See View Corridors, supra note 99, at 126; Keenan, supra note 112, at 65.} This hierarchical nature of access and use can intensify senses of powerlessness through an — at least perceived — imbalance in accounting for the divergent spatiotemporal, property, and use and access interests of people in a city.\footnote{See generally View Corridors, supra note 99; see also id. at 126; Sara Gwendolyn Ross, Urban Law at Night: Night Mayors and Nighttime Urban Governance Strategies for Sustainable Urban Night Spaces and Spatiotemporal Equality, 20 J.L. & SOC. DEVANCE 21 (2020).}

Where the act of gardening has been theorized by legal geographers, such as Nicholas Blomley, as performatively communicating ordered boundaries and private ownership over property,\footnote{See, e.g., Nicholas Blomley, Un-real Estate: Proprietary Space and Public Gardening, 36 ANTIPODE 614, 621 (2004).} the “domesticated” versus “wild” space of a city in its curated, gardened form can “signal a property claim that would persuade the disorderly to go elsewhere.”\footnote{Id. at 626; see also Nicholas Blomley, Civil Rights Meets Civil Engineering: Urban Public Space and Traffic Logic, 22 CAN. J.L. & SOC’y 55, 58 (2007).} In engaging with Blomley’s work, Amelia Thorpe notes that “the performances through which property is enacted extend beyond the official actions more typically associated with property law, such as passing legislation, deciding cases,
or registering titles.”

The everyday experience that people have of the ordering and regulation of urban property also takes place through, as Thorpe notes, “everyday activities like fence painting, hedge trimming, removing graffiti, or paying council taxes.”

The following interlude explores another concurrent dimension of this everyday experience of parks, power, access, use, and exclusion in Halifax to supplement the events within the Halifax Public Gardens with accompanying context.

While this Article focuses on the Halifax Public Gardens, it is also important to recognize the coinciding controversy and resistance in Halifax occurring at the same time as the Public Garden saga played out. In August of the same summer that the incidents took place in the Halifax Public Gardens, a temporary metal fence enclosing another nearby park was erected by the City of Halifax in order to “physically secure” this park for “rehabilitation” purposes — i.e. digging it up and replanting it — after its unhoused residents were forced to vacate the park. Amidst Halifax’s current housing crisis and proliferation of numerous houseless encampments in Halifax, Meagher Park, situated at the corner of Dublin Street and Chebucto Road, also popularly known as People’s Park, had become a refuge for unhoused individuals in Halifax following encampment evictions from city — public — land by Halifax Regional Police one year earlier, which included removal from in front of the old Spring Garden Memorial Library where hundreds of Haligonians had gathered to protest the evictions that led to a well-publicized clash with police. People living in People’s Park were notified that they would have to vacate the park in the weeks prior to the eventual “securing” of the newly vacated park by the city. This removal followed the Halifax City Council’s approval of the designation of four areas in the Halifax region as locations where unhoused individuals would be permitted to erect tents.

123. Id.
126. Staff Report to Halifax Regional Council, Homelessness and Designated Locations Report (June 14, 2022), cdn.halifax.ca/sites/default/files/documents/
As the Staff Report *Homelessness and Designated Locations Approach* noted,

People have been sleeping rough in the municipality for many years, however, in recent years, with the dramatic increase in the number of people experiencing homelessness more people have moved into municipal parks, rights of way, and other outdoor urban spaces. Currently, these options are not compliant with various municipal bylaws. As such, for the person experiencing homelessness who is unable to find an indoor shelter or housing option, they are faced with the situation that there is no place in which they are allowed to live. That said, not having any constraints on where people can shelter outdoors is not a workable option as it creates conditions for significant potential conflict between using the space for sheltering and other uses that have been identified and designated over time through bylaws or land use regulations. However, with insufficient indoor sheltering and housing spaces available and no permitted outdoor sheltering spaces it is difficult to tell people they must move on when there is no place they are allowed to be . . . . While overnight sheltering outdoors should not be considered a solution to housing options, in the situation in which the municipality currently finds itself, designating spaces in parks was proposed as a short-term option to manage a situation where outdoor sheltering is already occurring. The only immediate policy structure available to allow people to sleep on municipal land is through the Municipal Parks Bylaw, P-600. The Parks By-law generally prohibits camping in parks, unless otherwise posted or by permission, which comes from the Executive Director of Parks and Recreation.127

Along the lines of what Sheila Foster has observed, which is discussed in the following section of this Article, regarding the potential justification for rules and regulations in order to avoid rivalry between spatiotemporally conflicting use patterns and groups, of the sites initially proposed at the time by the City for multi-night overnight-only use, most of the sites were ultimately judged to be inappropriate for use due to conflicting — mostly recreational in

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127 Staff Report to Halifax Regional Council, *supra* note 126, at 3-4.
As an additional barrier for locating potential parks that could be used in the manner that Peoples' Park was being utilized, suitable locations could not be:

- within 50 [meters] of a school, daycare, or adult care facility;
- on active sports fields, dugouts, or bleachers;
- within horticultural displays or gardens;
- within cemeteries;
- near environmentally or culturally sensitive areas;
- blocking a path or right of access;
- on bridges, docks, or piers;
- near playgrounds, pools, or splash pads;
- near skateboard parks or sports courts;
- near picnic shelters, gazebos;
- near recreation facilities; or
- in highly inaccessible spaces for individuals, services, and support providers.¹²⁹

These parameters significantly restrict the possible parks available for permissible overnight use.

