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CHAPTER 1: THE NATURE OF PROPERTY

CHAPTER SUMMARY

MEANINGS OF PROPERTY

- The meaning is not constant, not a thing, a bundle of rights.
- **Common property** - created by the guarantee to each individual that he will not be excluded from the use or benefit of something.
- **Private property** – created by the guarantee that an individual can exclude others from the use or benefit of something.
- **State property** – consists of rights, which the state has not only created but has kept for itself or has taken over from private individuals or corporations.

THE RIGHT TO EXCLUDE

- One of the most essential sticks in the bundle of rights that are commonly characterised as property.
- Property is different than mere possession; property rights generally trump possessory rights.
- **Three schools of thought regarding the right to exclude:**
  - *Single-variable essentialism* – the right to exclude others is the irreducible core attribute of property, a necessary and sufficient condition.
  - *Multiple-variable essentialism* – essence of property lies not just in the right to exclude others, but in a larger set of attributes or incidents, of which the right to exclude is just one.
  - *Nominalism* – views property as a purely conventional concept with no fixed meaning, right to exclude is neither sufficient nor necessary.

THE CASE FOR PRIVATE PROPERTY – C. LEWIS

- Property laws reflect social values, needs public belief that it is morally right
- Accepting that a right of private ownership is better than control by the community allows for some to do better materially than others (inequality)
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| Promise of "economic prosperity" | • Exclusivity, transferability, and universality allow efficient exchange based on rational wealth maximizing, and are all incentives for increased production  
• Private property reduces ability of one owner to "shunt off costs onto others" and allows for the "internalization of beneficial and harmful effects" (prevents tragedy of the commons)  
• Promotes maximized production | • Losses dealt with privately and not spread out (loss of communal interest)  
• Incentive to exploit land and put the cost onto future generations  
• Costs to regulate and administer (i.e. Torrens system)  
• Tragedy of the anti-commons – land is split up between too many people, with none having effective control, gridlock resulting over resource use  
• No real proof of economic efficiency argument – Eastern bloc is not exactly "laboratory conditions" |
| Utilitarian and related | • Maximum happiness is achieved through security and wealth that private property provides (Bentham) | • Deciding what will produce happiness is subjective, perhaps immeasurable  
• Doesn’t address poverty, distribution (equality and justice unimportant) |
| Flourishing of freedom | • Promotes autonomy, freedom, negative liberty (freedom from interference from other people)  
• Right to control one’s destiny/not be reliant on others, including the state (except to enforce property rights)  
• Power is dispersed widely, reducing risk of a totalitarian regime | • Might just be freedom for the elites (the wealthy can control things)  
• Loss of liberty for the poor (i.e. homeless can only go in public areas)  
• Doesn’t justify private property in resources required by public |
| Personhood, moral development, and human nature | • An individual needs control over resources for self-expression  
• Fulfills needs of efficacy, self-identity, and sense of place  
• Can channel aggressive behaviour | • Can also foster avarice, selfishness, quests for power, envy, fear of theft |
| Natural law, labour, desert, and consent | • Individuals are entitled to things that they have labored over as a natural, pre-political right (Locke) | • Can lead to selfish exploitation of a common resource  
• Most goods are produced by more than one person  
• Doesn’t account for inheritance/transfer |
| First Occupancy | • “first in time is first in right” | • Unfair, promotes premature exploitation of resources  
• Few goods can be ‘discovered’ today  
• Doesn’t account for transfer/inheritance (limits disposal) |
| Pluralist | • Includes aspects of all (Munzer)  
• Private property with room for “sensible government regulation”  
• Principles of utility and efficiency = people’s equal moral worth |
• **Locke v. Hegel** (both assume individuals have an interest in owning things which should restrain government actions)
  
  o **Locke**: have this right based on what you have done “special right” (based on transactions and relationships)
  
  o **Hegel**: this is a basic “general” right humans have (based on ‘morality’ – protection of interference from others)

• Locke allows right to subsistence, special rights of appropriation (labour), which leads to a prosperous society, albeit an unequal one = theory has been proven to fail however

• Can a general-right-based theory succeed? (Hegel)
  
  o Perhaps, based on positive liberty and freedom

• Private property offers security and independence (don’t have to depend on others)
  
  o Equates restriction on owner’s activities with restriction on liberty

• Private property based on positive liberty promotes stability, discipline, and responsibility in the exercise of free will **STRONGEST ARGUMENT**
  
  o Encourages prudence and foresight, and enhances productivity

• Waldron critique: property is needed by everyone for the development of freedom and personality, BUT possession is enough, don’t need ownership to justify private property

• **Proudhon**: To one without property, the general right is useless (perpetuates poverty)

• ‘Opportunity’ to have property is not enough – allows for radical inequality

• Trouble:
  
  o Right to property itself frustrates principle of justice requiring property for all
  
  o Private property is inherently promotes inequality, means of production (Marx)

• Posner suggests that property laws most efficient when they include:
  
  o Promotion of “exclusivity” (law should allocate rights and protect individual entitlements)
  
  o Universality should be promoted (as many goods and traders as possible)
  
  o Facilitation of transferability of entitlements (goods can therefore gravitate to those most willing to acquire them)

• Property as having a “representational process” is VERY IMPORTANT, look at Egypt (wealth exists, but is on the margins of property) compared with the West (property IS wealth – West injects life into assets and makes them generate capital)

• Ascher proposes that inheritance should only be given when necessary (rest should go to government), exemptions: marital exemption, dependent lineal descendants, disabled lineal descendants, would also significantly raise gift tax

---

**PRIVATE VS. COMMON PROPERTY**

**TRAGEDY OF THE COMMONS**

• Garrett Hardin tried to demonstrate common ownership led to overconsumption and ruin of common property.
  
  • Common pasture exists. Herdsmen can use the land for as many animals as they want
  
  • For each animal that a herdsman adds
    
    ▪ + He gains utility of one animal
    
    ▪ - Effect of overgrazing is shared by all herdsmen
  
  • Therefore, all rational herdsmen will continue to add animals until the commons is ruined
• Hardin proposes two solutions:
  • Privatize the commons so the costs of each additional animal are internalized
  • Prevent overuse of commons by coercion/government regulation

**Conventional Typology of Property Systems - Daniel Cole**

- **State/Public Property:**
  - State or agencies have the right to determine rules of access and use, but a duty to manage publicly owned resources for the public welfare.
  - Individual members of the public do not necessarily have a right of access or use, but they have a duty to observe access and use rules.

- **Private Property:**
  - Owners have exclusive right to undertake socially acceptable uses to the exclusion of non-owners, and have duty to refrain from socially unacceptable uses.
  - Non-owners have a duty to refrain from preventing owners’ socially acceptable uses, but have the right to prevent or be compensated for socially unacceptable uses.

- **Common Property:**
  - Each member of ownership group has the right to access and use group-owned resources in accordance with access and use rules established collectively by the group, and a duty not to violate access and use rules.
  - Each member also has right to exclude non-members of the ownership group, but no right to exclude other members of the ownership group.
  - Non-members of the ownership group have a duty not to access and use the resource except in accordance with rules adopted collectively by the ownership group.

- **Non-Property/Open Access**
  - No individual has a duty to refrain from accessing and using a resource. No individual or group has the right to prevent any other individual or group from accessing and using the resource as they choose.

**Based on this division of Property, Tragedy of Commons is not a commons, but Non-property / Open Access.**

- **English and Welsh Commons (Bettison v. Langton)**
  - Commons exist, cover about 4% of England and Wales. Are last uncommitted land.
  - Farmers owning adjunct rights have traditional grazing rights to commons
    - Farmers can graze as many animals as their own land can support in winter
    - Known as “levant and couchant”

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| Promotes investment in maintaining and improving resources, development of new institutions and technologies. (Louis De Alessi) | Private property owners make decisions to maximize private, not social, benefits For example: Extermination of animal population may be most attractive policy when 
  - The discount rate sufficiently exceeds the maximum reproductive potential of the population 
  - An immediate profit can be made from harvesting the last remaining animals (Daniel Cole) |
| Establishes correct incentives and produces correct level of participation. (Neil Komesar) | Property can be divided into such small private squares that it no longer is useful – Tragedy of the Anticommons |
**NOVEL CLAIMS**

One function of property is to determine which items, tangible or otherwise, should be protected as property.

- No exhaustive list of what is property and no indisputable settled bundle of rights
- Property relies on what the law will recognize and reinforce
- Therefore, novel claims of property may be validated or rejected by the courts
- Property is not a static concept, but is in a constant state of flux

**Two factors seem to have prompted recent developments in juridical meaning of property**

- Rejection of the concept of property as thing-ownership in favour of the idea of bundle of rights
- Advances in science and technology have created new issues

**Two distinct styles by judges in determining novel claims**

- Some courts adopt an **attributes approach**
  - Inquiry hinges on whether the right being asserted looks like property - one searches for a family resemblance
  - Quest to find normative basis for recognition internal to law of property
    - Difficulty is there is no firm conception of the necessary traits of property
- Some courts develop **functional approach**
  - Looks at policy factors at play
  - How should property, as a tool of social life, be used?
  - Undermines traditional meaning of property - unless accepting nominalist view

**Graham v. Graham rejected University Degree as property:**

- No resemblance to conventional forms of property
  - No market value
  - Personal to holder and cannot be sold
  - Earned but cannot be bought
  - This is the view in Canadian Family Law

**Woodworth v. Woodworth accepted law degree was property (Michigan case)**

- Rejected attributes approach
- A functional approach was used - was given monetary value

**Numerus Clausus Principle**

- Taking of novel claims is fairly rare
- Courts have adopted this cautious view
- Recognition of a limited number and carefully regulated kinds of interests - a numerous clausus policy - has slowed down the process of judicial reform of property law
  - Limiting possible kinds of rights reduces information costs
  - Minimizes potential anti-commons problem:
    - Recognition of too many kinds of rights can fracture property holdings so significantly that efficient exchanges are prevented by holdouts, or pieces of property become too small
  - Property rights are difficult to abolish. Don't want to make one, then have to remove
**CASES OF NOTE**

**YANNER V. EATON**

**ABORIGINAL AUSTRALIAN KILLED TWO CROCODILES; WHOSE PROPERTY IS IT?**

Yanner was charged for hunting without a license per the *Fauna Act* *(Aus.)*.

**Majority:** Held that the *Fauna Act* did not preclude the right of a native titleholder from hunting or fishing for the purpose of satisfying personal, domestic, or non-commercial communal needs, which were conferred by virtue of the Australian *Native Title Act*. Property conferred on the crown is not full, beneficial, or absolute ownership.

**Dissent:** Property means to confer all rights on the crown and take the rights away from every other person. The Crown has every right, power, privilege, and benefit and excludes every other person from those rights. Native title does not give any immunity for Aboriginal people.

**HARRISON V. CARSWELL (1976) SCC**

**OWNERSHIP RIGHTS WHERE PUBLIC ACCESS NECESSARY**

**Majority:** Dickson J, cites/adopts *Peters v The Queen* (1971) SCC as analogous

- Does owner of a shopping plaza have sufficient control/possession of the common areas to invoke the remedy of trespass considering the unrestricted invitation for entry to the public?
- Gale, CJO in *Peters*: Open invitation doesn't equate relinquishment of right to exclude; Owner still has power to withdraw invitation to enter and subsequent refusal to leave can be found to be trespass as under the Manitoba *Petty Trespass Act* *(PTA).*
- Owner granted easements to many tenants thus respondent not in actual possession (Court considers the interests of the owners/tenants when considering "actual possession")
- Concern regarding right of person to picket peacefully weighed against property rights of owner considering social consequences—Dickson claims this is not for court to determine, but the legislature (contrast with dissent).
- As it stands, the relevant statute *(PTA)* forbids this activity following *Peters* and appeal allowed (ie Mrs. Carswell likely found to have trespassed)

**Dissent:** Laskin, CJ

- Concerning *Peters*: he questions 1) whether SCC “must pay mechanical deference to *stare decisis*” and 2) whether SCC has responsibility to balance intent of legislation and policy with effect.
- Distinguishes *Peters*, as it involved boycott of a product vs *Carswell* involving labour dispute with employer tenant (points out employer didn't attempt to stop picket)
- States court must consider both position of the owner and the “lawful picketer in a legal strike”
- Trespass connotes *unjustified* invasion of another’s possession: cannot apply same provisions to private dwellings as public places (ie roads or shopping centers)
- Theoretically, there is a legal injury but considering social and economic fact: no actual injury
• No real challenge to title, possession or privacy. Therefore general invitation awards privilege to the public, which is revocable only upon misbehavior or unlawful activity (neither present in this case).

**CASE QUESTIONS/NOTES**

**Legacy of this case** – MB altered the PTA so that lawful action could not be thwarted by the whims of an owner as occurred in *Carswell*. While the case was never overturned, it has been distinguished.

**INT’L NEWS SERVICE v. ASSOCIATED PRESS & VICTORIA PARK RACING AND REC’N GROUNDS LTD. v. TAYLOR**

**NOVEL CLAIM – NEWS IS A QUASI-PROPERTY, SPECTACLE IS NOT**

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<td><strong>Facts</strong></td>
<td>PI is owner of a racecourse. Def is his neighbour. Def built a platform tall enough to be able to watch the races. Def broadcasts the events over the radio. The PI claims to be losing ticket sales as people prefer to listen to the radio than to come to the race course.</td>
</tr>
<tr>
<td><strong>Issue</strong></td>
<td>1. <strong>Is a spectacle property?</strong> 2. <strong>Can Def. be charged with being a nuisance because his actions resulted in interference with the Plaintiff’s use and enjoyment of their property?</strong></td>
</tr>
<tr>
<td><strong>Decision</strong></td>
<td>1. Spectacle is not private property. For those who can see and report the spectacle from their own land, the spectacle has become common property. 2. The act of looking over and broadcasting events taking place within the fence is not “nuisance”</td>
</tr>
<tr>
<td><strong>Reasoning</strong></td>
<td>1. Law cannot provide injunction to “erect fences” that a plaintiff is not willing to build himself 2. You do not interfere with the use and enjoyment simply by looking someone’s property</td>
</tr>
<tr>
<td></td>
<td>- No case for nuisance - Def’s actions do not detract from the PI’s enjoyment of the natural rights of his land - Did not accept US standard for “quasi-property” - British courts did not accept concept that something that requires “ingenuity, knowledge, skill or labour” should become property.</td>
</tr>
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1. *Lathan, CJ:*
   1. Spectacle is not private property. For those who can see and report the spectacle from their own land, the spectacle has become common property.
   2. The act of looking over and broadcasting events taking place within the fence is not “nuisance”

2. *Pitney, J:*
   1. News is quasi-property
   2. Pitney approached issue as problem of unfair competition. Court held in favour of AP.

1. *Reasoning*:
   - News is traditionally seen as common property, not private
   - However, news becomes “**quasi-property**” when opposing parties attempt to exclude each other from using it and make profit on it
   - Functional approach of novel claims

2. No. INS’s behaviour is *“misappropriation.”* Court holds that which AP acquired fairly at substantial cost may be sold fairly at substantial profit.
Dissent

Holmes, J:
- Combination of non-copyrighted words is not property
- Property is a creation of law and just having value does not make something property
- Functional approach of novel claims
- Numerus Clausus Principle – limit new forms of property

- ok to issue injunction if INS does not acknowledge AP (= misrepresentation) but absent legislation, cannot require INS to pay.

Rich, J:
- Property is the land
- Not touch on whether spectacle counted as property

Why this case?

- Majority introduced “quasi-property” via the functional approach of novel claims
- Dissent dismissed concept of “quasi-property” via the attribute approach of novel claims

Obiter:

This is not an issue of abandonment because abandonment necessitates intent and there is no intent to do so at moment of publication.

Majority in AP used a functional approach to classify a novel claim. Majority in Victoria Park used an attributes approach (similar to Numerus Clausus Principle)

CASE QUESTIONS/NOTES

1. Both of these cases (and Moore) occur at the decisive moment as to whether or not label something as property
2. How can Victoria Park be distinguished from AP?

Majority in AP used a functional approach to classify a novel claim. Majority in Victoria Park used an attributes approach (similar to Numerus Clausus Principle)

Concept of Property, D.F. Libling

- Victoria Park should have followed reasoning from Associated Press.
- Defendant had right to build tower and to look at the race, but had no right to make profit of the spectacle that the PI created for the purpose of making profit.

_Pittsburgh Athletic Co. v. KQV_

_Doctrine of unfair competition_ is not recognized under English Common Law.
MOORE V. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA [CAL.S.C. 1990]

CONVERSION OF CELLS

- Facts:
  - Moore (P) treated for hairy cell leukemia by Golde (D). Golde removed blood, bone marrow, Moore's spleen, and other tissues w/o informing Moore of plans to use them. Golde patented a cell line using Moore's cells. Moore sued for conversion, claiming that his blood and tissues and the cell line developed from them were his tangible personal property. Trial court sustained D’s demurs to conversion claim. Court of Appeal reversed. Went to S.C.

- Issues:
  - Does a claim for conversion lie for the use of a plaintiff's bodily tissue in medical research without his knowledge or consent?
  - Under the duty to obtain informed consent, must a doctor disclose his intent in using a patient for research and economic gain?
  - Holding (Panelli)
    - No. A claim for conversion does not lie for the use of a plaintiff's bodily tissue in medical research without his knowledge or consent.
    - Yes. Under the duty to obtain informed consent, a doctor must disclose his intent in using a patient for research and economic gain

- Rules:
  - Re. Conversion: Plaintiff must establish an actual interference with his ownership or right of possession. Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.
  - Re. Breach of Fiduciary duty: Patient has right to informed content of medical procedures. A cause of action can lie under the informed consent doctrine as a breach of the fiduciary duty to disclose material facts, or the lack of informed consent in obtaining consent to conduct medical procedures. A reasonable patient would want to know that his physician’s professional judgment might be impaired by an independent economic interest.

- Conversion (reasoning):
  - Plaintiff did not expect to retain possession of his cells, to sue for their conversion he must have retained an ownership interest in them.
    - Reasons to doubt this interest
      - No precedent in support of plaintiff’s claim.
      - California statutes limit any continuing interest of a patient in excised cells by requiring that medical waste be destroyed.
      - The subject matter of the patent (i.e. the patented cell line and the technology and products derived from it) cannot be Moore’s property; factually and legally distinct from those taken from Moore’s body.

- Consequences of extending Tort of Conversion to this area

- (Patient autonomy vs. scientific progress)
  - Court recognizes the public value in this type of research: extension of conversion law will hinder access to raw material of human cells.
  - Imposition of strict liability in this case could deter drug manufacturers from beneficial pharmaceutical research
    - Decision which should be left to the legislatures not the courts
• The conversion action failing does not mean no justice; will succeed with breach of fiduciary duty

• **Fiduciary Duty (reasoning)**
  • Breached in this case because Moore was not made aware of the research and economic interests that influenced physician's judgment. Was not given the opportunity to refuse treatment

• **Dissent: (disagreed with everything)**
  • Shouldn't dismiss the use of conversion here simply because it hasn't been used in precedent cases
  • Re. argument that California law removes Moore's ownership of cells—property is a 'bundle of rights'; even if the law limits Moore's use of cells as property, he still retained certain rights to tissue
  • Re. Patent argument--doesn't hold bc Moore still retained property rights at the time the patent was made regarding his own tissue, and D's used Moore's cells before patent took effect
  • Re. argument that Moore's cells are not factually distinct from the patented line—no evidence that patented cells produce protein differently than Moore's cells

• **(Re. Extending Tort of Conversion)**
  o Re. argument about the medical implications if such lawsuits take place:
  o Increasing trends in patentability of human cells lines means that exchange of human materials is anything but ‘free’
  o Moral argument = very strong; if the science is science for profit, dissent fails to see the justification to exclude the patient from those profits
  o Re. argument that the legislature should make this decision does not relieve the courts of their duty to address this matter
  o Re. argument that non-disclosure is an adequate replacement for conversion---fails on 3 grounds: (1) unlikely to be successful usually; (2) fails to protect patient’s rights to share in proceeds of commercial exploitation of their tissues; (3) may allow exploiters to escape liability

### ADDITIONAL THINGS TO KNOW

### ACCEPTED AND REJECTED NOVEL CLAIMS

<table>
<thead>
<tr>
<th>Accepted as Property</th>
<th>Rejected As Property</th>
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</thead>
<tbody>
<tr>
<td>Fishing Licence <em>(Saulnier v. Saulnier)</em></td>
<td>“Know How” <em>(Roth v. R, within the income tax act)</em></td>
</tr>
<tr>
<td>Distinctive sound of a singer's voice <em>(Midler v. Ford)</em></td>
<td>Pre-embryos <em>(Davis v. Davis)</em></td>
</tr>
<tr>
<td>Frozen sperm <em>(JCM v. ANA)</em></td>
<td>Patents over mice <em>(Harvard)</em></td>
</tr>
<tr>
<td>Domain names <em>(Emke v. Campana)</em></td>
<td>Extracted human cells <em>(Moore)</em></td>
</tr>
<tr>
<td>Genetically modified plant cells <em>(Monsanto)</em></td>
<td>Next of kin to a human brain <em>(Dobson)</em></td>
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<tr>
<td>One’s personality or celebrity <em>(Athens)</em></td>
<td>University Degree <em>(Michigan)</em></td>
</tr>
<tr>
<td>University Degree <em>(Michigan)</em></td>
<td>University Degree <em>(Canada)</em></td>
</tr>
</tbody>
</table>
THE IRREVERSIBILITY OF COMMODIFICATION – B. ZIFF

Numerus clausus – A Latin civilian system term, translated into English as “closed numbers”, indicating the sole right of the legislature to create the civil code and determine the fixed set of entitlements associated with property.

Recently the term has been incorporated into common law systems and serves to limit the creative license of the courts to expand easements or create novel categories of easements. Creates a continuum of creative license in property rights rather than a legal box of property rights that an interest must be made to fit into for legal validation.
CHAPTER SUMMARY

INTRODUCTION - ZIFF

- No explicit protections for private property in the Charter - nonetheless the appropriate balance of public and private property rights is important in Canadian property law; considerable non-constitutional protections
- English law transported through invocation of rules governing reception of law into colonies.
- Conquered or ceded territories retain pre-existing legal regimes until altered.
- Settler colonies received English laws as appropriate.
- Notion of terrus nullius at the time - tension remains
- Rules of ownership are applied in a world where rights have already been distributed - that is the idea of property law as we currently understand it, or as it dominates in Canada, did not come into play on its own accord; rather, it was developed in a sociopolitical context where resources had already begun to be distributed and where a small elite had acquired an abundance, others had enough, and others very little.