A resulting central question in terms of the ordering and regulation of urban public space such as parks as well as the Gardens is one of degree: how much enclosure and exclusion is acceptable or desirable, by whom, for whom, for what ultimate objectives, and how should any degree of enclosure and exclusion be enforced in a just and equitable manner?²¹³⁰ Despite their “open and accessible” characteristics, spaces like the Public Gardens, and parks more broadly — not unlike quasi-public spaces — can nonetheless have a palpable exclusionary effect through their governance frameworks and the agendas set for permissible forms of spatial and temporal use and access.²¹³¹ In this sense, it is helpful to examine these governance frameworks for the “vertical” or “horizontal” linkages that are established between the state and the other affected parties within the urban spaces in question.

¹²⁸ Id.
¹²⁹ Id. at 4-5.
¹³⁰ See id.; see also David Harvey, Rebel Cities: From the Right to the City to the Urban Revolution 75 (2012); Katz, supra note 67, at 276-78 (regarding rights and role of property owner in setting agenda for use of resource in question).

This section will explore the above question of degree, the forms that governance relationships can take, and the effects these structural choices may have on the interaction and reaction of individuals and communities to and within urban public and common spaces. The processes of “disembedding” described below and the dimensions of local space, community, and social life are again approached via the lens of a “thick” study and textured description of local dilemmas, conflicts, and problems alongside the relations within which individual users find themselves. This lens is applied as a means of situating these processes and dimensions within an “analytic framework concerned with both causes and consequences in the use and management of common resources.”

While Foster and Iaione warn that there is “the risk that shared resources can be captured, co-opted, and enclosed in ways that undercut the very public nature of the resource,” they also note that “[s]ome enclosure and even exclusion of others from a resource might be necessary to maintain it and keep it accessible to some populations and communities.” As Foster notes elsewhere, the enforcement of park rules and regulations as well as general compliance via customary practice may be understood as a tool for coexistence and compatibility between divergent and/or conflicting interests in the same space: “[i]magine a park that is frequented by dog owners, families with young children, teenage skateboarders, and transient populations who sleep on public benches overnight. Intense rivalry between these users is avoided because these uses occur in identifiably distinct sections of the park or at distinctly different times.”

In terms degrees of ordering and regulation, the shape of involvement the state adopts in governing property that is either common or public — state-as-owner versus state-as-trustee — shapes the linkages or relationship the state has vis-à-vis the individual user. The closer the state’s role is to the state-as-owner model, the more vertical the linkage between the state and the individual user will be, which is in contrast to a horizontal linkage where the state’s role is closer to that of simply another affected or invested party within the ownership group and/or local community where “cooperative

132. McCay & Jentoft, supra note 6, at 24-25.
133. Co-Cities, supra note 7, at 46-47.
and symbiotic relation patterns” are more likely to exist. Where vertical linkages are prioritized over horizontal linkages, however, this can shift “[f]ormer cooperative and symbiotic relation patterns . . . into competitive and ‘positional’ relationships, bringing users into dependency in their relationship with government and at odds with each other.” As McCay and Jentoft conclude, the result of the latter is that “the conditions that are conducive to social action — solidarity, trust, equality — are eroded.” The vertical relationships as opposed to horizontal relationships that are then generated between a local community and the governing entity, alongside the resulting loss of connection and control over governance matters within the property in question is connected to what McCay and Jentoft — drawing on Giddens — identify as a process of “disembedding” or as having a “latent disembedding function” that contributes to “a ‘lifting out’ of social relations from local contexts of interaction.”

As a contributing factor, (over)regulation accompanied by hierarchical relationships of governance of access to space at certain times or portions of the twenty-four hour spectrum — such as the day versus the night — are an example of what Anthony Giddens describes as “time-space zoning” where particular “zones” of the day are categorized in manners that ultimately disproportionately affect access, social life, and the embeddedness or disembedding of some individual resource users or groups of resource users within a local context. Where disembeddedness may lead to “situations where resource users find themselves without the social bonds that connect them to each other and to their communities and where responsibilities and tools for resource management are absent,” this may result in harm or abuse to the common property at the center of a disembedding processes.

135. See, e.g., McCay & Jentoft, supra note 6, at 26.
136. Id.
137. Id.
138. Id.; Giddens, supra note 6, at 21; McCay & Jentoft, supra note 6, at 24-26.
139. Giddens, supra note 6, at 16-18. When the uniform measurement of time enabled time to be “quantified in such a way as to permit the precise designation of ‘zones’ of the day (e.g., the ‘working day’),” Giddens suggests that this resulted in the “emptying of time.” Id. at 17. However, he specifies that time and space were not disconnected “until the uniformity of time measurement by the mechanical clock was matched by uniformity in the social [organization] of time.” Id. Why this emptying of time is of any concern is that, as Giddens proposes, “[t]he ‘emptying of time’ is in large part the precondition for the ‘emptying of space’, which is the ability to, for example, regulate access to space based on time.” Id. at 18.
140. See also McCay & Jentoft, supra note 6, at 24-25 (for example, “[a] certain Tragedy of the Commons may be the product of specific configurations and disruptions of social life rather than a ‘natural’ outcome of individual rational behavior in the context of ‘imperfect’ or unspecified property rights”); see also Giddens, supra note 6.
Foster further identifies the regulatory slippage that occurs where “some access and use restrictions are unreasonable, unrealistic, or insufficiently attentive to changed usage patterns, giving rise to widespread noncompliance with these restrictions and an increase in monitoring and enforcement costs.”141 Foster suggests that when considerable changes occur in the behaviour of park users alongside a slippage in the enforcement of the rules and regulations governing a park, this can upset the existing balance between incompatible uses and can lead to rivalry and conflict between divergent groups, which can ultimately have a negative effect on the sustainability of the common resource or space.142 Of the rivalry and conflict arising from competing and/or contested demands and uses by affected parties, Foster and Iaione observe that “[s]uch users might be tempted to use or consume the common resource in ways that rival and/or degrade the value or attractiveness of the resource for other types of users and uses.”143 The shape that these reactions may take in terms of involving damaging use or consumption of the common resource is not limited to, for example, the acts towards and resulting damage to the trees in the Halifax Public Gardens and Horticultural Hall or the reaction of Grant Hadwin against the negative effects of logging in Haida Gwai. Further, within the local Halifax context, the divergence in local public outcry against the harm to the Public Gardens as well as polarized public reactions to the concurrent existence of and circumstances generating the need for houseless encampments in Halifax parks, collectively generated and illustrate some of the reality of the overlapping uses and demands of space, as described by Foster and Iaione, where the use and demands of space may be incompatible, rival, or regulated in a manner that does not effectively or fully engage with the full range of affected parties within an urban common space.144

VI. Conclusion

The identity of those who orchestrated and carried out the summer 2022 acts within the Halifax Public Gardens, as of April

141. Foster, supra note 134, at 67-68. Regulatory slippage is further defined by Foster as a “marked decline in the enforcement of . . . standards and/or the increasing tolerance of noncompliance with these standards by users of a given public space” that “occurs when the level of local government control or oversight of the resource significantly declines, for whatever reason.” Id. at 59, 67; see also Co-CITIES, supra note 7, at 44-45.

142. Foster, supra note 134, at 69-70.

143. Co-CITIES, supra note 7, at 44.

2024, remains a mystery. The analysis of actions such as these within the common and public spaces of a city, however, highlight questions surrounding the design and structure of the governance of overlapping interests, notably surrounding the regulation of use, access, and enclosure of public, common, urban resources. In order to engage in this analysis, the Article drew on methodological tools to access the textured layers of urban interaction that takes place within the contact zones of a city, such as the Halifax Public Gardens. In this case, the point of assessing the nuances of urban interactions and interventions within contact zones is to provide a perspective on sociospatial and sociotemporal governance as it is experienced “from below” in everyday life as urban citizens go about their days and nights in a city. This Article also sifted the experience of urban sociospatial and sociotemporal regulation, enclosure, and exclusion from a public or, theoretically, common shared resource like the Halifax Public Gardens through a number of analytical lenses. The notion of the right to the city was contextualized for its application within the framework of the urban commons.

A central facet of an urban commons framework is that of governance design and the high degrees of engagement with and involvement of local people and communities. As such, an assessment of the shape or degree that the governance of public or common urban property takes is relevant — whether and how this can be placed within the state-as-owner model or state-as-trustee analogy as well as on the spectrum of vertical or horizontal linkages established between the state and urban denizens. Finally, the Article considered the results that the latter can have and animating factors behind urban interventions such as that which took place in the Gardens. Where property consists of a system of relationships, disembedding processes from these property relationships as well as fissures in a sense of belonging that people have to local space and within urban contact zones can be broken by the design of urban sociospatial governance and the shape taken by use and access regulations within and to a city. These fissures and frustrating experiences of exclusion alongside rival demands of overlapping interests bound up in urban space can bubble up in a number of ways, and some of these can include harmful acts towards the very spaces and properties where exclusion takes place and to which access and use is sought.
APPENDIX A

PHOTOGRAPHS OF THE DAMAGE IN THE HALIFAX PUBLIC GARDENS
A mural by Ray Lefresne depicting the Halifax Public Gardens during the Victorian era. The locally infamous mural used to grace the side of the McDonalds located on Quinpool Road. When the McDonalds closed and was slated for demolition, a group of local Haligonians worked together to save the mural, have the mural carefully removed, and reinstalled in the basement arcade of Propeller Brewing on Gottingen Street.