SOURCES OF CANADIAN PROPERTY LAW

ENCOUNTERING THE SPIRIT IN THE LAND: PROPERTY AS A KIN-SHIP BASED LEGAL ORDER – OVERSTALL

- Why did Gitxsan people have difficulty establishing Aboriginal title in the Delgamuukw case?
  Gitxsan established title under a marriage between the chief and spirit of land where both would engage in reciprocal relationship. This article makes the point that disputes are best settled directly between State and Aboriginals. I think interaction needs to be bi-lateral when dealing with Aboriginals and property law.
- When Aboriginals establish property under a marriage between the chief and spirit of land in which the chief and spirit of land engage in reciprocal relationship, Aboriginals rely on reciprocity as governing rule, because Aboriginals find duty to respect people and supernatural being from chief’s marriage to the spirit of land.
- The Western concept of property excludes ownership against others in the owned property. When I own something, others are excluded from ownership. Thus, the system avoids relational aspect in property. When Western system excludes relationship in its concept of property, the Western system needs mutual understanding of Aboriginal system, because the Western system avoids opportunity of reconciliation with Aboriginals who rely on reciprocal relationship when dealing with concept of property.

PRINCIPLES OF THE LAW OF PROPERTY - CRIBBET

- What’s the origin of modern law of estate? Estate originated from Feudalism when weak sought protection from strong. The weak would hold or “tenure” land in return for “fee” or “fief” or service usually in form of military service. Four categories outlined types of tenure in return for
service: (1) military needs (2) King’s splendor needs (3) spiritual needs (4) subsistence needs. Modern law of estate preserves indirect effects of tenure under subsistence needs, also known as socage tenure.

- When observing origin of modern law of estate, the modern law of estate preserved indirect effects of socage tenure that required tilling the soil for subsistence purposes, because the modern law of estate arose from discovery of wealth of New World that modified all of feudalism’s tenure into socage. The rationale is that discovery of New Wealth undermined Feudalism’s weak/strong relationship from inflation that came after the discovery of wealth in New World during 16th century.
- In short, modern doctrine of estates preserves feudalism’s custom of duties and responsibilities for tenure of land.

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WARM RECEPTION IN A COLD CLIMATE - ZIFF

- How did Canada apply UK’s property law? Canadian courts would continuously apply English property law with some adjustments. Canadian property law originates from English property law. Canadian courts made a few adjustments as a way to give historical deference and to make laws more certain in Canada.
- When Canadian courts continuously applied English property law with some adjustments, Canadian considered geographical factors in Canada – such as navigability as factor for title to beds – and local circumstantial factor in Canada – such as requirement for tenants to surrender to landlord the premise that was destroyed by fire –, because Canadian courts sought certainty in property law. Thus, the “legal adjustment” is apparent under Canadian circumstantial factors. Note these factors when courts distinguish English property law from Canadian property law.

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AN INTRODUCTION TO PROPERTY LAW IN AUSTRALIA - CHAMBERS

- **Traditional method of classifying property rights:**
  - According to nature of things subject to property rights
  - Or according to the nature of the property rights
- **Traditional methods of classifying property rights suffer from two limitations:**
  - Obsolescence and isolation
    - Changes in law and society have rendered some of these categories obsolete and yet they persist
    - Traditional categories tend to isolate it from other areas of law
- **Land/Goods**
  - The law makes distinction between land and goods
  - Roman law classified things as either movable or immovable
    - Countries with Civil codes adopted this classification
- **Real/Personal**
  - Australia adopted British common law where property is either real or personal
  - Distinction between land and goods and between immovables and movables are based on the nature of the thing. Whereas distinction between real and personal property is based on the nature of the right
  - Real property: Holder of the right could bring a real action to recover the land from someone who was wrongly in possession of it
Private Law: Property

- Personal property: There was no real action available to recover the thing itself. They could just be compensated for the loss caused by the person who wrongly interfered with that right.
- Real/Personal similar to Land/Goods categories:
  - Real property rights are rights to land and most personal property rights are not.
  - This is misleading though because can have property rights to land that are not real property. Eg. Leasing land.

- Legal/Equitable
  - Property rights can also be divided into legal and equitable rights.
  - Based on the nature of the right
  - Legal rights: rights which could be enforced in the courts
  - Equitable rights: rights that could be enforced in the Chancery but not in common law courts prior to 1875

- Tangible/Intangible
  - All property rights are intangible in the sense that they are rights enforceable against others regardless of the nature of the thing.
  - Tangible property rights: include the right to possession of some thing
  - Intangible property rights: do not include the right to possession of some thing

- Property Creating Events
  - Organizing property rights according to the events that create them
  - 4 main categories:
    - Wrongs
    - Consent
    - Unjust enrichment
    - Others (including the creation/ destruction of property rights brought about by physical changes to things

PROPERTY, CLASS AND POVERTY

- Public spaces: Common property, areas that are characterized by the right of individual not to be excluded
- Problems when one person’s exercise of their right not to be excluded has the effect of precluding or discouraging others from using public spaces
- Provincial and municipal governments have faced pressure to regulate the behaviour of those who use public spaces beyond the criminal laws

HOMELESSNESS AND THE ISSUE OF FREEDOM - WALDRON

- Reflection on homelessness, the regulation of public spaces, and what it means to be human
- Private ownership: some individual has the power to determine who is allowed to be on the property
- Homeless are excluded from private spaces
  - So they can only go to public spaces
- Public and private are complementary
  - You do certain things in each place
  - Doesn’t work for those who live only on common land
• Their freedom is in the public land
• “Libertarians fantasize about all property being private - if so, all land would exclude the homeless; since everyone has to be somewhere in order to exists, it stands to reason the homeless would not be permitted to exist.”

CONTROLLING CHRONIC MISCONDUCT IN CITY SPACES – RC ELLICKSON

This article focuses on what the author terms “chronic nuisances” in public spaces. The two examples of chronic nuisance he provides are reoccurring panhandling, and long-term squatting on a bench.

• **Definition:**
  • Chronic street nuisance is defined as such:
    o “a person perpetrates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behaviour, to the significant cumulative annoyance of persons of ordinary sensibilities who use the same spaces.”
  • A person would be strictly liable for conduct creating a chronic nuisance, which would aid enforcement.
  • The standard is apparently democratic – everyone has the same sensibilities about what is an appropriate use of the street regardless of background... again apparently

• **Tragedy of the Commons:**
  • He describes open-access public spaces as classic sites for tragedy of the commons. Because people can’t be excluded from public spaces, panhandlers and “aimless wanderers pushing shopping carts,” are free to mill about on the street as much as they like. However because these people both make more than average use of resources and annoy other citizens, the result of the nuisance is a net decline in participation in public spaces.

• **Problematizing:**
  • He treats “chronic nuisance,” not as a social problem, but as a matter of land use regulation. Dealing with the problem is complicated by the tension in a democratic society between the desire to shield citizens from nuisance, and the belief that “every person, no matter how scorned” should be allowed to make use of public spaces.
  • Ellickson purportedly identifies four reasons why chronic nuisance behaviour is problematic
    o 1 – annoyance in public place affects hundreds or thousands of people an hour
    o 2 – over weeks the number of people affected accumulates (not sure how that reasons distinct from the first, but there you go)
    o 3 – public nuisances unchecked encourage other misbehaviour – broken window syndrome
    o 4 – the prolonged presence of nuisance causers flouts informal time limits. Informal time limits are important for well ordering of society – how long it’s acceptable to use a drinking fountain, or public parking spaces, or playground equipment.
  • Moreover, these behaviours annoy because they signal that society is unable to police the public space, and also demonstrates an erosion of work ethic. If chronic nuisance is not dealt with Ellickson prophesizes serious consequences for the future of the American city. If visitors to cities become increasingly uncomfortable, they are likely to flee to “cyber-space,” and walled-communities.”

• **Solution:**
The solution Ellickson proposes is to modify the system for zoning private land to the regulation of public spaces. He proposes a hypothetical division of public spaces into red, yellow and green zones:
- **Red** – 5% extreme caution for “ordinary pedestrians,” although not for those “inclined,” to “nuisance behaviour. There standards of normal conduct relaxed – tolerate more noise, public drunkenness, soliciting by prostitutes, and so forth.
- **Yellow** – 90% of the city – not be so strict as to exclude the “flamboyant and eccentric” but prohibit nuisances such as bench squatting and panhandling.
- **Green** – 5% of the city – area for toddlers and people reading poetry. By implication it would seem the “flamboyant and eccentric,” would be excluded from here.

**Conclusion:**
- Ellickson ends by noting the seriousness of the problem he has identified “chronic misconduct creates an ambience of unease”
- “Pedestrians can sense that even minor disorder in public spaces tends to encourage more severe crime” and with the assertion that the solution he proposes is sensible and in keeping with historical practices: “some neighbourhoods, like traditional Skid Rows, have been set aside as safe harbours for disorderly people.”

**Questions:**
- How does the tragedy of the commons and comedy of commons help explain the use of public spaces?
- The Red, Yellow, Green zone idea, does that exist in Victoria, and ought it to?

**PROTECTION FOR PROPERTY**

**CANADIAN CONSTITUTIONAL PROTECTIONS FOR PROPERTY - ZIFF**

- Property rights are not explicitly protected from state confiscation in the Canadian Constitution (Unlike the U.S)
- However, the CDN Constitution/Charter does protect rights within a reasonable limit such as:
  - Right against unreasonable search and seizure of property
  - Guarantee of Freedom of Expression
  - Freedom from discrimination (in relation to property interests)
  - Aboriginal Rights
  - The Charter also limits discrimination from public places
- The Federal Bill of Rights and various Provincial Bills of Rights *do explicitly* protect property rights.
- Furthermore, rules for expropriation are legislated for every Canadian jurisdiction; all follow of similar pattern that if land is expropriated by the state, the landowner is compensated in accordance to the legislation.
- However, CDN requirements for a *de facto* expropriation are much more strict and regulated rather than guaranteed (like in the US constitution).
EXPROPRIATION & COMPENSATION: A COMPARISON BETWEEN US & CANADA

- In the USA, private property owners are entitled to compensation for two different types of expropriation (Lucas):
  - The loss of physical land
  - Where regulation results in the loss of economic benefit or productive uses of land (Mahon, Lucas)
- This is because of the Fifth Amendment of the Constitution (Lucas)
- In Canada, under the Expropriation Act, private property owners are entitled to compensation only in the cases where the owner is deprived of actual loss of interest in land and not economic value/interest in land (Mariner)
- The loss of economic value can be used as evidence to show the loss of interest in land (Mariner)
- There is a distinction between the loss of interest in land and the loss of economic value in Canada (Mariner)

NORTH AMERICAN FREE TRADE AGREEMENT

Chapter 11: NAFTA Article 1110: Expropriation and Compensation

- No party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
  - For a public purpose;
  - On a non-discriminatory basis;
  - In accordance with due process of law and the general principles of treatment provided in Article 1105; and
  - Upon payment of compensation
- Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place...
- Compensation shall be paid without delay and be fully realizable
- "Investment" broadly defined in Article 1110 of NAFTA to protect foreign investors.
  Investments includes real and personal property rights of all kinds, including those acquired in the expectation of being used, or those actually used for business purposes
- Signatory states have surrendered a large measure of control over domestic public policy initiatives. For example a breach of Chapter 11 gives rise to a cause of action in which it is not necessary for the private interest to seek leave from the state of origin in order to pursue a claim.
- NAFTA has a quasi-constitutional status. Amendments can be accomplished only with consent of all parties. There is also no provision permitting derogations in demonstrably justified circumstances (like s.1 of the Charter) but a party can withdraw from agreement on six months notice
- Preamble to NAFTA suggests that improving trade relations should be "consistent with environmental protection and conservation" but the sections to the agreement refer only to trade enhancement
- Article 1114(2) recognizes that it is not appropriate to encourage investment by relaxation of domestic health, safety, or environmental measures but when a party improperly offers to lower environmental standards to encourage investment, the parties are only required to consult with one another
CASES OF NOTE

NANABUSH V. DEER, WOLF ET AL – J. BORROWS

SOURCES OF CANADIAN LAW

• Facts:
  o Nanabush tricks Deer into submission, kills and roasts Deer.
  o As Nanabush sits down to eat, he is disturbed by the creaking of Tree's branches, and climbs Tree to break off offending branches. Nanabush is subsequently trapped in Tree.
  o Marauding wolves happen by and despite Nanabush’s attempts to distract them, the wolves find and eat Nanabush's kill.
  o Nanabush frees himself, eats the remaining brains, is trapped in deer skull, is mistaken for a deer and chased.
  o Nanabush is freed from skull when he trips, falls, and the skull is broken open.

• Issue:
  o Do Nanabush’s actions violate the balance required by law in the relationship between humans and animals?

• Held:
  o Yes. Through disrespectful trickery Nanabush violated the nation’s oath of honour and respect creating an imbalance between humans an animals and an offense against Anishinabek resource law.

• Reasoning:
  • Majority:
    o Nanabush failed to respect the body and dignity of Deer
    o Insight into whether this constituted a breaking of the law can be gleaned from precedent in the form of additional stories of similar subject matter - similar to common law concept of precedence
    o Crow, Owl, Deer et al v. Anishinabek: deer, moose and caribou left land of Anishinabek and captured by crows - Anishinabek battle crows to free deer - deer appear unconcerned - battle continues until a truce declared and Anishinabek, crow and deer leaders meet - deer tell Anishinabek that they do not want to return because Anishinabek had wasted their meat and treated deer irresponsibly
    o Without Anishinabek, deer can live; however, without deer, Anishinabek cannot live
    o Anishinabek ask for forgiveness and how they can atone
    o Deer ask for honour and respect in life and in death - do not waste flesh, preserve the environment where deer live, and leave tobacco leaf where any deer is hunted and killed
  • Dissent: (Wendingo J.)
    o Deer is partly responsible for his own death through prideful susceptibility
    o Rest of the Forest v. Birch Tree analogised:
      o Birch tree boasts about his strength and beauty and is then whipped by pine needles for his vanity
      o Birch tree is liable for his own lateral markings on the otherwise purely white bark because of the imbalance created by birch tree’s arrogance and pride
      o Birch tree asserted his greater worth relative to others
  • Majority Reaction to the Dissent:
    o Distinguish Rest of the Forest v. Birch Tree:
private law

- The presence of the Anishinabek promise to respect the deer releases Deer from the offense of pride
- Deer was justified in trusting Nanabush because of the promise; therefore, Deer's actions are not prideful and Deer is not responsible for his own death

• Ratio:
  - Through disrespectful trickery Nanabush violated the nation's oath of honour and respect creating an imbalance between humans and animals and an offense against Anishinabek resource law. If the Anishinabek do not honour their promises, the resources will disappear. The resources can survive without the Anishinabek, but the Anishinabek cannot exist without the resources

• Questions:
  • There is a concept of individual ownership or at least of the potential short term benefit of exclusive use (selfishness) - Nanabush must have seen some sort of advantage to restricting the use of the deer meat to himself and keeping it from others.
  • There is a concept of social hierarchy and entitlement attached to the notion of having a 'right' to interfere with the rights of others (right to trick and kill deer, the right to break tree's branches in order to stop tree from interrupting the meal, right to keep meat from wolves)
  • There is a concept of appropriation (wolves taking meat)
  • There is a concept of respect for autonomy (offense for infringement of deer's trust)
  • Borrows uses other oral stories that have a similar theme of discordance between humans and animals, but he makes 'findings' on these cases at the same time he 'finds' for the Nanabush story. In other words, he does not draw on any 'ratios' found in the other stories, but draws simply on fact patterns to which he applies ratios currenetly. The fact patterns demonstrate potentially similar conclusions, but no 'previous decisions' have been rendered by 'courts'

VICTORIA V. ADAMS – ROSS J. 2008

PROPERTY, CLASS AND POVERTY

• Take away points:
  • The nature of government ownership of public land ≠ the same as ownership of private land, but holds land for benefit to the public
  • The nature of public use of public land - use is permitted as long as it does not exclude anyone else of use
  • Applying Charter rights to the use and regulation of land - government’s ability to prohibit certain uses of public land is limited by the Charter.

• Legal Principles:
  • The government ≠ determine the use of property like a private owner
    ▪ Public properties are held for public benefit.
  • Nature of use of public property = use is permitted as long as it does not deprive (exclude) someone else from use of the same "resource"
  • The government prohibition of activities on public property is limited by the Charter.

• Facts:
  • Bylaws prohibiting the erection of temporary shelter on public property in City of Vic
  • More than 1000 people homeless, only 104-326 beds available
Private Law: Property

- Prohibition in effect at all times, everywhere
- **Held:**
  - *Adams ≠ claiming property rights* - issue is about erecting a temporary shelter, it’s about USE rights
  - *Public benefit* = public includes the homeless
  - *Erecting a temporary tent ≠ change the nature of the use of public space for others*
  - *Prohibition interferes with s. 7 of the Charter,*
    - Homeless have no choice but to sleep outside because there are not enough shelter beds in Vic -- prohibiting homeless from erecting even a rudimentary form of shelter for protection poses the potential for severe health risks, therefore interferes with the life, liberty, and security of the person
  - *And is not justified pursuant to s. 1 of the Charter*
    - Prohibition = arbitrary and overbroad, therefore is not consistent with principles of fundamental justice
    - Prohibition = impact is disproportionate to advantages, therefore not justified as a reasonable limit to charter rights
- **Comments on the case:**
  - BCCA upheld Ross J.’s decision, with one variation: if the Court can be satisfied that the by-laws no longer violate s. 7 (aka if there are enough shelter beds) then the declaration would be lifted
  - Bylaw changed to provide an exception for overnight shelters

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**R V. BANKS**

**PROPERTY, CLASS AND POVERTY**

- **Take away points:**
  - Regulation of public space MAY BE PERMITTED to infringe Charter rights IF the infringement is justifiable (s. 1, Charter) for, among other reasons, public safety.
  - Regulation of public space may be enacted if it is applied equally (s. 15, Charter)
- **Legal Principles:**
  - Legislation regulating the USE of public property can be enacted even if it infringes Charter rights as long as the infringement is justifiable (s. 1, Charter)
  - Legislation regulating the USE of public property can be enacted if it applies equally and is not discriminatory (s. 15, Charter)
- **Facts:**
  - Constitutional challenge to the Safe Streets Act (Ontario)
  - Act prohibited soliciting “in an aggressive manner” and from “while on a roadway, solicit a person who is in or on a stopped, standing or parked vehicle”
  - Case involved charges against someone for “squeegeeing” aka soliciting funds from occupants of motor vehicles stopped at a red light
- **Held:**
  - The Act violated right to free expression (s. 2(b), Charter) but the regulation of pedestrian/driver interaction on roadways was important enough to restrict the right
  - The Act placed restrictions on individual liberties (s. 7, Charter) but the individuals were free to solicit anywhere else not specified by the Act
  - The Act prohibits *everyone* not just “beggars”, from soliciting on the roadway (s. 15, Charter)
PENNSYLVANIA COAL V. MAHON

PROTECTION FOR PROPERTY

- **Facts:**
  - PCC sold land to Mahon but retained subsurface rights in order to mine coal. In 1921 Pennsylvania passed the Kohler Act, which prohibited the mining of coal that caused the subsidence of any structure used as a human habitation. Pennsylvania Coal provided notice to Mahon that it planned to mine for coal under the Mahon's habitation and Mahon brought suit to prevent Pennsylvania Coal from mining under his land pursuant to the Kohler Act.

- **Issue/Judgment:**
  - Did the Kohler Act constitute an exercise police power (reasonable limit) requiring no compensation, or eminent domain requiring compensation? The court found that it was eminent domain and compensation was required.

- **Ratio:**
  - In the United States (where the right to property is constitutionally enshrined): “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”; removing someone’s economic interests constitutes “going too far”.

LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992)

PROTECTION FOR PROPERTY

- **Facts:**
  - Lucas purchased two residential coast lots in S.C. for development purposes. Beachfront Management Act, 1988 where local government can designate as unavailable for development. Barred Lucas from developing land

- **Issue:**
  - Should Lucas be compensated for the loss of economic rights over his land?

- **Held:**
  - Yes – Equivalent to physically taking the land.

- **Reasoning:**
  - Gov. power to redefine the range of interests included in ownership of property is limited by constitution (Mahon)
  - Maxim, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as taking” (Mahon)
  - Fifth Amendment
  - Two categories where property has to be compensated:
    - Physical invasion of individual’s land
    - Where regulation denies all economically beneficial and productive use of land
  - Why second category:
    - Owner has more risk that private property is being pressed into some form of public service under guise of mitigating public harm
    - ONLY EXCEPTION to not compensate: if it can be shown that the uses were not a part of the title to the property anyways--not a part of the "bundle of rights"
Ratio:
- In the US, under the Fifth Amendment, where regulation over private property deprives the owner of the economic benefits uses of his land, then he/she has a right to be compensated

Comments:
- Different from Canada because of constitution (see Mariner). The judgement builds off of Mahon

**MARINER REAL ESTATE LTD. V. NOVA SCOTIA (AG) (CA)**

**PROTECTION FOR PROPERTY**

- **Facts:**
  - NS enacted statute to protect environmental interest of beaches--the Beaches Act, property owner wanted to build, not allowed, P argued de facto expropriated property.

- **Issue:**
  - Is the property owner entitled to compensation since the Act is "de facto" taking his land (through depriving economic benefits)? Is loss of economic value loss of land under the Expropriation Act?

- **Held:**
  - No.

- **Reasoning:**
  - The scope of de facto expropriation is very limited in Canadian law
  - Constrained by Two guiding principles for de facto expropriation:
    - Valid legislation significantly restrict owner's enjoyment of private land;
    - Court authorized to order compensation where authorized by legislation
  - In Canada, unlike US and Australia, there is no broad mandate to review these issues under Constitution
  - "It is settled in law ... that the regulation of land use which has the effect of decreasing the value of the land is not an expropriation" (154)
  - In Canada, a de facto expropriation must be a confiscation of ALL reasonable private uses of the lands in question
  - The question to ask: does the regulation sufficiently remove virtually all the rights associated with the property holder's interest?
  - Have to consider the actual application of the regulatory scheme as opposed simply to its potential for interference with the owner's activities
  - The Expropriation Act draws the line of compensation to where land is taken
  - The loss of value in land is not the same as a loss in the interest of land
    - Loss of value may be evidence in the loss of interest in land
  - The requirement to obtain a permit that constrains the enjoyment of the land, but show recognition that economic or development is still considered in the act

- **Ratio:**
  - The deprivation for economic value is not a taking of land that necessarily entitles the owner to compensation in Canada.

- **Comments:**
  - States we cannot use US cases to persuade – in US, very different
  - Compare with Lucas
CANADIAN PACIFIC RAILROAD V. CITY OF VANCOUVER

PROTECTION FOR PROPERTY

- **Facts:**
  - 1886: the provincial Crown granted CPR land for the construction of a railway line now known as the Arbutus Corridor. Railway line built. As time went on traffic declined.
  - 1999: CPR began the process of discontinuing rail operations on the corridor
  - CPR put forward proposals to develop the corridor for residential and commercial purposes. Also said that if the City wished to acquired the land, it was willing to sell it a price determined by agreement or expropriation
  - City said it would not buy the land and adopted the “Arbutus Corridor Official Development Plan By-law” that designated the corridor as a public thoroughfare for transportation and greenways. By-law limited use to rail, transit, and cyclist/pedestrian paths. Excluded motor vehicles and SkyTrain
  - CPR argues that at common law, a government act that deprives a landowner of all reasonable use of its land constitutes a de facto taking and imposes an obligation on the government to compensate
  - CPR also argues that BC Expropriation Act requires the city to compensate while the Vancouver charter states that the city is not obliged to compensate for effects to land caused by an Official Development Plan and that s.2 of Expropriation act says that if there is an inconsistency between this act and another act respecting expropriation, the provisions of the Expropriation Act apply.

- **Issue:**
  - Has there been a de facto taking requiring compensation?

- **Held:**
  - No, neither requirements of two-part de facto taking test met. Also, not expropriation or taking according to Vancouver charter.

- **Reasoning:**
  - For a *de facto* taking requiring compensation at common law (2 elements):
    - An acquisition of a beneficial interest in the property or flowing from it
    - Removal of all reasonable uses of property
    - By-law does not prevent operation of railway but CPR has no desire to operate railway there
    - To show that the city has acquired a beneficial interest in to property it is not necessary to establish a forced transfer, but acquisition of beneficial interest related to property suffices.
    - In this case city gained nothing more than some assurance than the land will be used in accordance with its vision, without precluding the historical or current use. This sort of benefit is not a “taking”
    - By-law does not remove all reasonable uses of the property. Must be looked at not only in relation to the land’s best use but also the range of reasonable uses. By-law does not stop CPR from using the land as a railway (the only use the land has known) or from leasing the land for use in conformity with by-law
    - Expropriation Act does not take precedence because no inconsistency. Land has not been “taken” or “expropriated” because Vancouver charter says that property affected by a by-law “shall be deemed as against the city not to have been taken”
Since charter says there is no taking or expropriation, then there is no inconsistency.

**Ratio:**
- For a taking, the government doing the taking has to receive an actual beneficial interest in the property not just assurance that it will be used in a certain way.
- You have to remove all reasonable uses, it's not enough to just remove the best use.
- Can also override common law takings requirements by statute.

**Comments:**
- Receiving compensation from a de facto taking or expropriation seems much more difficult in Canada than elsewhere.

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**METALCLAD V. UNITED MEXICAN STATES**

**PROTECTION FOR PROPERTY**

**Facts:**
- American firm attempting to establish a hazardous waste treatment facility
- Federal and state authorization for the building of the facility had been obtained
- Local authorities denied local construction permit in part because of the perception of adverse environmental effects
- Metalclad began construction based on an understanding fostered by federal agencies in Mexico that there was no valid reason for the local permit to be refused
- Local authority issued a stop work order after a few months and one year later formally denied the required building permit
- NAFTA claim launched
- Several months later the state government issued an ecological degree making the relevant area an environmental preserve. This action added to NAFTA claim

**Issue:**
- Do the actions of local Mexican authorities and state government amounted to expropriation?

**Held:**
- Yes. Based on the representation of Mexican federal government and the local authorities subsequently denying work permit, this amounts to expropriation. Also the environmental decree of the state government considered expropriation.

**Reasoning:**
- Mexico’s obligation to provide investors with fair and equitable treatment under article 1105 had been breached by the actions at the local level.
- Article 1110 also violated. Defined article 1110 of NAFTA to include “covert or incidental interference with the use of property which has the effect of depriving the owner of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state”.
- With respect to actions of local authorities: held that the representations of the Mexican governments, which Metalclad relied on, the absence of a timely and orderly process, as well as the fact that there was no valid basis for a denial of the construction permit, amounted to an indirect expropriation
- Environmental Decree was not essential to finding of expropriation but since it had the effect of barring forever the use of the property as intended it was an act tantamount to expropriation (at first obiter dictum but then becomes essential on judicial review)

**Ratio:**
Covert or incidental interference with the use of property which has the effect of depriving the owner of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state can amount to expropriation under NAFTA.

**Comments:**
- **Judicial Review**
  - Held that tribunal acted beyond scope of authority by holding transparency was an element of due process under article 1105 of NAFTA. Ruling of the municipal government expropriation set aside since lack of transparency was so integral to the panel’s ruling.
  - Ruling that ecological degree was tantamount to expropriation upheld.

**ADDITIONAL THINGS TO KNOW**
- As a matter of general international law, a non-discriminatory regulation for public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation. (Methanex v. United States of America (2005))
- Regulatory action usually does not amount to expropriation (although it is not ruled out completely). Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference (SD Myer Inc. v. Canada (2011))
CHAPTER 3: BOUNDARIES

AIRSPACE AND SUBSURFACE RIGHTS

This section deals with the creation of boundaries to develop the “thine/mine” divide and allocates the power to exclude. Boundaries can be on the lateral plane (surface) or on the vertical plane (airspace and subsurface). Traditionally, the rule for determining conflicts of ownership on the vertical plane has been “Cujus est solum...” (the owner of a piece of land owns everything above and below to an indefinite extent). However, this has been modified by the consideration of balancing individual and societal rights and economic rationale models.

DIGGING BELOW THE SURFACE - ZIFF

- Epstein identified 6 plausible rules that might have been applied to the facts of Edwards v Sims. A court might confer ownership on:
  - The owner of the surface (court ruling)
    - Most efficient because it would prevent holdouts.
  - The discoverer of the cave
    - If the entrance is non-natural, the first occupancy norm results in wasted effort by losing party and may damage the cave
  - The owner of the entrance (Logan/ Epstein)
    - Can still have multiple owners (if there are several entrances)
  - Co-ownership of the entire cave based on surface title proportions
    - Undermine the value created by labour of first discoverer. Possibility of holdouts to use of the entire cave.
  - The party most willing to buy out the claim of the other party
    - Split vertical title: the actions of the cave owner may affect the surface owner’s rights. In cases of SVT, the owners have had mutual rights and obligations to protect their use and enjoyment.
    - Coase Theorem – assuming zero transaction costs the two parties will negotiate the best solution to derive the optimal value from the cave. (Does not matter to which party the court initially grants title.)
  - The state (Sprankling)
    - “Cujus est solum” is not absolute. Suggests a "bright horizontal line rule" - surface title should extend down to 1000ft, below which the land is public property. Accommodates CCS, prevents holdouts and problems with first occupation.
    - State can still bring trespass because the space is not common property (unlike airspace)
ACTS OF NOTES

STRATA TITLE ACT

• Allows the creation of an airspace parcel above or below the ground. The owner can sever the fee simple interest in that parcel from the title of the parcel above and below it. This parcel has the same legal rights as an interest in land that included some portion of the surface of the earth.
• High-rise buildings - provides a means to deal with the ownership of multiple parcels of air space in a vertical strata.

CARBON CAPTURE AND STORAGE ACT (ALBERTA)

• Grants all pore space in the province of Alberta to the provincial Crown. The Act does not consider this an expropriation and compensation is not required.
• Intends to provide for future use of pore space for Carbon Capture and Storage technology.

CASES OF NOTE

DIDOW V. ALBERTA POWER LTD

• Facts:
  o Electrical poles extend 6 feet into the air space above Didow’s land. Didow claims the intrusion is a trespass.
• Discussion:
  o The rights of a landlord to air space must be balanced with the rights of the public. This balance is best struck when:
  o The rights of an owner are restricted to the height that is necessary for the ordinary use and enjoyment of his land. Above this height the air space is common property.
• Two groups of cases:
  o The intrusion of permanent structural projections into the air space above another’s land
    ▪ This is trespass. The landowner owns at least as much of the space above the ground as he can occupy or use. He does not have occupy the land in the physical sense
  o A transient invasion into the air space above another’s land at a height not likely to interfere with the landowner.
    ▪ Case law and statute law: a landowner cannot object to air traffic that does not interfere with the use and enjoyment of the land.
• Held:
  o The landowner is entitled to freedom from permanent structures, which impinge upon the actual or potential use and enjoyment of this land. The presence of the poles amounts to trespass.

CASE QUESTIONS/NOTES

1. What rule governs the delimitation of a landowner’s airspace rights according to Didow? What is the rationale for the rule?
1. The landowner has airspace rights to the height that he can reasonably use, and no more. The rationale is to find a compromise with the uses that society might have for air space, such as air traffic.

2. What remedy did the plaintiff seek in this case? What would the effect of awarding damages have on the property rights of the parties?
   - The plaintiff sought a declaration that the intrusion constitutes a trespass of his rights.
   - An award of damages might negate the chance of seeking another solution to the problem (such as moving the poles), or compensating Didow enough to compensate for the inconvenience of poles. A declaration of trespass might push the parties to find an equitable solution.

3. The Land Use bylaw requirement of a 50ft set-back distance from the road would severely impinge on the ability for Didow to use his land. Given that the dimensions of his land were likely set before the by-law came into effect, would there be compensation available to him for the loss of his land (does this account to an expropriation of his land)?

4. Watson v Gliders
   - At what height do the gliders swoop over the backyard? Are they low enough to stop the owners use of the land?
   - Does the chance of gliders landing in the backyard prevent any use or enjoyment of his land?
   - Why do they land in this manner? Can they not control their descent? Emergency?
   - Possible recourse: action of trespass against the Glider club (if one exists) or against individuals as they swoop by (difficult).

EDWARDS V. SIMS

- Facts:
  - Edwards opens and explores cave. Entrance is on his land. Lee believes the cave passes under his land. Lee wants to sue Edwards for trespass but requires a survey of cave to determine its boundaries. Sims is the Trial Judge who orders the survey. Edwards seeks an injunction against Sims to prevent the survey.

- Issue:
  - How to determine the subterranean title? “Cujus est solum…” (‘sky to the depths’) or first discovery?

- Held:
  - Majority (Stanley): According to “cujus est solum” Lee owns the part of the cave below his land. If Edwards is using it in the course of his subterranean exploits, then he is trespassing.
  - Using a mining analogy, the court can compel the survey of the cave to determine whether Edwards is trespassing on Lee’s property
  - Dissent (Logan) – Dissent holds more weight now..
  - “Cujus est solum…” is outdated and is inapplicable for both subsurface or airspace land use
  - A landowner owns only the subsurface, surface, or airspace that he can use for his profit or pleasure. He owns nothing that he cannot subject to his dominion.
  - Economic rationale: Edwards exercised his dominion over the cave by his efforts to explore it – therefore, he should be the only person capable of having ownership and extracting value from the cave.
CASE QUESTIONS/NOTES

• According to the majority in Edwards v Sims, what rule governs the ownership of the subsurface?
  o “Cujus est solum…”
• What set of rules are argued for in the dissenting opinion? What underlying justifications are advanced by Logan, J.?
  o An economic rationale underlines this judgement. As first discover, with the entrance on his land, and through his hard work, Edward has created a use and a value for the cave, both of which would not exist if the cave belonged to Lee. Since Edward has the opportunity to use the cave, he should have title to the cave.
• Does it make sense to adopt different rules for the ownership of airspace and subsurface rights?
  o No, the extent (height or depth) of title to both airspace and subsurface land should be given to the surface owner should depend on the use that the surface owner can make. This best allows the compromise between the interests of the individual and the wider community.

ADDITIONAL THINGS TO KNOW

<table>
<thead>
<tr>
<th>COASE THEOREM</th>
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<tbody>
<tr>
<td><em>As long as smooth bargaining processes are in place, any state (or judicial) allocation of entitlements will be adjusted by private parties to produce an economically efficient allotment</em></td>
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• If transactions costs are zero, the initial assignment of a property right will not affect the ultimate use of the property.
• Market forces will drive property into the hands of the party that values it the most.

**As applied to Didow:**

  o What legal rule promotes the most effective use of the contested airspace?
  o It would cost Didow $40000 to deal with the intrusion and protect his cows
  o It would cost AP $32000 to move the poles
  o If Didow wins the case, AP has two options: move the poles or pay for insulation. AP will likely move the poles for $32000. It is cheaper than leaving them there and paying the farmer $40000 to protect his cows.
  o If AP wins the case Didow should be willing to pay up to $39999 to AP to move the poles because he will save at least $1 from what he would otherwise have to spend on insulation. (Likely that he will only pay $32000 to AP to and save $8000.)
    ▪ Either way, the poles will be moved and the most efficient outcome is achieved (lowest cost to protect the rights of the titleholder).
    ▪ If the cost for Didow was higher, the result would still be the same. If the cost for AP was higher than that of Didow, the poles would remain on the field (it would be cheaper to insulate than relocate).

**As applied to Great Onyx Cave**

  o Edward can make $6000 from tours that explore the entire cave. He can only make $1000 if he shows tours around his part of the cave. The other $5000 is gained from using Lee's part of the cave.
 Scenario 1: The court awards title to Lee.
   - Edward should be willing to pay $4999 to Lee for the rights to use Lee’s part of the cave in his tour.
   - Edward will then make $1001, which is more than what he would have made otherwise.

 Scenario 2: The court awards full title to Edward
   - Edward makes $6000 through the use of the entire cave.
   - No matter to whom the title of the cave is awarded, the maximum value of the cave will be extracted.

Problems with Coase Theorem:
- Holdouts - someone not willing to accept any amount of money on principle
- Free riders – one party benefitting from the work of another
- Bilateral monopolies - two parties who may not be able to reach an agreement
- Endowment effect – a party would ask for more than they would be willing to give

LATERAL BOUNDARIES

RELEVANT TEST, DEFINITIONS AND RULES

DETERMINING WHETHER SUBSTANCE IS A MINERAL

- Vernacular Test (used most often)
  - Is substance regarded as a “mineral” in the vernacular of miners, landowners?
- Purposes and Intentions Test
  - What is the purpose of the reservations in the Crown grant?
    - E.g. land being used to build a railroad
- Exceptional Occurrences Test
  - “Minerals” does not include the ordinary rock of a district – has to be exceptional
- Other factors considered:
  - Often whether the substance will be used for profit will be taken into account – not determinative but if it has been recognized as being profitable taken into account
  - “Minerals” will typically be construed in its widest sense
  - Onus is on the person alleging the reservation, usually the Crown
  - The meaning of mineral not restricted by the fact that the substance cannot be worked except by destroying surface

TEST FOR BOUNDARIES

- Step 1: General rule: When there is ambiguity regarding a grant, reference will be given to things about which people are least likely to mistake:
  - Intention
  - Natural boundaries
    - E.g. if orally discussed as 52ft up to tree, but actually 47, then the tree becomes the natural marker
  - Lines actually run and corners actually marked at time of grant
    - E.g. survey lines
If the lines and course of an adjoining tract are called for the lines will be extended to them if they are sufficiently established
- To courses and distances giving pref. to one or the other in the circumstances

**Step 2:** BUT if location of boundaries still uncertain, then the boundary itself needs to be established
- natural landmarks
- original monuments
- fences and original surveys
- descriptions

**Step 3:** If there is still uncertainty refer to *Conventional Line Doctrine*: When adjoining neighbours are unable to determine their boundary, they meet and have agreed on a common boundary that becomes the boundary irrespective of other evidence. (*Robertson v. Wallace*)

### POLICY AIM OF BOUNDARY TEST:

- To reduce the expense determining boundaries
- Where parties have agreed on a boundary and one party has relied on that it would be unfair to insist on proper or other determination of the boundary.

### RIPARIAN RIGHTS:

- *Right of access to the water and the right to take emergency measures to prevent flooding.*
- General Rights of Riparian Owners in BC – Cite *District of N. Saanich v Murray / District of N. Saanich v EMP Estates LTD.*
- **See Water Act s(2) for BC** – This part is repeated below
  - Access to and from water
    - The right is a private, not a public, right – actionable without proof of special damage; does not depend on ownership of the bed, and does not depend on navigability.
    - However, riparian owner must not impede access to foreshore or interfere with navigability of public
  - Incidental rights
    - Right to pass over shore or the bed, even if he/she does not own it
    - Right to load/unload vessels
  - But these rights must not interfere with any public right of access/navigability or any other riparian owner’s rights.

### RULES FOR WATER BOUNDARIES

- Non-tidal and non-navigable rivers: ownership to middle of river
- Tidal and navigable bodies of water: ownership to the ordinary or mean high water mark; below that the crown owns it
- Tidal but non-navigable or non-tidal but navigable: navigability takes precedent
RELEVANT ACTS

LAND ACT BC – S. 50 & 11

• Exceptions and reservations
• s. 50 (1)
  o A disposition of Crown land under this or another Act
  (a) excepts and reserves the following interests, rights, privileges and titles:
    (i) a right in the government, or any person acting for it, to resume any part of the land that is deemed to be necessary by the government for making roads, canals, bridges or other public works, but not more than 1/20 part of the whole of the land, and no resumption may be made of any land on which a building has been erected, or that may be in use as a garden or otherwise;
    (ii) a right in the government, or any person acting for it or under its authority, to enter any part of the land, and to raise and get out of it any geothermal resources, fossils, minerals, whether precious or base, as defined in section 1 of the Mineral Tenure Act, coal, petroleum and any gas or gases, that may be found in, on or under the land, and to use and enjoy any and every part of the land, and its easements and privileges, for the purpose of the raising and getting, and every other purpose connected with them, paying reasonable compensation for the raising, getting and use;
    (iii) a right in any person authorized by the government to take and occupy water privileges and to have and enjoy the rights of carrying water over, through or under any part of the land granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the land, paying a reasonable compensation to the grantee, the grantee’s successors and assigns;
    (iv) a right in any person authorized by the government to take from any part of the land granted, without compensation, gravel, sand, stone, lime, timber or other material that may be required in the construction, maintenance or repair of a road, ferry, bridge or other public work,
  (b) conveys no right, title or interest to
    (i) geothermal resources as defined in the Geothermal Resources Act,
    (ii) minerals and placer minerals as defined in the Mineral Tenure Act,
    (iii) coal,
    (iv) petroleum as defined in the Petroleum and Natural Gas Act,
    (v) gas, or
    (vi) fossils
  (c) conveys no right, interest or estate to highways, within the meaning of the Transportation Act, existing over or through the land at the date of the disposition.
• s. 50 (6)
  o The power under subsection (4) to accept and reserve rights and privileges includes the power to create a right of way, and if this is done (a) the government is, with respect to the right of way, a grantee (b) the right of way is conclusively deemed to be necessary for the operation and maintenance of the governments undertaking. c) s. 218 of the Land Titles Act applies
• s. 11(2)
  o (2) The minister may, under subsection (1),
    (a) sell Crown land,
(b) lease Crown land,
(c) grant a right of way or easement over Crown land,
(d) grant a licence to occupy Crown land, or
(e) transfer ownership of fossils located on Crown land, grant the right to remove fossils from Crown land, or both, if done in accordance with section 50 (3.1).

**SUMMARY OF THE S. 50(1) OF LAND ACT BC:**

- government can’t take more than 1/20th otherwise expropriation of land
- government has right to minerals but have to provide reasonable compensation
- government can take over water privileges for the purpose of mining or agricultural but have to provide reasonable compensation
- government can take natural resources for public works without compensation
  - b) government cant give their right to reservation away
  - c) can’t give the rights over highways away

**LAND TITLE ACT S. 24 – TITLE BY PRESCRIPTION ABOLISHED**

- **s. 24.** All existing methods of acquiring a right in or over land by prescription are abolished and, without limiting that abolition, the common law doctrine of prescription and the doctrine of the lost modern grant are abolished.
  - prescription refers to the right to use the land even though someone else owns it – ex. *Robertson v. Wallace*

**WATER ACT S. 2 – VESTING WATER IN GOVERNMENT**

- “ground water” means water below the surface of the ground
- “stream” includes a natural watercourse or source of water supply, whether usually containing water or not, and a lake, river, creek, spring, ravine, swamp and gulch;water act
  - The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.
  - No right to divert or use water may be acquired by prescription.

**CASES OF NOTES**

**ROBERTSON V. WALLACE**

- **Facts:**
  - 1890 land surveyed and river used to divide boundary between Wallace land and Robertson land; river shifted course and dispute arose; 1994 land surveyed again which increased Wallace land by 20 acres and created overlapping titles; Wallace sold land and new owners challenged Robertson use

  - **Issue:**
Was there a conventional boundary established between the adjoining property owners in order to determine who owns the disputed land?

**Test:**
- In order to determine where there is a conventional boundary:
  - there must be adjoining land owners
  - they must have a dispute or uncertainty about the location of the dividing line
  - they must agree on a division line and recognize it as a common boundary (fairness)
    - the recognition of the line can be oral, in writing or by conduct but evidence must be clear and definitive
    - onus is on the party claiming ownership by virtue of conventional line

**Analysis:**
- Both used the land, fixed the fence, however no discussion occurred after the 1950’s about boundaries. River has shifted and fence repaired numerous times therefore the natural boundary is unreliable evidence to determine actual boundary.
- There is no direct evidence, oral evidence or evidence from their conduct from which it can be inferred that there was an agreement that the fence was an actual boundary line.

**Held:**
- That there is no proof of agreement regarding ownership of the land

**Ratio:**
- **Conventional Line Doctrine:** If there is agreement by both sides as to the appropriate line, and one party subsequently builds to that line, the other party is prevented from later denying it is the true line. Conventional line exists if adjoining land owners, dispute arises, and common boundary agreed upon.

**Blewman v. Wilkinson**

**Facts:**
- Defendants owns excavated and subdivided land; cuts a right of way to give access to rear sections below lot 7; defendant sells lot 7 without giving it bank support. Plaintiff builds house on lot and the bank gradually erodes. Plaintiff brings action – interference with natural right of support enjoyed by their land

**Issue:**
- Is the subdividing owner responsible to the new owner for the erosion of the land?
- Premised on common law rule, that a landowner has the right to enjoy his land in its natural state, unaffected by excavation. If excavation does occur that interfered with right, the owner has a right of action against the original excavator.

**Analysis:**
- In this case the plaintiff knew that the land had been excavated before they purchased it, did nothing to prevent the erosion until after trial started.
- This land had never enjoyed support from the soil.
- The defendant had acted on proper professional advice
- Soil erosion is common in such properties; a purchaser can be fairly expected to accept risk

**Held:**
- Appeal was dismissed.

**Ratio:**
Where a subdivision has been created by excavation, the owner is not under a strict non-contractual duty to a subsequent owner if interference occurs because of that excavation. However, law of negligence would apply.

**Comments:**
- there must be damage for there to be a cause of action (Bullock Holdings Ltd. v. Jerema)
- a right of vertical support exists – if exploration of a subsurface mine owned by B damages owner A's land there is a cause of action – causal connection presumed as evidence
- right of support can be waived by agreement

**R. V. NIKAL**

**Facts:**
- Aboriginal man fishing on reserve. Reserve on both side of the Bulkley River. Charged with fishing without a license

**Issue:**
- Is the river a part of the reserve? Does doctrine of ad medium filum aquae apply to Aboriginal Reserves?

**Ad Medium Filum Aque**
- Presumption that boundary of a piece of land bounded by a body of water is at the center line of that water
  - Remember this application changes depending on whether the river is navigable or non-navigable
  - Crown intends to reserve fishery rights in navigable water

**Analysis:**
- River is navigable, part of the river is navigable (not where he was fishing), above and below the reserve is navigable, so river is considered navigable.
- Fishery is a common law right that is severable from the title to the river bed itself, retained by the Crown. Thus even if ad medium filum aquae were to apply it has no effect on fishery
- The Gov’t never intended to grant the bed of the river to the reserve

**Held:**
- River not a part of reserve land but appellant acquitted because license requirements infringed aboriginal rights and therefore unconstitutional.

**Ratio:**
- To assess navigability, the entire length of the river from its mouth to the point where its navigability terminates must be considered. Non-navigable waters within these limits are considered navigable.

**Notes:**
- Public Lands Act s.3 – states that the title to beds and shores of all permanent and naturally occurring bodies of water is vested in the Crown (in Alberta) and any grant or certificate of title made or issued before May 31st 1984 does not convey title
- Where land is granted with a water boundary, the title to the grantee extends to that land as added to or detracted from by accretion, regardless of whether grant is accompanied by identifiable boundary line
  - Accretion must be gradual and imperceptible
Accretion may even occur through non-natural forces (such as by the building of a dam upstream), as long as landowner didn’t cause it (Clarke v. Edmonton (City))

Newly exposed land as a result of recession of water must be connected to the riparian (water-bound) land to support claim for accretion

- Must own up to shore line
- If change not gradual then original boundary lines still apply – Robertson v. Wallace

Three rules for water boundaries

- non-tidal and non-navigable rivers: ownership to middle of river
- tidal and navigable bodies of water: ownership to the ordinary or mean high water mark; below that the crown owns it
- tidal but non-navigable or non-tidal but navigable: navigability takes precedent

DIST. OF N. SAANICH V. MURRAY; DIST. OF N. SAANICH V. EMP ESTATES LTD

• Facts:
  o Appellants own land that fronts upon the sea; constructed wharf on foreshore; the respondent is the lessee of the foreshore; respondent claims construction to constitute a trespass

• Issue:
  o Does a riparian owner have the right to construct wharves or other structures upon the foreshore?

• Analysis:
  o The general rule is based on the summary of Halisbury Law of BC
  o General Rights of Riparian Owners in BC
    • Access to and from water
    • The right is a private, not a public, right – actionable without proof of special damage; does not depend on ownership of the bed, and does not depend on navigability.
    • However, riparian owner must not impede access to foreshore or interfere with navigability of public
    • Incidental rights
      • Right to pass over shore or the bed, even if he/she does not own it
      • Right to load/unload vessels
    • But these rights must not interfere with any public right of access/navigability or any other riparian owner’s rights.

• Held:
  o No, therefore there was a trespass

• Ratio:
  o Riparian owners have a right to access, but do not have a right to construct anything which disturbs the foreshore or interferes with any public right to navigate in the water

STEADMAN V. ERIKSON GOLD MINING CORP.

• Facts:
  o Respondent owned land used for living & business
  o He piped water into house from small spring dug out stream
In 1985 the defendant (a mining company) constructed a road near the respondent's land and silt was carried into the respondent's reservoir. Respondent sued for damages for nuisance and trespass. Corporation appealed.

- **Issue:**
  - Can respondent claim damages from appellant, despite not having a license?

- **Analysis – Seaton JA:**
  - Only stream water is subject to legislative schemes – BC Water Act vests the right to use all water of the Crown and all surface water and licensing to it is by BC.
  - If it is NOT ground water, respondent wins à
    - Respondent's right to use water for domestic purposes exists so long as there is not another person with a license to use the water (unrecorded water therefore not covered by water act).
  - If the water in question constitutes ground water, respondent stills wins à
    - A right of action against those who contaminate your use of the ground water exists because no one has the right to be a nuisance to your use of the water (percolating water is not included in the water act).
  - When you have permission to use the unrecorded water, you have a right to not have the water be polluted by another individual and thus can have an action against the polluter.
  - **Common law is that the groundwater is a common resource in which no one has a property interest – you can use it until it is dry but you cannot contaminate it**
  - Because Steadman had right to use unrecorded stream water for domestic purposes, the Act must be interpreted as allowing works and pumps for these purposes.

- **Held:**
  - Yes, since respondent's water use has domestic character.

- **Ratio:**
  - Riparian rights exist except where explicitly stated that they do not.

### FIXTURES AND CHATTELS

#### FIXTURES

- Fixtures are considered part of realty (i.e. real property) vs. chattels which are personal property.
- Chattels may be transformed into fixtures and when this happens, the title is subsumed by that of the realty (so whoever owns the land, owns the fixtures).

#### TRADE AND TENANT FIXTURES

- **Trade fixtures** – installed by a tenant on leased commercial property specifically for their use in a trade or business (e.g. business signage, equipment).
- **Tenant fixtures** are objects a tenant has attached to a unit in order to render it more habitable.
- Not every fixture may be removed prior to end of a lease term simply because it was attached by the tenant, must have been attached.
  - For the purpose of carrying on a trade; or
  - Ornamental or for the purpose of domestic convenience (e.g. stoves, lighting, curtains).
• Must be capable of being removed without causing material injury to the estate or irreparable damage, also without being entirely demolished or losing its essential character or value
• Tenant’s right to remove leasehold improvements must be exercised before lease term expires, or else fixtures are forfeit to the landlord whether or not he or she will receive benefit from them
  o Parties may agree to alter rules governing removal of fixtures
• Most agricultural fixtures excluded from common law definition of trade fixtures

THE TRANSFORMATION OF CHATTEL OWNERSHIP

• Comparable to law of fixtures that joins chattels to realty but instead concerns chattels becoming connected with other chattels
• Confusion/Intermixture/Admixture/Comingling: occurs when chattels belonging to two or more persons become somehow “connected” and are so similar that they cannot be distinguished
• Accession: when distinguishable items become inextricably fused
  o Four tests suggested to determine if accession has occurred (Thomas v. Robinson):
    1. Accession if part cannot be removed without damaging the remaining principal chattel
    2. Accession arises only if there has been a complete incorporation to the point of extinction of identify
    3. Destruction of utility – accession even if article can be removed without causing damage but it destroys the chattels usefulness
    4. Degree and Purpose of Annexation: articles intended as permanent parts of chattels pass on accession but others could be treated as mere accessories depending on the case and intention of the parties
  o Normally in law of accession, original owner entitled by their right of possession to the property in its improved state
• Alteration/Specification: when chattels are fundamentally transformed
  o Whatever alteration of form property may undergo, true owner is entitled to seize its new shape if they can prove the identity of the original material

CASES OF NOTE

LA SALLE RECREATIONS LTD. V. CANADA CAMDEX INVESTMENTS LTD.

CARPETS

• Facts:
  o La Salle installed carpets on payment plan in hotel and retained title as security until entire purchase price paid.
  o Before the mortgagee had completed the payment plan, CCI purchased the hotel and became the new mortgagee but because the payment plan had not been registered with the appropriate land registry office, La Salle’s security not binding to CCI.
  o Priority over carpets therefore depended on if the carpets had become fixtures or not. If so, then CCI could claim them.
• Rules:
  o McFarlane J.A. takes 4 principles from other case (Stack v. Eaton) to determine if an object is a fixture or chattel
1. If object not attached to the land (but resting on its own weight), not considered to be part of the land, unless circumstances show it was intended to be
2. If even slightly affixed to the land, object is considered a fixture unless it is shown to have been intended to remain a chattel
3. Consider the prima facie character – object and degree of annexation, which is lying open for all to see (objective test – what would it look like to an average person)
4. “That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.”

   - McFarlane also uses principle from Haggart v. Brampton (Town)
   - If object affixed for the better use of the land, then likely a fixture
   - If object affixed for the better of its use as a chattel, then likely a chattel
   - If the object looks like it was intended to be affixed permanently, likely a fixture; if intention appears to have been occasional affixing, more likely a chattel
     - McFarlane interprets permanent as “so long as the object is serving its purpose” – thus allowing for wear and tear/decoration changes

**Application to Current Case:**
- Carpet annexation is slight (most areas may be removed without causing damage)
- Carpet annexed more for the better and effectual use of the building as a hotel, not for the better use of the goods as goods

**Decision:**
- Carpeting and accessories annexed to the land in such a manner and under such circumstances as to constitute fixtures.

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**DIAMOND NEON (MANUFACTURING) LTD. V. TORONTO DOMINION REALTY CO.**

**SIGNS ON PROPERTY, WHO DO THEY BELONG TO?**

**Facts:**
- Diamond Neon (DN) had contract with Dueck, a car dealership, to affix signs advertising their business to property they were leasing. Contract eventually expired and Dueck vacated the land, DN left signs there thinking they would lease signs to another dealership.
- When property sold to Toronto Dominion Realty (TD), signs were still on the property and TD was unaware of the contract upon purchase. DN claimed signs are their chattel while TD claims they are fixtures.
- TD seeking to sell signs while DN claims wrongful conversion of its chattels.

**Held:**
- **Majority: Robertson J.A.**
  - Refers La Salle case about what constitutes fixture vs. chattel and concludes that the degree of annexation and object of annexation make it part of realty
  - D. had no knowledge of contract when purchased land so could not be affected by it (even if had known about the contract after purchase, too late, already fixtures)
  - When D negotiated purchase of land saw thing affixed, had no obligation to make inquiries to ascertain if they were someone else’s chattels and acquired title to signs
  - Upon buying land, D also acquired title to the signs as fixtures, no conversion.
- Appeal dismissed
- **Dissent: Carrothers J.A.**
• Agrees with Robertson’s recitation of facts and the principles of law BUT takes issue with the uniqueness of the object involved
• Sign unique and by very working has ability to speak for itself about intention or purpose as a chattel. Analogizes to display of a nameplate for a doctor, normal rule would establish it as a fixture but in absence of evidence of abandonment, nameplate would remain a chattel belonging to the previous tenant
• D should have inquired if signs included in purchase and their subsequent actions seeking to sell the signs as chattels confirm the expectation that they should have been viewed as chattels at time of sale
• Would allow the appeal

GLENCORE INT’L A.G. ET AL V. METRO TRADING INT’L INC.

CASE OF UNAUTHORIZED COMINGLING AND BLENDING OF OIL, WHO MAY CLAIM THE NEW PRODUCT?

• Facts:
  o MTI mixed crude oil provided by Glencore for refining and blended it with oil of other companies in the process. MTI went bankrupt holding less oil than what it owed to all of the contributing companies. Glencore seeking to recover its share. Both the ownership of the comingled oil and the oil that had been transformed into a new product in question.
• Rules:
  o Moore-Bick J. distinguishes between blending and comingling – blending has taken place where the resultant product is different in nature from its original form. Comingling is mixing goods of the same nature and quality.
  o The owner of goods which are taken and used to make a new commodity can recover them from the wrongdoer, even in their altered form, if they can identify them in that new commodity and show it is wholly or substantially composed of them
    ▪ If goods can be separated, innocent party can recover share proportionate to what they contributed
    ▪ If goods cannot be separated, innocent party is entitled to recover the whole mixture thing (e.g. Husband used wife’s 18 beaver skins and his 4 skins to make coat for his mistress. Court found the coat belonged to the wife because she was the innocent party)
    ▪ If there is more than one innocent party, they own the product in common
  o Doubt re quantity is resolved in favour of the innocent party who is entitled to the whole mixture
• Decision:
  o All the contributing oil companies own the refined oil product in common and should receive a quantity proportionate to their contribution. Any doubts about the quantity or value should be resolved against MTI and the oil companies may also recover damages for any loss suffered because of MTI’s wrongful use of their oil.
  o Rejects MTI’s argument that the original goods have ceased to exist because they have been turned into a completely new product that they should have title to because they made it, are in possession of it, and exercise dominion over it (this is the doctrine of
specification but Moore-Bick J. questions its applicability in English law, particularly in the case of wrongdoers attempting to claim ownership).

**MCKEOWN V. CAVALIER YACHTS LTD.**

**COMPETING CLAIMS TO OWNERSHIP OF YACHT, CASE OF ACCESSION AND SPECIFIC RESTITUTION**

- **Facts:**
  - McKeown owns a yacht hull (worth $1777) enters into an agreement with Cavalier to turn it into a finished product. C hires Spartech to complete the project and S spends $24409 doing so; M unaware of change in ownership of project. S claimed ownership of the entire yacht claiming hull had become an accession to their work while M claimed title because had fulfilled terms of agreement with Cavalier. M seeking an order for specific restitution to return the yacht.

- **Rules:**
  - Specific restitution only granted where chattel has special value or interest and damages would not fully compensate the plaintiff.
  - If a minor chattel (not strictly defined but usually the part worth less) can be physically detached, order may be made for return. If it cannot be conveniently detached, then compensation may be imposed.
  - Accession: If substance receives accession, the original owner is entitled by their right of possession to the property in its improved state
  - Similarly, when the goods of one person are affixed to the land or chattel of another, may become part of it and so accrue to the owner of the principal thing

- **Decision:**
  - Young J. decides that the hull is the principal chattel and that the work by S constitute accessions, therefore M owns the whole thing
  - M is granted specific restitution, but must pay S for their work, minus what had already been paid in the agreement with C.
  - Rejects S's argument that they are an innocent bystander who thought they owned the chattel when doing work on it. Should have known that C had some contractual rights and obligations re the project and should have inquired.

**GIDNEY V. SHANK**

**CLAIM FOR RESTITUTION AS A REMEDY FOR UNJUST ENRICHMENT (STOLEN CANOE)**

- **Facts:**
  - Gidney purchased a dilapidated canoe that had been stolen from Feuerstein and extensively repaired it (did not know it was stolen). Canoe removed from Gidney by police for investigation and then returned to Feuerstein. Gidney suing in restitution for cost of repairs.
  - At trial, judge found in favour of Gidney finding it to be a case of unjust enrichment.
  - Previous settlement beforehand, if the facts had been different, could have had a different outcome. Because Gidney had already received a $2000 settlement out of court, didn’t have an issue with not giving the canoe back.

- **Rules:**
  - *Unjust Enrichment* – 3 requirements
1. Enrichment
2. Corresponding deprivation
3. Absence of any juristic reason for enrichment
   - Juristic reason = an explanation based upon law for the enrichment of one at the detriment of another (if no lawful explanation, would be an injustice to allow the enrichment of one at the detriment of another)

- **Decision: Huband, J.**
  - Agrees with trial judge (Beard, J.) who found that the canoe being returned to Feuerstein in improved condition constituted enrichment and that Gidney's losing the benefit of his labour and expenditures constituted corresponding deprivation
  - Disagrees on third point, feels that juristic reason interpreted too narrowly.
    - No injustice in the defendant’s retention of the improved canoe because of the lack of a prior relationship between the plaintiff and defendant.
    - Also, Feuerstein had no knowledge of nor had given any consent for any improvement to his canoe. Nothing binding on Feuerstein’s conscience.

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**TANGIBLE AND INTANGIBLE RESOURCES**

**COPYRIGHT**

- **Defining Copyright:**
  - Artistic works of originality are protected by copyright from inception – no need to register them. This right extends to original work and subsequent copies (Théberge 252-3)
  - “A copyright springs into existence as soon as the work is written..or...recorded in some reasonably permanent form” (Laddie et. al. qtd. in Théberge 256).

- **Copyright generally inclusive of two kinds of rights:**
  1. **Economic Right**
     - Dominant concern in Canadian copyright law
     - Artistic works are articles of commerce
     - These are the rights to use / display / reproduce your work – these rights can be bought / sold in part or in whole
  2. **Moral right**
     - Essentially, the right to protect the integrity of your work and your reputation as an artist, and the right to recognition as author of the work (or to maintain anonymity, your choice)
     - Moral rights remain with author, even if econ rights are sold
     - Descends from civil law but some moral rights protected under Copyright Act S. 13.4 (above)
     - Snow v. Eaton Centre – successfully protects moral right to integrity of work – argues “decoration” of his art by owner renders it ridiculous; court agrees

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**PATENTS (SEE MONSANTO)**

**TRADEMARKS**

- **Legal Purpose of Trademarks:**
“to distinguish wares or services manufactured, sold, leased, hired or performed by him [the trademark owner] from those manufactures, sold, leased, hired or performed by others”
- [Trade-marks Act RSC 1985, c. T-13]

• **Trademarks are:**
  1. A proprietary right recognising a linkage between a certain name and a product or service
  2. A guarantee of origin and, therefore, a valuable business asset because they contribute to “brand equity” ie. the advantage a manufacturer gets from being well-known
  3. A form of Consumer Protection Legislation ie. A consumer will know that products issued under a certain Brand Name will be of a certain quality, if the manufacturer is a trusted one.

• **Special Characteristics:**
  o **Use it or Lose it:** Trademark entitlement comes from actual use. You can only register a trademark if it is connected with some product or service. If you do not use a trademark, it can be expunged. A trademark holder must defend his trademark or it will lose its distinctiveness and the holder will lose his legal protection eg. “Thermos”
  o **Nature of Products/ Similarity of Marks:** Some trademarks are so well known that they can exclude the registration of similar marks, even in cases where the wares or services are of an entirely different class. However, in other instances, several nearly identical trademarks exist in cases where they are primarily associated with different fields: eg “Apple” is a brand of computer, an auto glass manufacturer, and a record label
  o **Piracy, Free-riding etc.:** It is often argued that if A tries to register a trademark similar to B’s pre-existing or famous one, in a similar field, that A is trying to get a free ride or, in other words, to pirate the consumer goodwill that B has built up over a long time and with considerable expense. These cases are analogous to a trespass against property and, therefore, intention to commit the act is not an issue. On the other hand, if no confusion (ie. mistaken inferences in the marketplace) can be proven then no trespass occurred and it is irrelevant whether or not A intended to get a free ride or not (see Mattel).

**ACTS OF NOTE**

**COPYRIGHT ACT, R.S.C 1985**

• **Economic rights:** Artist has sole right to produce / reproduce the work for artists lifetime (S.3(1)) plus 50 years (S.6)
  o These rights can be sold in whole or in part – for instance, you can sell rights to reproduce a work only in a certain province, or only for a limited period of time (S.13 (4) econ right)
• **Moral Rights:** Integrity of an artists’ work is infringed only if work is modified in such a way as to prejudice the honour or reputation of the author (S.13(4))

**PATENT ACT, R.S.C 1985**

See **Monsanto**

**TRADE-MARKS ACT, R.S.C 1985**

See **Trademarks**
CASES OF NOTE

THEBERGE V. GALERIE D’ART DU PETIT CHAMPLAIN INC.

- **Issue:**
  - To what extent can an artist control the use or display of an authorized reproduction of his / her work in the hands of a third party purchaser?

- **Ratio:**
  - An artist does not have an economic right to control the use or display of an authorized reproduction, but (s)he may have a moral right to do so.

- **Facts:**
  - Théberge authorized reproductions of his works to be printed on posters
  - Appellants purchased some of those posters and used a chemical process to separate the entirety of the inked image from paper and place the inked image on canvas
  - Théberge had the canvas backed reproductions seized before satisfying judge that CR Act was violated by appellants
  - Appellants claim economic loss from not being able to sell the seized canvases

- **Reasoning:** (Binnie J.)
  - Appellants purchased posters from someone authorized to reproduce and sell the image
  - Appellants now own the posters – as purchasers / owners they have some property interest in the objects and may do whatever they want with them, including tear / rip / modify / divide the posters
    - Did not reproduce the posters – no copies were made
    - Only divided the ink from the paper – division is not reproduction
  - Not fixation (as Gonthier argues) w/in meaning of copyright law – “fixation” in copyright just means recorded in a reasonably permanent form
    - Gonthier's definition of fixation overreaches – removing the image from one backing, replacing with another backing does not constitute fixation and thus no reproduction
  - **Must consider policy interests of copyright law:**
    - CA Seeks balance between promoting public interest (as patrons, purchasers, distributors of the arts) and obtaining fair economic compensation for creator
      - Favouring Théberge here would ignore the balance of rights and interests that are the basis of copyright law

- **Dissent:** (Gonthier J.)
  - Not division, but fixation – image was transferred to a new medium and fixed upon it – this constitutes an act of reproduction

CASE QUESTIONS/NOTES

- Did Théberge have a right to seize the inked canvases?
  - **A1:** No, this is only available as a remedy if he had maintained an economic right to the works, which he did not. (Note: 4-3 ruling – all Quebec judges dissented, favoring Théberge).

- Did Théberge have a moral right / interest in the works?
MONSANTO CANADA INC. V. SCHMEISER

- **Relevant statute:**
  - Patent Act, R.S.C. 1985, c P-4
  - 42. Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall, subject to this Act, grant to the patentee and the patentee’s legal representatives for the term of the patent, from the granting of the patent, the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used, subject to adjudication in respect thereof before any court of competent jurisdiction.

- **Facts:**
  - Schmeiser sprayed roundup in the ditches bordering his fields and cultivated the surviving plants (which were immune to the roundup). He did not spray roundup on his fields.
  - Charged with infringement of Monsanto’s patent.
  - Trial judge found patent to be valid and rejected the argument that the gene and cell are un-patentable because they can be replicated without human intervention or control.
  - Schmeiser appealed to Federal Court of Appeal and then to the Supreme Court of Canada.

- **Issues:**
  1. **Was the patent valid?**
     - Yes: Schmeiser referred to Harvard Mouse: Supreme Court held that higher life forms, including plants are not patentable because they are not ‘compositions of matter’. But the court distinguished this case: was a mammal not a plant, and Harvard Mouse also noted that a fertilized egg can be patented, regardless of its ultimate development into a mouse. Don’t need to be able to patent the plant in order to patent the building blocks of the plant.
  2. **Did Schmeiser infringe the patent?**
     - S 42: grants patent holder the exclusive right of “making, constructing and using”
     - Interpretation of ‘use’ must be purposive, contextual and attend to case law.
     - Purpose of the act: to provide protection to the inventor from being deprived of a monopoly. Did the defendant further its own commercial interest? Any commercial benefit belongs to the inventor.
     - a) **Does protection extend to objects that contain the patent object?**
        - Yes, if it is significant or important. The object could not exist independently of the technology. Genes are instrumental to the structure of the plant.
        - Infringement does not require use of the gene or cell in isolation (ie in a laboratory).
     - b) **Does ‘use’ necessitate that the benefits of the technology are taken advantage of?**
        - Stand-by utility: Schmeiser didn’t utilize the technology because he did not spray roundup, but he could. There is investment value. Therefore this is still an infringement. Note: The fact that he hasn’t profited, does have an impact on the damages awarded.
     - c) **Does possession equate use?**
        - Presumption of use arising from possession could be rebutted if the presence of the gene was accidental or unwelcome. A defendants conduct on become aware of the presence of...
the gene could assist in rebutting the presumption. Unrebutted in this case because Schmieser actively cultivated the gene. Not an ‘innocent bystander’

3. **Schmieser argues the use of common law property rights which allow farmers to keep what comes onto their land.**
   - This is a patent case, not property rights. Ownership is no defense to a breach of the patent act.
   - **Damages:**
     - None. Schmieser’s profits were not attributable to use of the patented invention.
   - **Obiter:**
     - Issues of morality regarding genetic engineering are left to parliament to decide on

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**FUGACIOUS SUBSTANCES AND RULES OF ACCESSION**

**Fugacious substance:** that which can migrate in the course of nature such as Soil, like water, gas, petroleum, pollen etc. According to the general rule of accession, when fugacious substances are scattered, title is lost. Some rights, such as patents, are immune to those forces.

- **The General Rule of Accession:** Where the goods of two owners become inseparably joined, an accession results. In terms of inventions, when this happens it is usually the result of a knowing act by the patent violator. In that instance, the patent holder would likely be awarded the item. However, if a microscopic invention composed of physical matter is contained—innocently but inseparably—inside a plant, it is probable that a court would hold that the genetic machine accedes to the plant and not vice versa. Counsel for Schmieser argued that the law of natural accession was germane. The court disagreed.
  - **Monsanto produces a new accession rule.** The functional and legal result is to confer shared ownership. The infusion of every seed or speck of pollen into the crops of someone else renders Monsanto a co-owner of every plant thereby affected. This holding alters the rules that govern the natural migration of fugacious goods. Loss of possession does not destroy the intellectual property associated with those goods.
  - **In distinguishing Harvard Mouse,** the majority in Monsanto stressed that it is the gene and cell that are patentable, not the plant per se. But the patented gene is part of every cell of the host plant, and therefore, the infusion of the gene confers, in substance, the right to control use (to exclude or include) on the patent-holder.

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**MATTEL INC. V. 3894207 CANADA INC.**

- **Facts:**
  - “Barbie’s” [the respondent] is a small chain of Montreal-based restaurants. The owners of this business applied to register the trademark of “Barbie’s” in connection with “restaurant services, take-out services, catering and banquet services.”
  - Mattel, Inc., [the appellant] the maker of the BARBIE doll, brought an opposition proceeding before the Registrar of Trademarks to oppose the registration of the restaurant’s trademark on the grounds that market confusion would result (ie. consumers would think that Mattel had something to do with the restaurants.)
  - The Trade-marks Opposition Board, who decided the issue, granted the trademark to “Barbie’s.” Mattel appealed this decision to the SCC who upheld the Board’s decision.
  - **Binnie J. wrote the decision. LeBel J. wrote a concurring judgement**
• **Issues:**
  - Would market confusion result if “Barbie’s” restaurant registered a trademark for their name? In other words, would the average consumer believe that there was some connection between the makers of the doll and the operators of the restaurant?
  - In opposition proceedings, the burden of proof is on the applicant [the party applying for the trademark, in this appeal case, the respondent] to demonstrate, on a balance of probabilities, and that market confusion will not result if they register their mark. The applicant must prove that mistaken linkages are unlikely to occur in the minds of potential purchasers. In deciding this likelihood, the court is guided by the Trade-marks Act, which stipulates that “all the surrounding circumstances” must be taken into account. The list of circumstances provided by the Act is non-exhaustive and a context-specific analysis will emphasise certain factors over others.

• **Five Factors for Statutory Test for “Confusion”:** - Right from the Trademark Act 6(5)
  1. The inherent distinctiveness of the trademarks or trade-names and the extent to which they have become known;
  2. The length of time the trademarks or trade-names have been in use;
  3. The nature of the wares, services or business;
  4. The nature of the trade; and
  5. The degree of resemblance between the trademarks or trade-names in appearance or sound or in the ideas suggested by them

• **Decision:**
  - It was held that it is unlikely that market confusion will occur and, therefore, the respondent is entitled to trademark. Appeal dismissed with costs.

• **Reasoning:**
  - Court focused on factor 3 above. It concluded that the appellant’s Brand name was mainly associated with “dolls and doll accessories” and that, therefore, it was unlikely that consumers would imagine a connection with a restaurant, even if they had the same name, a similar logo etc. BARBIE’s trademark is limited and didn’t deserve the “broad zone of exclusivity” which they demanded.

### DOMAIN NAMES

**BLACK V. MOLSON CANADA 2002**

• **Facts:**
  - Black acquired the domain name “Canadian.biz”. Molson sought an order to get the domain name transferred to them on the grounds that Black’s purpose in acquiring the name was not “legitimate.” It was found that Black’s purpose was good and so he was allowed to retain the name.

• **Issues:**
  - Everyone registering a domain name is bound to an arbitration process under the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN has a protocol for deciding whether a domain name can be challenged and reallocated. Possession of a domain name can be challenged if the following factors are found to be present:
    1. The domain name is identical to a trademark or service mark in which the complainant has rights;
    2. The respondent has no rights or legitimate interests in respect of the domain name; and
3. The domain name has been registered or is being used in bad faith

- **Decision:**
  - It was held that Black’s case did not satisfy any of the above factors. Particularly, it was found that his purpose of using the domain name to disseminate info about Canadian business opportunities was a legitimate one (factor 2). His ownership of “Canadian.biz” was confirmed.

- **Note:**
  - It is generally understood that buying a domain name solely for the purpose of selling it at a profit is not legitimate.

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**TUCOWS.COM CO. V. LOJAS RENNER**

- **Facts:**
  - Tucows.com is a technology company headquartered in Toronto. It owns 30,000 domain names including “renner.com”. Renner is also the name of a Brazilian department store and the store has registered its trademark in Brazil and elsewhere. Tucows.com sought declaratory judgement in Ontario before Renner challenged possession of the domain name under the ICANN protocol.

- **Issues:**
  - Is the domain name “renner.com” property and, therefore, does Tucows have the right to seek judgment in an Ontario court given that such judgements only apply to “real or personal property in Ontario”?

- **Definitions of Property:**
  - ownership or quasi-ownership interests in things (tangible or ideational)
  - other rights over such things which are enforceable against all-comers (non-ownership property interests)
  - money; and
  - cashable
    - -Ziff, Principles of Property Law, 5th ed.

- **Property rights must be:**
  - definable
  - identifiable by third parties
  - capable in its nature of assumption by third parties, and
  - have some degree of permanence or stability
    - -Lord Wilberforce, National Provincial Bank LTD. v. Ainsworth

- **Decision:**
  - It was held that a domain name satisfied the definitions of property under the common law and could be considered “personal property”.

- **Note:**
  - This case is on-going and it has not been determined whether or not, under ICANN rules, Tucows.com has a legitimate right to “Renner.com”.

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**INTEL V. HAMIDI**

NO RELEVANT BLACK LETTER LAW, BUT IT DOES GIVE SOME IMPORTANT POLICY CONSIDERATIONS IN THE CONTEXT OF INTERNET PROPERTY RIGHTS.
• **Background:**
  - Hamidi, a former Intel employee, used Intel’s server to send e-mails that were critical of Intel to its current employees
  - Intel sues under tort of trespass to chattels – court rules not trespass to chattels b/c no legitimate property right or interest has been intruded upon
    - Because Hamidi’s actions didn’t cause or threaten to cause any damage to Intel’s computer systems / servers nor did they interfere with Intel’s ability to use servers or systems
    - Intel is trying to claim trespass to chattels, but really it’s the content of the messages that they object to, not the frequency of messages or the use of their computer servers
    - Favouring Intel here would mean extending the law so that the sender of an electronic message would be strictly liable to the owner of the server through which the communication passes for any consequential injury arising from the content of the communication (286).
• **Conclusion:**
  - There may be an issue here where non-commercial e-mail should be regulated – but that would be a matter for legislature and not the common law, as it would demand the creation of a rigid property rule (that the court is not prepared to create).

### FROM INTEL: SHOULD THERE BE A TORT OF CYBERTRESPASS?

• **No**
  - Werdegar J’s (majority) arguments
    - Free speech: Should the sender of an e-mail be liable to the owner of the server the communication is sent through, just b/c the server owner finds the e-mail content objectionable? (court says no)
    - Absurdity: Court compares to unwelcome messages on telephone, fax – should I sue you for trespass to my telephone if I don’t like what you said when you called me?
  - Lemley’s arguments (prof): “Tragedy of the anti-commons”
    - Every internet user would have to get permission in advance from anyone they want to communicate with and advanced permission from owner of the server their message might travel through
    - Consequently, each server owner could impose its own limitations on the message content – in theory, you’d have to read terms of service of each email system you send a message to?
    - so result is substantial reduction in freedom of communication
    - Ex, if I’m on gmail and you’re on uvic.ca, I’d have to agree to uvic.ca terms of service to send you an e-mail. If uvic.ca says “NO JOKES PLZ LOL” and I send you a pic of grumpy cat and you LOL, then I’ve committed a trespass, b/c I used their server to send something they hadn’t given permission for.
    - Website owners would be able to control who and what may enter their site and access and use the information provided on it
    - Following a disapproved link from one page to another would constitute a trespass onto the server of the linked to page
    - Some websites receive huge economic benefits from open access network linking – if individual sites impose their own rules of exclusion, the value of the network declines – if must negotiate before entering a site, the cost of the network climbs
CHAPTER QUESTIONS OF NOTE

- **What is the difference between a copyright, a patent, and a trademark (briefly)?**
  - Copyright – culture industries – bring something new and expressive into cultural world
  - Patent – technological innovations – invent something new and useful
  - Trademarks – commercial goodwill – to differentiate wares and avoid market confusion

- **What is a copyright, what does it protect, and how?**
  - Copyright applied in culture industries – gives legal rights to author / artist regarding production / reproduction of their work when bringing an original and expressive cultural product into cultural world (or “human repertoire”)
  - These rights protected through Copyright Act and common law

- **Binnie’s judgement in Théberge is recognized as a landmark decision b/c of its emphasis on principle of balance. Whose rights, specifically, was the Court balancing?**
  - Rights of artists / authors to receive fair economic compensation for their works with rights of public, who drive the economic market for artistic wares through consumption, patronage, distribution of art.

- **What is a trademark, what does it protect, and how?**
  - A trademark is a proprietary right which recognizes a linkage between a name or manufacturer and the wares or services which the trademark holder provides. For the trademark holder, the trademark protects his “brand equity” and the investment he has...
made in his own good name. For the consumer, trademarks protect them from being tricked into buying inferior goods, believing them to have come from a manufacturer that they have confidence in. Trademarks, fence off “a marketing territory” ie. they prevent other people from marketing similar products under a similar name in the same geographical area. The analysis of whether or not a trademark has been trespassed against is very context-specific and required the analysis of many factors. (See Mattel)

- **What principles justify protecting trademarks as intellectual property? How are these principles similar to or different than the principles justifying copyrights and patents?**
  - In terms of policy, copyrights and patents exist to reward creators of works of art, inventions, new processes etc. They grant a monopoly to the creator and prevent other people from taking his ideas, work etc. without permission. The inventor is entitled to full enjoyment of this monopoly.
  - Trademarks are different in the sense that they are not applied to novel works or inventions. A trademark can be registered for a very commonplace name as long as it is associated with a specific business. In a sense, they protect the economic interests of the trademark holder by preventing other people from pirating the good reputation a brand can build up over time. The monopoly they grant, however, is not absolute and trademark law must strike a balance between different interested parties. Trademarks are violated only in instances, which cause market “confusion” which is different from copyrights or patents, which can be trespassed against in numerous ways outside of the market context.
CHAPTER 4: THE CONCEPT OF POSSESSION

DEFINITION AND SQUATTERS RIGHTS

SECTION SUMMARY

POSSESSION

- 2 main components
  - Intention to possess (animus possidendi)
  - Physical control (factum)
- Physical control depends on what is necessary to exclude others and what dominion is practically possible.
  - e.g., Hunter acquires possession on mortally wounding animal (Pierson)
- Constructive possession may be found when intention or physical control are not complete
  - e.g., Popov v. Hayashi: full intent to possess, but incomplete physical control of baseball

ACQUISISITON OF TITLE BY POSSESSION: SQUATTERS

- Adverse Possession (squatters rights)
- Right of title owner to sue is statute-barred against person in adverse possession (loss of right to sue corresponds with loss of title)
- Justifications for adverse possession
  - Delays can prejudice preparation of defence, thus places limits on the time in which one can pursue action (fairness to defendant)
  - Rewards usage of land
    - However, also promotes exploitation of land
    - Will a person truly be induced to use land if they may be trespassing?
  - Prevents boundary errors and corrects in timely manner
    - "quiets title claims", resolves disputes
  - Protects settled expectations by aligning legal and actual possession ("good faith" reliance)
- What is required to accomplish adverse possession? (Keefer v Arillota, from Pflug and Pflug v Collins)
  - Must show possession for full statutory period
    - Open, notorious (ensures adverse possession is discoverable)
    - Peaceful
    - Adverse (without permission of title owner)
    - Exclusive (discontinued use by title owner)
    - Actual, continuous
  - Must show intention to exclude
    - Usage must be "inconsistent" with intended use of title owner (Does not apply in cases of mutual mistake – Teis v Ancaster)
  - Discontinuance of possession by title owner
**ACTS OF NOTE**

*(Provisions have been summarized)*

**S. 2, WILDLIFE ACT**

1. Ownership in all wildlife in British Columbia is vested in the government
2. If you kill without a license then you do not have a right of property
3. If you hunt with a license you can gain a property right in the wildlife
4. If you accidentally kill wildlife, the property still belongs to the government
5. The government is not liable for any damage caused by a wild animal

**S. 8, LAND ACT**

Cannot claim adverse possession against the Crown

**S. 12, LIMITATIONS ACT**

Except as specifically provided by this or any other Act, no right or title in or to land may be acquired by adverse possession

(Note: this Statute was not intended to encourage people to behave wrongfully - by trespassing – but it has that effect in practice – as people attempt to gain title through adverse possession)

**S. 23(3), 23(4), AND 171, LAND TITLE ACT**

Effects of indefeasible title

23(3) Adverse possession does not apply to lands with indefeasible title

23(4) If land has adverse possessor at time of application for indefeasible title, indefeasible title does not apply to that adverse possessor

171 If claiming adverse possession, must comply with Land Title Act

**S. 36, PROPERTY ACT: ENCROACHMENT ON ADJOINING LAND**

(2) If building or fence encroaches on adjoining land, court has the option of 3 remedies:

   a. Easement with compensation
   b. Grant title with compensation
   c. Order removal of encroachment
CASES OF NOTE

POPOV V. HAYASHI

DEFINES POSSESSION AND INTRODUCES “CONSTRUCTIVE POSSESSION” AND PRE-POSSESSORY INTEREST

- **Facts:**
  - Popov initially had Barrie Bonds 73rd home run ball in the mesh of his glove (unsure if it was secure)
  - He lost control when an illegal mob descended upon him
  - Hayashi picked the ball up off the ground and put it in his pocket
  - MLB had possession, after the home run it became intentionally abandoned property
  - Look at Limitations Act
- **Issue:**
  - Who has title of the baseball?
  - Popov sues for Conversion (Wrongful exercise of dominion over the personal property of another)
- **Held:**
  - Both men had equal claims to possession as they had equal and undivided interests, thus the ball must be sold and the money split
- **Ratio:**
  - Definitions of possession
    - 1) Physical control + Intent to control and exclude others
    - 2) Actual power and ability to hold and make use of it + manifest intent to control
  - This analysis must be very contextual (dependent on industry/circumstances)
  - Gray's rule: actor must retain control after incidental contact with people or things
    - Note: in this case, rule was not used as mob was unlawful
  - Both men had equal undivided interest in ball and equal claims to possession
  - **Popov has pre-possessory right since:**
    - obvious intent to control
    - significant but incomplete steps to control
    - effort interrupted by unlawful acts
      - “pre-possessory rights” first recognized in this case
      - Achieved cause of conversion for his half of the ball.
  - **Hayashi has claim to possession since:**
    - obvious intent to control
    - unequivocal domain and control
    - (Note: his claim is valid b/c not part of unlawful mob.)

PIERSON V. POST

DETERMINES POSSESSION IN HUNTING CASES (NEED NOT BE FULL DOMINION)

- **Facts:**
  - Post is pursuing a fox, Pierson intervenes, kills the fox and takes possession
• **Held (Tompkins Majority)**
  
  • Pierson properly has possession

• **Ratio:**
  
  • Person who mortally wounds animal is said to have possession since:
    o Unequivocal intention to appropriate the fox
    o deprived the fox of its liberty
    o brought him within certain control

• **Policy arguments:**
  
  • This method provides certainty and helps to preserve peace and order in society

• **Dissent (Livingston)**
  
  • Possession should go to person who has:
    • Put in the work hunting the animal (labour argument)
      o Doctrine of First Occupancy
      o Locke: ownership as tied to “sweat of hunter’s brow”
    • reasonable prospect of killing it

• **Note: Seal hunting cases**

• **Clift v Kane**
  
  o Majority held Pierson v Post (killing = possession)
  o Dissent favoured industry specific view (putting corpses on ship = possession due to likelihood of losing seal post-killing)

• **Doyle v Bartlett**
  
  o Qualifies possession in Clift v Kane: you need to kill and to be able to recover

• **Moby Dick case**
  
  • (fast fish, you have possession, loose fish, you don’t)

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**KEEFER V. ARILLOTA**

**ESTABLISHES REQUIREMENTS OF GAINING ADVERSE POSSESSION**

• **Facts:**
  
  • A strip of land, which includes a grassy area, a driveway, and a garage are in dispute.
  • Keefer has right-of-way usage of the land
  • Keefer mainly uses land (parking car, picnics in summer), but Arillota uses the land for deliveries and access to upstairs apartment
  • Keefer argues maintenance of strip of land and almost exclusive usage over the years constitutes Adverse possession

• **Issue:**
  
  • Was Keefer in adverse possession?

• **Held:**
  
  • the acts were not sufficient to establish possession in relation to the driveway or the grassy area, but were sufficient to establish possession in relation to the garage

• **Ratio:**
  
  • **3 Requirements of Adverse possession (from Pflug and Pflug v. Collins)**
    o Actual possession for the statutory period
That such possession was with the intention of excluding from possession the owner or persons entitled to possession.

Discontinuance of possession for the statutory period by the owner and all others (Inconsistent use: excluding owner from using the land the way he wanted to use it).

- It was not enough for the adverse possessor to merely exclude the Title Owner, but rather the adverse possessor must do something which interferes or frustrates the Title Owners intended use. Therefore, doesn’t meet requirements b and c.
- Granting right-of-way easement changes factors of adverse possession—hard to claim adverse possession in this case.

**TEIS V. ANCASTER (TOWN)**

**“INCONSISTENT USE” LIMITED: NOT APPLICABLE IN CASES OF MUTUAL MISTAKE**

- **Facts:**
  - Teis family and town mistakenly believe Teis owns property in public park
  - Trial court awarded Teis ownership by adverse possession, but easement for public use on foot and for cars.
  - Town appeals ownership award and Teis cross appeals easement
- **Issue:**
  - Must inconsistent use be shown when title owner and claimant both believe that claimant owns land? (Mutual Mistake)
- **Held:**
  - Both appeals dismissed. Teis has ownership and easement granted to public use of land.
- **Ratio:**
  - Inconsistent use does not apply in the case of mutual mistake
  - **Adverse possession requires**
    1. Actual possession for statutory period
       - open, notorious (ensures adverse possession is discoverable)
       - peaceful,
       - adverse (no permission of title owner)
       - exclusive (discontinued use by title owner)
       - actual, continuous
    2. intent of excluding possession from all other with claim to possession
    3. discontinuance of possession by owner and all others
- Teis fulfilled these requirements

**PYE LTD. V. GRAHAM (ENGLAND)**

**LIMITS SCOPE OF “INCONSISTENT USE”**

- **Facts:**
  - Graham was leasing the land, the lease ran out and he remained in possession for a time beyond the 12 year statutory period
- **Held:**
  - He was granted ownership by House of Lords
- **Ratio:**
• “dispossessed the paper owner by going into ordinary possession of the land for the requisite period without consent of the owner”
• **Inconsistent use**
  o If the squatters use is not inconsistent with owners intended use, may provide some evidence that he was using property until the owner wanted it back, but this is not a determinative factor for adverse possession.
• **Adverse use:**
  • Squatter’s recognition of true owner’s title does not bar him from claiming adverse possession

### SECTION QUESTIONS OF NOTE

• What elements are necessary to constitute possession in law?
  1. physical control
  2. Intent to possess
    • Note these are dependent on industry and context.
• What is conversion, and what function does it serve?
  • The wrongful exercise of dominion over the personal property of another. Protects property rights.
• What are the requisite elements of adverse possession? what must the title holder to before the statutory period expires?
  1. Actual possession for statutory period
    o open, notorious (ensures the adverse possession is discoverable)
    o adverse (no permission of the title owner)
    o exclusive (discontinued use by title owner)
    o peaceful (not by force)
    o actual
    o continuous
  2. Intent of excluding possession from all other with claim to possession
  3. Discontinuance of possession by owner and all others

### ADDITIONAL THINGS TO KNOW

### ADVERSE POSSESSION OF CHATTELS

Different limitation periods of chattels:

• Barberee v. Bilbo (Alberta): Limitation period starts over with each new owner.
• O’Keafe (USA): Tacking: stringing together of limitation periods of each owner.
• Guggenheim Foundation v. Lubell (USA): clock starts when the owner makes a demand for return of chattel
RELATIVE NATURE OF TITLE: FINDERS

SECTION SUMMARY

FINDERS

- Not an area of pressing practical concern
- Possession used to be primary basis of title in land (now changed due to registers)
- Registers for personality and personal property would be unfeasible
- English law identified priority entitlement rather than absolute (like in Roman law)
- Finder has claim – can be suggested it is a reward for bringing it back into social use
- If finder didn’t have title, would encourage trespass on found goods (Donaldson LJ in Parker)
- If finder had no rights, subsequent title would be precarious (nemo dat quod non habet – can’t give what you don’t have)
- “Possession ... is entitled to the same legal protection whether or not it has been obtained lawfully or by theft or by other unlawful means” Costello v. Chief Constable of Derbyshire Constabulary
- Not sure how far will take this (see Bird and Baird)
- Finder has superior title to subsequent claims, but inferior to previous continuing claims
  - Occupier of land or vehicle can argue antecedent constructive possession
  - If imbedded in soil, sort of treated like a fixture so goes to landholder (not completely treated like fixture...otherwise true owner would lose title until severed)
- If mislaid on land generally goes to occupier of land
- If lost on land, goes to finder (hard to distinguish “mislaid” from “lost”)
  - Mislaid: put somewhere and forgotten
  - Lost: fell out of your pocket and not recovered
- Treasure Trove – legislation that treasure goes to state (used to be because of need to use to make coins, now often because goes to museum...reward often paid – Ziff suspects would be divided amongst all those making claims and not just one)

CASES OF NOTE

TRACHUK V. OLINEK [PRIORITY 1]

- Facts:
  - Plaintiff was farmer who leased land around a well site
  - Defendants were lawfully on site digging and found $75,000 that had been buried
  - Claims by defendants’ employer and someone claiming he’d hidden money were dropped
  - Question is who had right between farmer and workers to the money
- Arguments:
  - Farmer – in de facto control of the land. In cases where deliberately placed, priority goes to person in control of land over recoverer.
  - Workers – not in de facto control.
- Held:
Not in de facto control of land. Need intent and ability to control and intent to exclude others.

Deliberately placed items go first to owner of item, second to person in control of land, then to finders – in this case no claim from anyone in control of land (due to above point)

- **Rule:**
  - Finder has title good against the world except those with continuing antecedent claim (if abandoned, no continuing claim)
  - Deliberately placed vs. lost vs. abandoned
  - If deliberately placed, land owner has priority claim over finders (called “recoverer” in this case)
  - If lost, finder had claim over land occupier (unless land occupier intended to exclude from property)
  - Abandonment not addressed in this case
  - Jus tertii: a third person with a better claim (defense that the plaintiff finder cannot have rights because someone who didn’t make a claim would have more rights - has to show that the plaintiff does not have rights at all – i.e. if there’s evidence the plaintiff sold it then they can’t claim it even if the person who bought it isn’t in court. Most applicable if one of the parties is a bailee or agent of the true owner but other party has better claim. Can’t be a vague third party like a hypothetical true owner)

**PARKER V. BRITISH AIRWAYS BOARD**

- **Rights and Obligations of Finder**
  - Finder of a chattel acquires no rights unless (a) it has been abandoned or lost and (b) he takes it into his care and control
  - Limited right if has dishonest intent or was trespassing
  - Doesn’t acquire absolute property right, just rights against all but true owner or those with prior claim
  - Finder’s employer has rights if found while working unless otherwise agreed (doesn’t matter if employer doesn’t make a claim: Trachuk)
  - Finder assumes a responsibility to take reasonable steps to try to return item

- **Rights and Obligation of Occupier**
  - Right over finders in chattels in or attached to the land
  - Right over finders in chattels upon or in but not attached only if manifest intention to exercise control over building and the things upon or in it
  - Has to take reasonable measures to return it
  - Occupier of a chattel (e.g., a ship) is treated as if he were occupier of building

**BIRD V. FORT FRANCES**

- Trespassing child found money on land
- No claim by any other

**BAIRD V. BRITISH COLUMBIA**

- Thief asked for money to be returned
• Not given due to *ex turpi causa non oritur actio*
• Distinguished from *Bird* by degree of criminality or culpable immorality

**PERRY V. GREGORY**

- **Facts:**
  - Two people scanning potato farm with metal detectors
  - Perry got signal and started digging, then asked Gregory to confirm signal
  - Gregory confirmed signal and finished digging to find belt buckle from late 1700s
- **Issue:**
  - Had Perry abandoned the hole?
- **Held:**
  - Perry had not abandoned and was rightful owner

**MILLAS V. B.C.(A.G.)**

- Police officer found $1 million in trash can in public park
- Was awarded money
- His lawyers said to press he should hold on to it for an appropriate period of time (they said 6 years)

**CHARRIER V. BELL**

- **Facts:**
  - Plaintiff was “amateur archaeologist” and obtained permission from who he thought was owner of property to dig
  - Found out after started digging that he wasn’t owner, just caretaker
  - Kept digging
  - Tunica Indians claimed ownership
- **Issue:**
  - Who has better claim?
  - *Charrier*
    - Abandoned so finder is owner
  - *Bell*
    - Not abandoned
- **Held:**
  - Burying goods with bodies does not equal abandonment
- **Rule:**
  - Abandonment = voluntarily leaving with the intention of having it go to the first person taking possession
  - *res derelictae* = things abandoned by owner
  - Factors to determine intention: passage of time, nature of transaction, owner’s conduct, nature and value of property (from Stewart v. Gustafson p.345)
TRANSFER OF TITLE THROUGH DELIVERY: GIFTS

SECTION SUMMARY

- Delivery and consideration is what separates gifts from contracts. A contract can be an exchange of promises. If you eliminate consideration from contracts, you could have a one sided promise, which is essentially a gift without delivery. The division would disappear.
- It is well established in the common law that one-sided promises will not be enforced without delivery. People often make impulsive promises and then change their minds. But after delivery, there is likely reliance on the part of the donee so it is unfair to let the donor take it back.
- Problem: Over-breadth – people can still be impulsive even with delivery, and deliberate intention to give a gift can be undermined by failure to show delivery (like in Bayoff if she hadn’t been the executrix)
- Solution: alternates to actual delivery
  o Constructive delivery = means of accessing and controlling to exclusion of others including donor OR no change in possession (already had it)
  o Symbolic delivery = something else instead of the thing itself
  o These alternates are used when a factual concession seems warranted (often DMC cases)
- Gift can be perfected by deed (under seal)
- Transfer of possession does not need to happen at the same time as expression of intention to donate.
- Constructive delivery sometimes enough.
  o If goods are unwieldy or donor is unable to deliver item (due to illness, for example) something less that actual delivery is okay.
  o Or if goods are delivered by someone acting on behalf of the donor.
- Critical elements:
  1. Whether or not donor retains control of goods
  2. All that can be done to divest donor of goods has been done.
- Gift-giving in co-habitative situations: no special concessionary rule, delivery still necessary
- Physical delivery can be replaced with transfer by deed
- **Gift of land**
  - Some provinces can only be done with registration on title
- **Symbolic delivery**
  - Where goods are heavy or unwieldy – virtually undeliverable physically
  - Delivery symbolic (as opposed to constructive) when a representative of the goods is handed over rather than the means of control.
  - Weak
- **Donatio Mortis Causa**
  - Somewhere between an inter vivos gift and a will
  - Conditional on death
  - “In contemplation of death” can be implied
  - Debated
    o There is a rule against DMC-ing land, but it has been broken once in Canada
    o As long as there is apprehension of death, needn't be mortal peril
    o Danger subjective or objective?
o Must the donor die of that particular peril?
  - Delivery required, although sometimes ‘diluted’ to account for the circumstances (mortal peril)
    - Delivery standards relaxed
    - Transfer of partial control may be acceptable

ACTS OF NOTE

LAND TITLE ACT

S. 20 – UNREGISTERED INSTRUMENT DOES NOT PASS ESTATE

(1) Any instruments not registered in compliance with this Act won’t pass land, an estate, or an interest in land (except as against the person making it)

(2) An instrument referred to in subsection (1) confers on every person who benefits (or people claiming on their behalf) the right:
   (a) to apply to have the instrument registered, and
   (b) in the process of registration to use the names of all parties to the instrument, even if they’ve died or become legally incapacitated.

(3) Subsection (1) does not apply to a lease or agreement for lease for a term up to 3 years if there is actual occupation under the lease or agreement.

S.189 – DEALINGS WITH DUPLICATE INDEFEASIBLE TITLE ON TRANSFER

(1) If land is transferred by someone with a duplicate title – duplicate title needs to be given to registrar for cancellation

(2) If transfer covers whole land – copies marked “cancelled” by registrar and all copies are marked with number of new title.

(3) If the transfer covers
   (a) only a part of the land included in the duplicate indefeasible title, or
   (b) an undivided interest in the land less than the whole interest shown on the duplicate indefeasible title,

the registrar may,
   (c) cancel both and, subject to production of a reference or explanatory plan that the registrar may require, register a new indefeasible title covering the remainder, or
   (d) amend the existing indefeasible title and duplicate indefeasible title, if any, by removing the part or interest covered by the transfer.

(4) A plan required under subsection (3) by the registrar does not require approval under sections 75 and 91.

(5) If one co-owner buys from the other co-owner, registrar will register single title and cancel duplicates.
(6) The registrar may apply subsection (3) if a part of or an interest in the land is to cease being contained in the title.

**CASES OF NOTE**

**J.B. BARAON, “GIFTS, BARGAINS, AND FORM”**

- Discussion on gifts vs. bargains
- Gift is transfer without consideration
- Gifts need formalities to be enforceable

**NOLAN V. NOLAN & ANOR**

- **Facts:**
  - Three paintings supposedly gifted to wife by husband prior to death of wife
  - Wife’s estate went to daughter
  - Husband died later, estate went to others
  - Daughter claiming ownership of paintings (plaintiff)
  - Was there delivery? (not deed or declaration of trust…see below)
- **Held:**
  - Documents in evidence didn’t establish donative intent
  - Mother did take paintings but no evidence that possession was delivered (he possibly didn’t know of or consent to her actions) – no visible, unambiguous act
- **Rule:**
  - Three ways to give gifts: deed, declaration of trust, delivery
  - **Three parts to inter vivos gift:**
    - *intention to give,*
    - *intention to accept,*
    - *delivery* (once all three are in place, it is as binding as a contract)
  - Intention to accept: understanding of transaction and desire to assume title. This is presumed to exist, burden of proof to show rejection of gift.
  - Delivery in common home, has to be visible, unambiguous act of delivery
  - Courts will not complete an imperfect gift. BUT when the donee relies on the promise of a gift to their detriment, they may be able to invoke estoppel. (Judicial discretion to accept indirect perfecting of a gift if it would be unconscionable for the donor to withdraw the gift.)

**RE BAYOFF ESTATE**

- **Facts:**
  - Contents of a safety deposit box
  - Given keys but not proper paperwork to access
  - Donor dies
  - Was gift completed?
- **Held:**
  - **DMC:**
    - Had terminal cancer (impending death)
• Attempted to deliver (parted with control)
• Not conditional on death because expected her to get them right away
• Inter vivos gift
• Was intention: the documents did not amount to “words of gift”. Words of gift are non-essential but can help prove intention. The court concluded that donative intent was NOT proven.
• Was acceptance Presumed to exist
• No delivery while living but since she was executor she was able to perfect gift

• Rule:
  • *Donatio Mortis Causa*
    • Three elements:
      • Impending death from existing peril,
      • Delivery,
      • Gift is conditional on actual death of donor
CHAPTER 5: COMMON LAW ESTATES AND ABORIGINAL TITLE

DEFINITIONS

- **Testator:** A person who has made a will or given a legacy
- **Beneficiary:** A person who derives advantage from something, esp. a trust, will, or life insurance policy
- **Executor:** A person or institution appointed by a testator to carry out the terms of their will
- **Trustee:** An individual person or member of a board given control or powers of administration of property in trust with a legal obligation to administer it solely for the purposes specified
- **Remainderman:** A person who inherits or is entitled to inherit property upon the termination of the estate of the former owner
  - E.g. “To A for life then to B in fee simple”
  - E.g. “to A with power to encroach and then to B”
- **Reversioner:** A person who possesses the reversion to a property or privilege
  - “From G, to A for life” - interest reverts to G when A dies
- **Words of purchase:** Describe intended recipient of property, e.g. “To A”
- **Words of limitation:** Delineate extent of right conferred on A, e.g. “and his/her heirs” or “for life”
- **Intestacy:** The situation of being or dying without a legally valid will
- **Aboriginal Peoples/First Peoples:**
  - Indian, Inuit, Métis
- **Terra Nullius:** Prior to arrival of Europeans, “no man’s land”
- **Indian:** Legally entrenched in the Royal Proclamation
- **First Nations:**
  - 630+ communities across Canada with distinct laws, languages and cultures

CHAPTER SUMMARY

**DOCTRINE OF ESTATES**

- Doctrine associated chiefly with land within Anglo-Canadian system of property rights
- Arose because absolute ownership is not recognized with tenurial holding so need rules to settle the duration of property rights

**KINDS OF ESTATES**
Canadian law recognizes freehold estates, leasehold estates, and copyhold estates. Leasehold estates have not been covered in the course yet and copyhold estates are now obsolete. These notes deal only with the three types of freehold estates described below.
FREEHOLD ESTATE TYPE 1: FEE SIMPLE

WHAT IS FEE SIMPLE?

- Fee simple estate is the closest to absolute ownership in Canadian landholding

RC ELLICKSON – PROPERTY IN LAND: WHY HOLD LAND FOREVER?

- Simplify land-security transactions
- Low transaction cost device for inducing a mortal landowner to conserve natural resources for future generations
  - i.e. owners in fee simple will invest in the conservation of their land because of the increase in value to future owners to whom they can sell
  - Perpetual land ownership makes for better land stewardship

COMMON LAW (OLD APPROACH):

- At common law there was a rule of law with a strict language requirement - meaning that even if it was apparent that a fee simple was intended, the absence of the appropriate language would mean that only a life estate was transferred
- Wording a transfer of fee simple must include words of purchase/receipt (to whom is the property being given?) and words of limitation (what interest in the property is being given?)
- “Magic Words” of transferring Fee Simple: “To A and his/her heirs”
  - “To A”: describes recipient of property
  - “and his/her heirs”: are called “words of limitation” describes the duration of the estate granted (as long as the holder has some person to whom the land can devolve)
- Any other wording in an inter vivos (between the living) property transfer creates only a life interest
- In a testamentary disposition (transfer of property in a will) the magic words rule relaxed
- Fee simple would be found so long as the language was sufficient clear to create a fee simple; otherwise, only a life interest would be created
- Shelley’s Rule (from Wolfe v. Shelley [1581]): **Not used in Canada**
  - A gift “to A for life, remainder to A’s heirs” works to place the fee simple in A, not the life estate that appears to have been given
  - Must show that intent when referring to ‘heirs’ was to refer to line of descent, and not particular people

ACTS OF NOTE

PROPERTY LAW ACT:

- s. 19(1) In transfer of an estate in fee simple, it is sufficient to use the words “in fee simple” without the words “and his heirs”
- s. 19(2) A transfer of land to a person without words of limiting the interest transferred... passes the fee simple or the greatest... interest in the land that the transferor has power to transfer,
unless the transfer expressly provide that a lesser estate or a particular interest is being transferred.

**LAND TITLE ACT S. 186**

- s. 186(5) Subject to subsection (8), if the transfer does not contain express words of limitation, the transfer operates to transfer the freehold estate of the transferor in the land to the transferee in fee simple.
- s. 186(6) Subject to subsection (8), if the transfer contains express words of limitation, the transfer operates to transfer the freehold estate of the transferor in the land to the transferee in accordance with the limitation.
- s. 186(8) Subsections (4) to (7) do not operate to transfer an estate greater than the estate in respect of which the transferor is the registered owner.

**WILLS ACT S. 24**

Unless a contrary intention appears by the will, if real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate that he testator had power to dispose of by will in the real property.

**CASES OF NOTE**

**THOMAS V. MURPHY**

The strict language requirement of the “magic words” which were needed by rule of law to convey fee simple is relaxed in this case - looking at the will as a whole explains the intention and the requirement for words of limitation are considered satisfied by the clear intention to convey fee simple.

- **Facts:**
  - P’s retained D as agent to purchase property
  - Title acquired by P’s derived from a deed given by the residual beneficiaries under a will
  - Grant of property was to grantees, their successors and assigns, in trust with specific power of sale for such price and pursuant to such term as they may in their discretion determine (i.e. it didn’t include the full phrase “grantees, their HEIRS, successors and assigns”)
  - P’s claim against the D in negligence as the deed sold to them was defective. P’s claimed that as the grantees were not given a fee simple, the property bought by the P’s could not have been “marketable property” as reported by the D

- **Issue:**
  - Did the grantees in the trust receive a fee simple interest in the property?

- **Held:**
  - Action dismissed - grantees held the property in fee simple

- **Ratio:**
  - Magic words in granting of property are no longer necessary
  - Requirement of words of limitation satisfied by the clear intention to pass the fee simple interest of the grantors
o Court refers to principle of construction in Wheeler v. Wheeler and Wheeler’s Estate (1979) NB
   ▪ A Principle of Construction: “the instrument will be construed as a whole in order to ascertain the true meaning of its several clauses”

FREEHOLD ESTATE TYPE 2: FEE TAIL

FOR ALL INTENTS AND PURPOSES, THIS NO LONGER EXISTS IN CANADA

HISTORY:

- An estate of inheritance in real property which cannot be sold, devised by will, or otherwise alienated by the owner, but which passes operation of law to the owner's heirs upon his death
  o Passed to the "heirs of the body" of the first taker until the particular line of descent became extinct
  o If line of descent to estate in tail became extinct, land reverted to original grantor or his heirs
- Purpose of fee tail was to establish series of life estates in successive generations of same family; owner of estate in tail could transfer only his present right to posses; attempt to tie up real property in a family
- E.g. Father possessed of estate for life, son possess estate tail = “tenant for life”, “tenant in tail”
  o If son succeeded in inheritance while still holding tail, he would be owner in fee simple
  o So instead, he agrees to settlement in which his future interest cut down to a life tenancy and the inheritance entailed upon his own future son

ACTS OF NOTE

S. 10, PROPERTY LAW ACT:

(1) An estate in fee simple must not be changed into a limited fee or fee tail, but the land, whatever form of words is used in an instrument, is and remains an estate in fee simple in the owner.
(2) A limitation which, before June 1, 1921, would have created an estate tail transfers the fee simple or the greatest estate that the transferor had in the land.

FREEHOLD ESTATE TYPE 3: LIFE ESTATE

- Duration of a life estate is determined by reference to continued existence of a life or lives
- Life estate can arise by private conveyance (ie by inter vivos transfer, by testamentary disposition) and also by operation of statute (ie historically by dower, curtesy and in contemporary times by homestead legislation)
- **Doctrine of Repugnancy**: when a testator tries to accomplish two things which cannot logically stand one with the other (Taylor, p380, Walker p375)
LIFE ESTATE ARISING BY PRIVATE CONVEYANCE

- A gift of land “to A for life” is an estate pur sa vie: “For life”. A holds estate until their death
- A gift of land “to A, B, and C for the life of A” is an estate pur autre vie: “For the life of another”. B and C hold estate until A’s death
- The transfer of a life estate pur sa vie transforms it into one pur autre vie, with the original life tenant remaining as the measuring life
- Common law: Rules of first occupancy governed ownership of this residual portion
- Modern wills legislation now provides for property to devolve along with rest of A’s estate

CASES OF NOTE

- Main question: Is beneficiary being given a fee simple or a life estate, and why should it be interpreted this way?
- Judge’s goal: Give proper effect to the intention of testator (Christensen)
- Wording important: “use” versus “dispose” (Taylor, Townshend); “in lifetime” versus “no longer need” (Christensen)

RE WALKER, 1924 (ONCA)

*Use of words “I give and devise...” combined with directions to deal with remainder = Intention of absolute interest combined with intention for gift over = trying to do that which is impossible - so look to see which is the dominant intention - in this case the gift over must fail because it is repugnant to the dominant intention*

- **Facts:**
  - Man's will gave real and personal property to wife - "I give and devise unto my said wife all my real and personal property...", and stipulated that should “any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided as follows...”
  - When widow died, the people referred to in the husband's will claimed that the remaining portion of husband’s estate must be passed to them instead of go to the people that were set out in the widow's will
  - The people claiming under the widow's will contend that under the provision of husband’s will the widow took all of it absolutely
- **Issue:**
  - Did the widow get fee simple or life estate from her husband's will?
- **Held:**
  - Fee simple for the widow
- **Judgment:**
  - When a testator gives property to one, intending him to have all the rights of ownership and adds a gift over at the death of that person, he is attempting to do the impossible.
  - Cannot confer absolute ownership then resume ownership or control destiny of thing given - by conveyance this is impossible
  - Doctrine of repugnancy: Court must determine which part of the testamentary intention predominates, and reject subordinate intention as being repugnant to dominant one
  - **Two classes of cases plus one “exception* to the rule”**
(1) Gift to person first named prevails and gift over fails as repugnant
(2) First named takes life estate only and gift over prevails
(3) *** First named takes life-estate with power of sale (determined by construction)
   • In this case, there is an attempt to deal with that which remains undisposed of by the widow in a manner repugnant to the gift to her; gift to her must prevail

RE TAYLOR, 1982

Use of words “have and use during her lifetime” = life interest with power to encroach - is not an absolute interest - and if combined with gift over does not mean that the gift over will fail - overall intention is important. In this case, overall intention leads to life estate with power to encroach.

• Facts:
  • Man’s will gives wife his estate “to have and use during her lifetime” and stipulates any remainder on her death must be divided between daughters
  • Wife used portions of his estate until she died
  • Wife's will says to establish two funds, one to charity and the other to go to five people
• Issue:
  • Did the wife get fee simple or only a life interest from the husband? if she got fee simple then the remainder goes according to her will. If just a life estate, then remainder goes according to husband’s will
• Judgment:
  • Distinguishes the Walker case on the basis that in this case the deceased used clear words indicating a life interest whereas in Walker, the words used stipulated both an intention to give an absolute interest and an intention to give a limited interest so doctrine of repugnancy kicked in to require that the court give effect to the dominant intention
  • Language used evinces an intention on part of testator to give to his wife a life interest coupled with a power to encroach on capital for her own proper maintenance
  • Because wife could technically use capital entirely up, it amounts to same result as absolute interest; however, says judge, just b/c same result does not mean the two interests are identical
  • Judge rejects the argument that the right to encroach on capital without limitation amounts to an absolute interest - what matters is the intention
  • "During her lifetime" = words operate as limitation
  • Any significance a right to encroach on capital may have as evidencing an intention to give an absolute interest is displaced by the clear words of the testator
  • = life estate with power to encroach
  • *Life interest coupled with a power of disposition is possible, depends on court’s construction of will
• Distinguishes the case of Townshend v MacInnis, 1973 (where the court found that a life interest with the power to dispose = absolute interest) on the basis that in that case there was the power to dispose during the life interest but in this case the wife had the power to encroach for her own maintenance with no power to divest herself of the body of the estate during the time she had it
  • Power to encroach vs. power to dispose; even though may end up disposing it, it isn’t the same power
CHRISTENSEN V. MARTINI ESTATE, 1999

“For her use” combined with “when she no longer needs” = life estate without power of encroachment with a gift over - the court should endeavour to give effect to testator’s intentions. Strict transfer language not required.

• Facts:
  o Man has wife (Martini) and is close with sister neighbours (Christensens)
  o All live in duplex owned my man and his ex-wife
  o Man died. Will specified: "I give to my wife ... [his half of the duplex] for her use. When she no longer needs [it] that she give said property to [the Christensens]"

• Judgement:
  o Preferable interpretation is that testator gave wife a life estate without power of encroachment in the undivided half-interest he owned at death
  o "The testator’s intention is collected from a consideration of the whole will taken in connection with any evidence property admissible, and the meaning of the will and of every part of it is determined according to that intention."
  o In this case it is apparent testator intended to benefit both wife and Christensens
  o Absence of words "during her lifetime" does not necessarily mean that the testator did not intend to grant his wife a life estate; "no longer need" implies upon her death, but leaves it up to her to decide
    ▪ = life estate pur sa vie to widow

POWERS V. POWERS ESTATE, 1999

Where there is a life tenant (who gets income from the estate) and a future fee simple owner (who will eventually get the estate and the capital), who should bear the cost of repairs, insurance, heat, etc.?

• Thoughts:
  o Capital vs. income - which should be used to pay for certain things?
  o Capital is investment; income is interest generated from that investment (e.g. Mutual funds)
  o So, different people may pay, depending on what source is used to pay for something:
    o Income: the person with the life interest has income reduced by equivalent amount
    o Capital: the person with the eventual fee simple will have the Estate capital reduced by that amount

• Facts:
  o The will granted life estate to mother, then life estate to brother, then fee simple to last brother
  o This was an application for a declaratory order [presumably by the brother with the life interest] respecting responsibility for certain expenses related to a property
  o The life interest gave the brother the use of the house and the income from the investments, less any amounts which were to be paid by him
  o The executor was given power to encroach on the assets of the estate for the limited purpose of maintaining and providing services to the property but not for the maintenance of the life tenant
o Generally - life tenant is responsible for paying annual taxes and utilities out of the income of the property
o Life tenant says the will requires certain things be paid out of the capital of the estate (this means that its coming out of the pocket of the person who ends up with the estate in fee simple rather than from the income of the life tenant)

• Issue:
  o How are certain things to be paid - out of income or capital?

• Judgment:
  o Heating
    ▪ Paid out of income
  o Repairs
    ▪ Executor had difficulty being impartial because precedent says
    ▪ Dwyer Re 1930 - recurrent or periodical repairs to be paid from income
    ▪ Woods Re 1926 - restoration of heating apparatus was to be paid by capital
    ▪ Court decided that regular repairs should be paid out of income but things like deck repair, replacing a fence, a retaining wall replacement, felling of tree endangering property should come out of capital
  o Insurance:
    ▪ American view: Insurance premiums are like repairs, taxes, and mortgage interest, and should be borne by the life tenant
    ▪ Canadian: Two views; dominant is that there is no obligation on the life tenant to insure and so premiums are capital outlay; other view is that premiums should be apportioned upon equitable principles as between the life tenant and the reversioner
    ▪ Conclusion: S. 18 of the Trustee Act provides the trustee with power to do what he or she would've done if directed by the testator to insure, that is, pay the premiums from income
    ▪ Since the Act, the law in Canada has developed to require a trustee to insure against loss by fire; for fire insurance, premiums should be paid from income
    ▪ Other types of insurance, the purpose becomes relevant =
      ▪ If for benefit of remainderman, cost should be borne by capital
      ▪ If for regular maintenance and repair, is responsibility of life tenant
  o Rights of Life Tenant – 1: To use, 2: To transfer (pur autre vie)

“The balancing of rights of use and occupation between a life tenant and subsequent owners can be understood by introducing an analogous relationship – that which exists between income and capital beneficiaries. Assume that A dies leaving a large fund of money (the capital) on trust, with instructions that the interest derived from the investment of the trust funds is to be accumulated and paid annually to B (the surviving spouse) for life. Assume further that the will provides that the capital is to be divided among the surviving children on the death of the widow. The creaming off of the income for the widow should leave the capital undiminished. The trustee must walk a tightrope, attempting to optimize the income for the widow, while not jeopardizing the capital through improvident investments. This balancing act is performed in substantially the same way when settled land is involved. The copious rules that apply here can be understood if one regards the life tenant as akin to an income beneficiary and the subsequent owners as being entitled, ultimately, to the capital (i.e., the land in fee simple).

DOCTRINE OF WASTE

Preserves integrity of the life estate and prevents the tragedy of the commons; balance interests of those in present possession against interests of those who will or may become entitled to possession in the future
• Waste = act that causes injury, or does lasting damage, to the land
  o Ameliorating: Waste which results in benefit and not an injury, improves the inheritance
  o Voluntary: Committing positive, wrongful action that diminishes value of land
  o Permissive: Damage resulting from failure to preserve or manage the estate
  o Equitable: Severe and malicious destruction; where waste amounts to acts of wanton destruction, and tenant for life is exonerated by terms of grant, tenant may still be restrained in equity by injunction
• Onus is on plaintiff to prove the damage
• Damages
  o Amount to decrease in value of the reversion, less an allowance for immediate payment
  o Sometimes exemplary damages
  o Alternatively or additionally, an injunction
    ▪ Not if waste is minor and not likely to be repeated

**LIFE ESTATES ARISING BY OPERATION OF LAW**

**W. RENKE, “HOMESTEAD LEGISLATION IN THE FOUR WESTERN PROVINCES”**

• At common law there are two situations where rights could arise regardless of the owner’s testamentary wishes through the use of two kinds of estates (curtesy and dower)
• Was a useful instrument of social policy in early English law
• A similar concept is found in contemporary western Canadian homestead legislation.
• In 1925 the common law dower and curtesy rules were eliminated in BC by the Administration Act Amendment Act, 1925
• The main reason for the elimination of the dower and curtesy rules in the western provinces was their inconsistency with principles of the emerging land titles systems because dower and curtesy impaired ability to transfer land and provided for interests that were not disclosed on land title certificates
• The elimination of these interests facilitated commerce but imperiled wives and farm families
• The economic tragedies falling on farm women motivated some of the first feminist activities in Canada

**DOWER**

• Designed to provide shelter for widows
• Conferred a life interest to a widow in the freehold lands of her deceased husband
• This conferral took precedence over a testamentary transfer
• Over time the quantum of entitlement evolved into a norm of an allotment of one-third of the deceased husband’s lands
• Husband could avoid dower by inter vivos transfer by deed so was regarded an increasingly problematic
• Owing to theoretical and practical deficiencies, common law dower is not a creature of the past
• Common law dower was abolished in BC in 1925
• In western Canada, a dower-like interest has been created through homestead legislation

**CURTESY**
This is the widower’s interest in the lands of his deceased wife.
Called curtesy because of reference to the “gracious rule” which created it.
There is controversy surrounding the original purpose of curtesy.
The right of curtesy conferred upon the widower a life estate in all of the realty of the deceased wife which remained undisposed at the date of death of the wife as long as “heritable issue [ie a child] had been born and heard to cry within the four walls during the marriage.
Curtesy has been abolished in Canada and the family property and support laws that are now in place are formally gender neutral.

**Homestead Legislation**

- Homestead legislation arose in western Canada in the early 20th century.
- Arose to protect the matrimonial home from seizure by creditors of the husband.
- Canadian statutes drew heavily from developments in the US but there is also faint resemblance with common law dower.
- Typically what it did was:
  - Exempt the family home from seizure by creditors.
  - Confer life estate on the spouse to prevent dispositions of the home.
  - Confer life estate on the spouse after the death of the owner.
- Generally speaking, these elements remain as part of the law in the four western provinces.
- Modern laws in each province confer a spectrum of rights on the non-owning spouse including sanctions and rights of action.

**Estates in Personalty**

- B. Ziff, *Principles of Property Law*
- Doctrine of estates is inapplicable to personalty because chattels can be owned outright.
- Qualifications
  - Bailment: Granting of temporary interest in chattel (e.g. Borrow a book from a library)= estate-like interest.
  - Equity will recognize time-limited gifts of personalty contained in a trust.
  - Accepted that the dividing up of the legal title of personalty under a will is valid
    - E.g. Chattel "to A for life, then to B absolutely" --> future interest in B.
    - Three theories of why this is allowed
      - Title vests immediately to B with usufructuary right in A for life.
      - A becomes absolute owner, with executory gift over B.
      - A takes the property subject to a trust in favour of B, with either executor or life tenant serving as trustee.
  - Sometimes estate interests in personalty introduced via statute.
- Despite these qualifications, estates cannot be created over consumable items that do not form part of stock in trade.
- What if owner of personalty dies with no heirs?
  - Property becomes vested in the Crown as *bona vacantia* (ownerless goods).
  - In jurisdictions where all land is held by Crown anyway (and so principle of escheat of land), there’s really no distinction between realty and personalty concerning ultimate fate of heirless property.
ABORIGINAL PROPERTY RIGHTS

ISSUES

- Interpretation and enforceability of existing aboriginal treaty rights and negotiation of new ones.
- Rights on federally created reserve lands.
- Misappropriation of aboriginal cultural property, tangible and intangible.
- Constitutional protection of aboriginal rights.
- Aboriginal self-governance.
- Land rights.
- Section 35
  - Recognises and affirms the rights of “the aboriginal peoples of Canada”.
- Indian:
  - Determines a person's status and entitlement to particular rights under the legislation.

HISTORY

- **House of Lords 1919, Lord Sumner:**
  - Some tribes are so low on the scale of social organization that they are not reconciled with the institutions or legal ideas of civilized society.
  - Some indigenous peoples' legal conceptions, though differently developed, are hardly less precise than our own.
- **U.S. Supreme Court, Johnson v. M'Intosh:**
  - A European nation that had “discovered” territory in America acquired sovereignty and title to the land.
  - They made ample compensation to inhabitants by bestowing on them civilization and Christianity.
  - The original inhabitants were the rightful occupants, with a legal and just claim to retain possession of it, but their rights to complete sovereignty were necessarily diminished and their power to dispose of the soil at will to whomever they please we denied.
- **High Court of Australia, Mabo's Case, Justice Brennan:**
  - There was not an “absence of law” and they were not “barbarians”.
  - Terra Nullius: an unjust and discriminatory doctrine of that kind can no longer be accepted. Indigenous are not too low in social organization to be acknowledged as possessing rights and interests in land.
- **Royal Proclamation, 1763:**
  - Aboriginal peoples being taken advantage of by European traders and settlers, need protection.
  - Crown losing control over relationship between colonizers and Aboriginal peoples.
    - Solution: nobody other than Crown can validly acquire lands from Aboriginal peoples.
    - Aboriginal peoples can negotiate over land rights only with Crown
  - Crown fiduciary obligation
  - Formal recognition of existence of Aboriginal title
- **Jean Chrétien, White Paper, 1969:**
  - Proposal to abolish provision of Indian Act granting special status.
  - Attempt to assimilate aboriginal peoples in Canadian population.
Indian Residential Schools
- Run by government in cooperation with churches.
- “Cultural genocide” to emancipate Indian children from their language, culture, and identity.
- Children forcibly removed from homes, dismantling aboriginal communities and dispossessioning them from their lands.

St. Catherine’s Milling & Lumber Co. v. Ontario
- Interpreted Royal Proclamation to give merely personal and usufructuary right.
- Non-proprietary right of occupation.

Calder v. British Columbia
- Aboriginal land rights did not depend on Royal Proclamation, they predated it.

R. v. Guerin
- Aboriginal title is sui generis (of its own kind).
- Inalienable except to the Crown.
- Surrender of land to Crown attracts fiduciary duties.

R. v. Sparrow

R. v. Van der Peet and R. v. Gladstone
- Elaborated common law framework for proving existence of aboriginal right and basis upon which infringement could be justifiable.

ABORIGINAL TITLE AT COMMON LAW

DELGAMUUKW V. BRITISH COLUMBIA, 1997 SCC

Issues:
1. What is the specific content of aboriginal title?
2. What’s the test for proof of title?
3. Does aboriginal title mandate a modified approach to the test of justification?
4. Did the province have jurisdiction to extinguish aboriginal title?

Reasoning:
1. What is the specific content of aboriginal title?
   - Aboriginal title is a right in land – more than a right to engage in specific activities.
   - Right to use the land for various activities, not all of which need be aspects of practices, customs and traditions, which are integral to the distinctive cultures of aboriginal societies.
   - Subject to Limits – “inherent limit”
     - Land must not be used in way irreconcilable with the nature of the attachment to the land, which forms the basis of the particular group’s aboriginal title.
     - The inherent limit differs for different groups – because each group may have their own historical uses of the land.
       - Prof’s note: - This inherent limit is the first way in which aboriginal title is distinct from fee simple.
     - Another limiting feature: inalienability.
   - Aboriginal title at common law – general features
Draws on both common law and aboriginal perspectives – this is why it's sui generis.

Source: arises from prior occupation in two ways.
- Physical fact of occupation – derives from common law principle that occupation is proof of possession. Aboriginal title is sui generis because it arises from possession before British assertion of sovereignty. This is the second way aboriginal title is distinct from fee simple.
- Relationship between common law and pre-existing systems of aboriginal law.

Communal land-holding (another distinction from fee simple)

Content of aboriginal title
- Can be summarized in two propositions:
  - Aboriginal title encompasses the right to exclusive use and occupation of the land. Can be used for all kinds of things, which need not be related to practices integral to distinctive aboriginal cultures.
  - Uses of the land does not include those which are irreconcilable with the nature of the group's attachment to the land.
    - Eg. the group who has claimed land on the basis of being hunters cannot strip mine it.
    - The nature of the group’s ‘special bond’ with the land cannot be destroyed by the use.
- Inalienability of aboriginal title: alienating the land would terminate the group's special bond with it, and therefore ends their entitlement.
- Similarity between inherent limit and doctrine of equitable waste.
- If aboriginal peoples wish to use their land in ways that aboriginal title does not permit, they can surrender those lands to the government (for money) and convert them into non-title lands to do so.

S. 35(1) as a constitutionalisation of existing common-law aboriginal rights
- Existence at common law is sufficient but not necessary for a right to be recognized and affirmed at s. 35(1)
- Relationship between s. 35(1) aboriginal rights and aboriginal title: aboriginal title is one manifestation of the broader-based conception of aboriginal rights.
- Aboriginal title confers more than the right to engage in site-specific activities – aboriginal title confers the right to land itself.
- Side-note on nomadic groups: may not be able to make out title, but can make out site-specific rights.

2. What's the test for proof of title?

Land must have been occupied prior to sovereignty
- Aboriginal title crystallized when sovereignty was asserted
- Occupation is sufficient to ground aboriginal title.
- Use of both aboriginal perspective and common law
- Prof's Note: Sovereignty = 1846 (as a start date).

Present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation
- Unbroken chain of occupation unnecessary – merely "substantial maintenance of the connection"
- Prof's Note: Through actual physical occupation (dwellings, village sites, enclosures of land) or through presence of aboriginal law
private law

§ At sovereignty, that occupation must have been exclusive
• Because right to title is exclusive, it must flow from exclusive possession
• Use of both common law and aboriginal perspectives
• Groups can have joint title, as long as it is exclusive of all others.
• Also, if exclusivity cannot be established, the group can establish some claim short of title – rights tied to lands.
• Class notes: presence of aboriginal law in a community can help prove exlusivity and therefore title. For example, the presence of things like - trespass laws, granting of permissions for use/access, temporary residences, treaties for land use – help establish control over the land and therefore title.

3. Does aboriginal title mandate a modified approach to the test of justification?
• Aboriginal title is not absolute! Rights may be infringed by federal or provincial government.
• Prof’s Note: Crown suggests that just because a fiduciary relationship exists between the crown and the aboriginal people doesn’t mean aboriginal rights will be given priority
• Two part test of justification:
  • Compelling and substantial purpose
  • Assessment of whether the infringement is consistent with the special fiduciary relationship between the crown and aboriginal people
• Nature of infringement affects degree of scrutiny required by infringing party.
• Duty to consult
• Duty to compensate
• Duty to take aboriginal rights into consideration
• Justifications?
  • Development of agriculture, mining, hydroelectric power, general economic development of the interior, protection of endangered species or the environment, building of infrastructure, or the settlement of foreign populations.

• 4. Did the province have the power to extinguish these rights?
• A provincial law of general application cannot function to extinguish aboriginal title.

Case questions/notes

1. In what way does sui generis differ from fee simple?
   • Inherent limit: range of uses is subject to limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the Aboriginal title
   • Understood by reference to both common law and aboriginal perspectives
   • Source: occupation of land before the assertion of British sovereignty (fee simple arises after)
   • Communal: cannot be held by individuals. Collective right to land held by all members of Aboriginal nation. Decisions with respect to land made by the community.
   • Inalienable except to Crown

2. Is it morally compelling to argue that indigenous peoples should have property rights on principles of first occupancy?
Harris: turfing someone off land is morally wrong only because it constitutes assault, not because it constitutes theft. Right to be free of violent assault, but not property interest in the land they occupy.

In some cases, removing indigenous peoples from their land may be an assault on the community itself. If the indigenous community is integrally tied to the land, first occupancy can give right to natural property right.

Does Harris’ argument make sense?

- Opinion answer

3. **Lamer makes an analogy between Aboriginal title’s inherent limit and ancient doctrine of equitable waste. Is this analogy apt?**

- Inherent limit: range of uses is subject to limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the Aboriginal title.

- Equitable waste: waste that a life tenant has a right to commit at common law but is restrained by court of equity. A life tenant who is granted an estate and can’t be sued for waste, may not commit acts of flagrant destruction inconsistent with fruitful use of the land.

- Similar framework. Key issue is whether you think the “nature of the attachment to the land which forms the basis of the Aboriginal title” is akin to “fruitful use of land”.

- Opinion answer.

4. **In Delgamuukw, inherent limit is introduced. What is the legal effect of irreconcilable use?**

- Occupancy is determined by reference to activities that have taken place on the land and the uses to which the particular group has put the land. Relationship of Aboriginal community with its land should not be prevented from continuing into the future.

- Reinforces the conclusion that Aboriginal title is limited. If Aboriginals want to use their lands in a way that Aboriginal title does not permit, they must surrender those lands to the Crown and convert them into non-title lands to do so.

5. **Outline the test for recognition of Aboriginal rights other than rights to Aboriginal title. Does it make sense to have different criteria? Is a site-specific Aboriginal right a sui generis interest in land?**

- Van der Peet Test:
  - Take into account perspectives of Aboriginal people’s themselves
  - Identify nature of claim
  - Must be of central significance to the Aboriginal society to by an integral practice, custom or tradition
  - Practice, custom or tradition must have continuity with practices, customs or traditions that existed prior to contact
  - Approach rules of evidence in light of evidentiary difficulties inherent in adjudicating Aboriginal claims
  - Must be adjudicated on specific, rather than general basis
  - Must be of independent significance to the aboriginal culture in which it exists
  - Must be distinctive
  - Influence of European culture is only relevant to demonstrate that the practice, custom or tradition is only integral because of that influence
  - Take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples

- Site-specific: right to exercise of harvesting or other rights intimately related to a specific piece of land, where no claim is made to the land itself

- Aboriginal title: confers the right to title to the land itself
6. **Two means of extinguishing Aboriginal title:** 1) surrender by Aboriginal nation (often by treaty, often converting to reserve lands governed by the Indian Act. 2) unilateral state action that manifests “clear and plain intention” to extinguish title. But, “the intent need not be express and therefore aboriginal rights may also be extinguished implicitly.”
   - *Delgamuukw* – distinguish between state action that infringes an Aboriginal right, and action that extinguishes Aboriginal right. Provincial government can’t extinguish but both provincial and federal can infringe.
   - *Van der Peet* – Aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out in Sparrow.
   - Does this mean the federal government is no longer constitutionally competent to expropriate Aboriginal title lands? Is distinction between infringement and extinguishment stable? What does general law of takings suggest?
     - The Crown can no longer extinguish existing aboriginal rights, but may regulate or infringe upon them using Sparrow test. But extinguished before 1982 will not be revived and protected
     - Sparrow test for justifying infringement:
       - Infringement serves as “valid legislative objective” like conservation of natural resources,
       - As little infringement as possible in order to effect the desired result
       - Fair compensation provided
       - Aboriginal groups consulted, or at least informed
     - Law of Takings: the power to take private property for public use by a state, municipality, or private person or corporation authorized to exercise functions of public character, following the payment of just compensation to the owner of that property

7. **Tee-Hit-Ton Indians v. U.S.** – American Indians have no property rights in their lands, merely non-proprietary rights of occupation. Expropriation or de facto takings of interest in land are still not subject to due process or compensation under the 5th Amendment. How does this compare to Canada s. 35 of Constitution? How does this compare to law of expropriation in Canada?
   - Canada: The Crown can no longer extinguish existing aboriginal rights, but may regulate or infringe upon them using Sparrow test. But extinguished before 1982 will not be revived and protected.
   - Less judicial attention to appropriate balance between the public regulation of private property in Canada than in the U.S. Courts defer the balance of private rights and public interests to the legislatures

8. **1839: Chippewas purported to sell lands to C.**
   - Crown was advised of negotiations and agreement for sale was approved by order in council
   - 1853: title to lands passed
   - letters patent for the lands were issued to C by colonial governor
   - sale was not a surrender, but order in council was consistent with idea that there would be formal surrendering
   - letters patent were issued under mistaken belief that valid surrender occurred
   - 150 years later: Band disputed title to patented lands
   - property had been sold and resold on numerous occasions by private owners unaware of irregularities of initial acquisition from Chippewas
   - Can Band reclaim title?
s. 109 – Crown’s constitutional interest is subject to the Indian Constitutional interest so long as the Indian interest has not been sold to the Crown by valid treaty.
• Aboriginal title may be transferred or surrendered only to the Crown. Such lands must be surrendered and converted into non-title lands if Aboriginal peoples wish to use them in a manner incompatible with their title
• Absent valid extinguishment or surrender, the Aboriginal peoples have Aboriginal title to the lands they exclusively occupied at time of assertion of Crown sovereignty

ELEVATOR ETIQUETTE, HAMAR FOSTER

• **Model of thinking: law as being in different stages: helps cross legal orders**
  1. People don’t think about the intersection between colonial powers and the indigenous peoples – no questioning – settler perspective only
  2. People want to learn more – what does colonialism look like from an indigenous perspective? How does indigenous law function?
  3. Complexity emerges, lenses available
• We’re still in step 1. Means there is no traction for arguments about Aboriginal law. Structures and functions of law remain invisible.
• People don’t think about where they are in this framework.

BEYOND THE INDIAN ACT: RESTORING ABORIGINAL PROPERTY RIGHTS

• **Defects exist at two levels:**
  o With a few exceptions created by recent realties, First Nations do not own their lands.
  o Federal Crown has legislative jurisdiction over and manages these reserves for the use and benefit of their residents.
  o Most reserves are at least partially subdivided through some combination of certificates of possession and leases (both in the *Indian Act*), as well as customary landholdings (not mentioned in the act).
  o Solution proposed is that First Nations should possess the underlying or reversionary title, which is now in most cases held by the province.
  o First Nations that want to go down the path of reversionary title and fee-simple ownership should be emancipated from the *Indian Act* and allowed, but not forced, to do so.

R. V. BERNARD; R. V. MARSHALL

*Court narrowed the test from R v Marshall for determining the extent of constitutional protection upon aboriginal practices. Court held that there was no right to commercial logging granted in the "Peace and Friendship treaties of 1760", the same set of treaties were the right to commercial fishing was granted in the R v Marshall decision.*

• **Background:**
  o This decision considers two separate cases. IN the first one Marshall and 34 other Mi'kmaq were charged with cutting down timber on NS Crown land without a permit. In the second case, Bernard (also a Mi'kmaq) was charged with possession of logs stolen from a rural NB sawmill that was cut from Crown lands.
In both cases all of those accused argued that their status as Indian gave them the right to log on Crown land for commercial purposes as granted by the treaties of Peace and Friendship.

At trial, the judges convicted all of the accused. At the provincial courts of appeal, convictions were overturned.

**Opinion of the Court:**

- McLachlin, writing for majority, held that there was no right to logging under the treaties. From the evidence she found that it did not support the conclusion that logging formed the basis of the Mikmaq’s traditional culture and identity. The majority restored the convictions at trial.

**HAIDA NATION V. BC (MINISTER OF FORESTS)**

*Crown duty to consult Aboriginal groups prior to exploiting lands to which they may have claims.*

**Background:**

- 1961 BC government issues a Tree Farm Licence over an area of land to which the Haida Nation claimed title. Title had not yet been recognised at law. Haida Nation also claimed an Aboriginal right to harvest red cedar in that area.
- In 81, 95, 00, the Minister replaced TFL 39, in 99 the Minister authorised a transfer to Weyerhauser.
- These actions were performed unilaterally, without consent or consultation with the Haida Nation.
- Haida Nation brought a suit, requesting that the replacement and transfer be set aside.
- Chambers judge found that the Crown was under a moral - but not legal - duty to negotiate with the Haida.
- BCCA reversed this decision, deciding that both the Crown and Weyerhauser Co are under legal obligations to consult with Aboriginal groups whose interests may be affected.

**Judgment of the Court:**

- McLachlin (unanimous) found that the Crown has a "duty to consult with Aboriginal peoples and accommodate their interests". This duty is grounded in the honour of the Crown, and applies even where title has not been proven. The scope of this duty will vary with the circumstances; the duty will escalate proportionately to the strength of the claim for a right or title and the seriousness of the potential effect upon the claimed right or title. However, regardless of what the scope of the duty is determined to be, consultation must always be meaningful.

- Where there is a strong prima facie case for the claim and the adverse effects of the government's proposed actions impact it in a significant (and adverse) way, the government may be required to accommodate. This may require taking steps to avoid irreparable harm or minimize the effects of the infringement.

- Both sides are required to act in good faith throughout the process. The Crown must intend to substantially address the concerns of the Aboriginal group through meaningful consultation, and the Aboriginal group must not attempt to frustrate that effort or take unreasonable positions to thwart it.

- On the facts of the case, the Court found that the Haida’s claims of title and an Aboriginal right were strong, and that the government’s actions could have a serious impact on the
claimed right and title. Accordingly, the Crown had a duty to consult the Haida and likely had a duty to accommodate their interests.

- The Crown’s duty of good-faith consultation does not extend to third parties, and cannot be delegated to them by the Crown. This is not to say that third parties cannot be liable to Aboriginal groups in negligence, or for dealing with them dishonestly. However, it does mean that the legal obligation of consultation and accommodation is shouldered exclusively by the Crown.
- Accordingly, the Crown’s appeal was dismissed and Weyerhauser Co’s appeal was allowed.

**CASE QUESTIONS/NOTES**

1. The *Indian Act* provides communal rights to Aboriginals on reserved land. This form of communal rights is consistent with Aboriginal title. Furthermore, in both entitlements under the *Indian Act* and lands under Aboriginal title, the title is inalienable (*Indian Act provides for within band transfers*), except to the Crown.

   - On a broader scope, the *Indian Act* provides a structured framework around which the government can determine the rights and extent of those rights of Aboriginals living on reserve lands. Many decisions and agreements that can occur freely between Aboriginals on Aboriginal title land are directly controlled at the discretion of the Minister on reserve lands. Aboriginal title also protects as of yet undetermined Aboriginal rights from being undermined through the honour of the Crown, which imposes a duty of consultation and possible accommodation on the government.

   - Considering this hierarchy of self-determination, fee simple stands at the highest amount of freedom. However, it should be noted that in Canada property is not a constitutionally protected right (hence our expropriation laws: see *Mariner*). Aboriginal title falls directly under s. 35; therefore once determined to be a right under Aboriginal title it is firmly protected. The problem is establishing the right itself.

   - Note: if there is any question on the exam regarding Aboriginal right to self-government, it may be useful to quickly contrast the *Indian Act* to Aboriginal title. As it stands now, Aboriginal title provides the springboard from where self-determination and self-government will arise via negotiations backed by litigation. It may be argued that being outside of the *Indian Act* could provide greater flexibility for recognizing the interests of Aboriginals.

2. Many First Nations have a system of *matrilineality*, which traces descent through the mother and maternal ancestors. In this system, under a *matriline*, inheritance of property/possessions can be flow through the mother. A basic example of differing inheritance would be for surnames (instead of father, flows through mother).

   - In contrast to this, the *Indian Act* imposes a *patrilineal* framework. Many of these inconsistencies have been removed by amending the Indian Act. Presently, the family framework under Canadian law is more or less superimposed on Aboriginals within the scope of the *Indian Act*. Wills and the rules of dying intestate are all borrowed from laws normally governing provinces.

   - Section 48(8) cuts off inheritance to a next-of-kin after someone’s brother’s or sister’s children, with interest in land going to the Crown if the nearest of kin is more remote than a brother or sister. Section 48(8) also provides that the interest shall vest in Her Majesty for the benefit of the band. Ultimately, as is the general theme underlying the
Indian Act, all discretion to the benefit of the Band is at the discretion of Crown. This overriding discretion of the Crown and the Minister creates the largest difference between Aboriginal title and fee simples.

RIO TINTO ALCAN INC. V. CARRIER SEKANI TRIBAL COUNCIL

- The SCC elaborated further on the analytical framework to assess the duty to consult. It held that the test from Haida Nation can be broken down into three elements:
  1. The Crown’s knowledge, actual or constructive, of a potential Aboriginal claim or right,
  2. Contemplated Crown conduct; and
  3. The potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

“FIRST NATIONS WANT PROPERTY RIGHTS BUT ON OUR OWN TERMS”, G&M

- As a result of our nations’ governance-rebuilding work, there are already many different types of land-tenure systems on First Nation lands; systems that support property rights and, to use the language of economist Hernando de Soto, “unlock the capital” of First Nation lands.
- Land tenure systems designed to:
  - Ensure community and collective rights,
  - Ensure primary economic gain from capital from land goes to aboriginal citizens not third parties.
- First Nations Property Ownership Act proposed (as a potential option for moving away from Indian Act) but it suggests that there is no property ownership on first nations land today.
  - The Assembly of First Nations, through a chiefs’ resolution, has expressed opposition to the FNPOA.
  - If nations want to pursue a particular option, that is their prerogative, but it cannot be imposed on others.
  - Further, as there are limited federal resources to support moving beyond the Indian Act, it is important that resources are directed to initiatives where there is strong support and the best chance of success.
  - For legitimate and well-thought-out policy reasons, most of our nations do not support or see the need for the FNPOA.
- Each of our nations needs to go through its own process of deconstructing the colonial past, and the solutions certainly cannot be imposed or dictated by the Crown.
- There is currently innovative work being done in communities that needs to be acknowledged.

BREATHEING LIFE INTO DEAD THEORIES ABOUT PROPERTY RIGHTS:

de Soto and Land Relations in Rural Africa – Celestine Nyamu-Musembi

- Presumption of a direct causal link between formalisation of property rights and economic productivity is back on the international development agenda based on work by de Soto (this focus was previously attempted in the early 1990s but failed after 4 decades of land tenure reform)
- De Soto argues that formal property rights hold the key to poverty reduction by unlocking the capital potential of assets held informally by poor people.
• In 1950s introducing formal title was done in Africa
  o Introduction of formal title in the African areas was seen as the key to solving problems of land degradation and
  o Improving agriculture by providing farmers with security of tenure that would create incentives for further investment in the land.

• 5 shortcomings for formalisation of land title
  1. Legality is constructed narrowly to mean only formal legality.
     ▪ Therefore legal pluralism is equated with extra-legality.
  2. Underlying social evolutionist bias that presumes inevitability of the transition to private (conflated with individual) ownership as the destiny of all societies.
  3. Presumed link between formal title and access to credit facilities has not been borne out by empirical evidence.
  4. Markets in land are understood narrowly to refer only to ‘formal markets’.
  5. The arguments in favour of formulisation of title as the means to secure tenure ignore the fact that formal title could also generate insecurity.
CHAPTER 6: THE ORIGINS AND NATURE OF EQUITABLE INTERESTS

INTRODUCTION

- Common law courts and equitable courts developed as complementary rule systems
- Norman England (post-1066) – equity developed as corrective to ineptitudes of common law
  - Equity: “A vague, flexible, and discretionary form of justice” (Ziff, 451)
- Crown itself was basis of equity claims; later, Lord Chancellor; later, Court of Chancery
- Equity created the modern trust and plays important role regarding rights of women and aboriginal people.

THE ORIGINS OF EQUITY

P. BUTT, LAND LAW

- Doctrines of tenures and estates were from feudal society. Feudal land law slowly lost its relevance, so people began to find ways to “escape” it – alternatives to rigid common law
- The “use”: land transfer to a friend who would hold the land and use it per transferor’s instructions (rather than holding it for personal benefit)
  - Long history of uses, e.g., knights on Crusade, would leave lands w/ others or Franciscans who couldn’t own land but could use land owned by others
  - “Feoffee to uses”: the person that the land was conveyed to [legal ownership]
  - “Cestui que use” (CQU): the person whose benefit the land was conveyed for [beneficial ownership]
- 3 main advantages of land conveyed to a use:
  - Grantor shifted feudal burdens to the feoffees.
  - You could dispose of a use in a will
  - Allowed bypassing of strictures of common law conveyancing.
- The Court of Chancery and the Use
  - Uses became more prevalent – so where to direct complaints that arose, like fraudulent feoffees?
  - No common law protection for CQU, who, unlike the feoffee, did not have seisin (i.e., freehold possession).
  - Slowly petitions started coming to the Chancellor, who was protecting beneficial interests of CQUs by later 1400s.
  - Feoffees were the owners, but Chancellor made them act according to terms of the use
  - Chancellor protected the beneficial interest against not only feoffees, but others such as donees of the land, purchasers for value, etc.
    - Modern doctrine of “notice” originated: If purchasers buying from feoffees were acting in good faith, they weren’t bound in conscience to the beneficiary’s claims
  - With this protection, the CQU became a proprietary interest – but it was still equity, which acts “in personam”: a person’s conscience was bound, not the land/estate itself
  - Feoffee-cestui que use relationship highlights difference btwn legal and equitable interest; this difference is important to history of land law
  - Equitable ownership developed sometimes analogously to common law, sometimes not – Chancellors could make equitable interests that weren’t like any at common law
**The Statute of Uses**

- **Henry VIII, 1535** – prevalence of uses meant less money in royal coffers
- **Statute’s purpose:** “to divest the legal estate from the feoffee to uses and vest it in the CQU”
  - This would mean that the use could continue, but it revenue could still come in.
- **With the statute,** the CQU would get the legal fee simple interest, where before, that party would’ve gotten the equitable fee simple. They were also considered to be in possession.
- **The CQU got a legal estate of same quantum as would they would’ve gotten in possession.**
- **Statute’s operation/application:**
  - Statute allowed for resulting uses (i.e., not expressly created) but didn’t execute active uses (where feoffee had active duties, e.g., collecting rents), in which case feoffee would get the legal fee simple
  - Only applicable where feoffee to uses was seised, not just a leaseholder
  - Not applicable where feoffee was seised to her own use, only where person was seised to use of another person
  - Did not execute a “use upon a use” (*Tyrrel’s Case*), e.g., “to F and his heirs to the use of A and her heirs to the use of B and her heirs”.

**Trusts:** Tenures Abolition Act in 1660 did away w burdensome feudal incidents, so Crown was not longer financially interested in curtailing equitable ownership. Conveyancers employed the “use upon a use” to play with beneficial interests.

- **New terms:** “trust” is the relationship, “trustee” is the legal owner, “in trust for” means creation of equitable interest and “to the use of” limited to uses created by statute.

**CASE QUESTIONS/NOTES (PP 458)**

1. **Where feoffee is a corporation...**
   - Statute of Uses also didn’t execute uses where feoffee was a corporation, not a person (but the CQU could be a corporation)
   - [e.g., to F Ltd. to the use of A and his heirs. F Ltd would keep legal title, A would have equitable title.] (458)

2. **Fusion of Chancery/common law courts...**
   - Administration of equity by Chancery, not common law judges, was problematic – reforms in England to fuse court systems (late 19thC)
   - Ziff: this was “procedural fusion but no more” (459)
   - Superior courts given capacity to deal with equity and law, though distinction remained
   - However, equitable/common law principles can seep into one another (Cf. Chippewas, Ch 12)

3. **Equity Trumps Common Law...**
   - Though common law and equity said to work in complement, obviously there’s a conflict where equity says A owns something but law says B owns it ← general rule: equity trumps common law
   - But various qualifications to this:
     - Discretionary application of equity, or restricting obligations from bona fide purchasers

4. **Diverse modern applications of trusts...**
   - Organizing family property interests, e.g., protect inheritances in case of marriage breakdown
   - Tax lawyers can use trusts to lessen tax liability of their clients
   - Developers going thru trustees to acquire land w/o publicity about the development
Enviro organizations can hold land “in trust”, where beneficiary is general public (e.g., BC’s Islands Trust protecting ecosystems in Gulf Islands)

M. CONWAY, “EQUITY’S DARLING?”

- There is a fiction surrounding equity that it is a “protector of women”, which in some cases was true:
  - Women from wealthy families in 1800s could have their property protected by trustees for their sole/separate use so that husband could not access it
- However, Conway argues that in some circumstances, equity was used to defeat women’s common law rights to protect succession in the male line
- At common law, where a daughter was in a family with no sons, she had the common law right to inherit under primogeniture
- Landowners preferred to maintain patrilineal succession, and were able to use equity as a tool to circumvent the common law
  - Equity was used by way of trust and strict settlement (lands are settled to parent in life, and then to sons in tail) to defeat common law rights of daughters to inherit
  - Common law dower provided 1/3 of income of real property for widow
    - Dower could not attach to any property held in trust, so equity assisted in depriving widows of property
- In this way, common law was a better friend to married women than equity was
- Ultimately the removal of “legal disabilities” attached to wives at marriage (inability to sue, no ownership of property, cannot have own earnings) in 19th century were not brought about by equity, but by broader social reform movements
- The key point of this article is to understand that law “does not function in a hermetically sealed world, above and unaffected by social, political, economic, cultural and religious developments”

RESULTING TRUSTS

- **Resulting trust**: Trust that arises by implication from circumstances of a particular transaction
  - Beneficial or equitable interest in property “results back” to the settlor or their estate
- **Resulting trust is recognised in two main ways**:
  - When trust document has failed to dispose fully of all beneficial interests in property, equity presumes resulting trust for benefit of settlor to fill in gap
    - E.g.: Amy says: “To Brian in fee simple to hold in trust for Monica for life.” The words creating the trust do not reveal the trustee’s obligations at the end of Monica’s life.
      - Equity imposes a resulting trust for benefit of settlor or settlor’s estate (remainder of beneficial or equitable interest “results back” to Amy/her estate)
    - Unlikely that Amy intended for Brian to gain the benefit, or she would have said so.
  - **Gratuitous transfers (equity prefers bargains, not gifts)**
    - If Catherine purchases property and asks for title to be placed in Zheting’s name, equity presumes that Catherine intended to retain the equitable interest by making Zheting a trustee, holding legal title for Catherine’s benefit
      - This is unless Zheting can show that Catherine intended to make a gift of the property
- **Exception to presumption of resulting trust**: gratuitous transfers between family members
  - Presumption of advancement: equity will sometimes presume that a transfer between family members was intended to be a gift (see Pecore below)
Here, the transferor gains both the legal and equitable title (instead of the legal title on a resulting trust to benefit the transferor).

Previously, a transfer from husband to wife was presumed to be an advancement (but not a transfer from wife to husband).
- In Rathwell v. Rathwell (SCC), Dickson J said that this was no longer a credible guide to intention of spouses
- 30 years later, the presumption of gift is likely no longer operative between spouses

Consider the issue of intimate partnerships, in which both partners contribute to acquisition of family property but often title to major assets is held by one only.
- Judges have struggled to find way to ensure title holding partner cannot walk away with all at end of the relationship
- Some judges have deployed a variant of the resulting trust in these situations: common intention resulting trust (Kerr v. Baranow: common intention resulting trust is no longer has a role in these cases)
- Generally settled by statute now.

**PECORE V. PECORE**

*A presumption of resulting trust is the general rule for gratuitous transfers.*

**Facts:**
- Father (E) was retired miner; began transferring assets to account held jointly with daughter (P), who had a disabled husband (M).
- E wrote letters stating he was 100% owner of funds and they were not gifts
- E’s will left some items to M, most to P, with residual to be divided 50/50 between them
- M left P and claimed half the value of accounts held by P and E

**Issue:**
- Are bank accounts part of residual estate (held in trust by P for estate) or a gift of beneficial interest to P? How is intention of transferor determined? What is the rule for gratuitous transfers?

**Held:**
- Decision for P.

**Ratio:**
- Generally: A presumption of resulting trust is the general rule for gratuitous transfers. Presumption of advancement will apply only to gratuitous transfers from parent to minor children.
- However, presumption of advancement will apply when 2 criteria met:
  - Transfer must be from spouse to spouse or from a parent their child
  - The child must be a minor
- Dependency alone is insufficient

**Analysis:**
- Requirements for presumption of advancement not met here as P was adult; however, P successfully rebutted presumption of resulting trust due to her dependency on her father combined with statements and actions of the father indicating an intention to gift the balance to P.

**CASE QUESTIONS/NOTES**
• **Madsen Estate v. Saylor SCC 2007**
  - Confirmed Pecore decision on presumption of resulting trusts for adult children
  - Burden of proof (BoP) on child to show that father intended to make a gift to her of the accounts
  - Evidence of intention to gift was insufficient to overrule the presumption of resulting trust in this case
  - *Distinction between this and Pecore: Here, siblings contest sister’s claim to beneficial ownership, whereas in Pecore, the siblings supported the claim against her former husband who was contesting it*

• **It is not uncommon for property to be transferred into the name of another (often a family member) for, let’s say, questions purposes…**
  - Effects of illegal purpose (e.g. insulation of property from transferor’s creditors) on presumptions of advancement and resulting trust: (Tribe v. Tribe, 1996 CA)
    - Title to property passes in law and equity even if transfer is for illegal purposes
    - Transferor’s action will fail if it would be illegal for her to retain any interest in the property
    - Transferor can recover property if possible without relying on illegal purpose
    - #3 will almost always be possible when the illegal act has not yet been carried out; if carried out, transferee can rely on transferor’s conduct being inconsistent with retention of beneficial interest
    - Transferor can lead evidence of the illegal purpose provided he has withdrawn from the transaction before the illegal purpose has been carried out (if he brings an action at law)
    - The only way someone can protect his property from creditors is to divest themselves of all beneficial interest in it.
    - Therefore, evidence that one transferred property to protect it from creditors doesn’t rebut the presumption of advancement; it reinforces it
    - The court should not conclude that this was the transferors intention without compelling evidence to this effect

**CONSTRUCTIVE TRUSTS**

• **2 main kinds:**
  - Institutional constructive
    - Equity will impose constructive trusts to remedy wrongful or unconscionable acts (like fraud)
    - Used when a person acquires property for his own benefit at the expense of someone to whom he has a fiduciary duty
    - Seen in Soulos v. Korkontzilas – now covers situations where good conscience requires it
  - Remedial constructive
    - Provides remedy in situations where title holder would be unjustly enriched unless equity compelled him to share property with someone who helped him acquire or improve it
    - Usually seen when property is acquired in course of intimate relationship but held in one name
    - Governed by legislation
    - *Rawluk v. Rawluk (SCC 1990)* - applied constructive trust doctrine
Equitable interest comes into existence when the contribution is made, and is not created but rather confirmed by the declaration of the constructive trust

Peter v. Beblow (SCC 1993) - awarded wife entire beneficial interest in property; rejected distinction between ordinary and extraordinary contributions

KERR V BARANOW; VANASSE V SEGUIN 2011 (SCC)

Cromwell J's judgement sets out an analytical framework for unjust enrichment cases in the context of a joint family venture. An unjust enrichment claim is the preferred method for settling property disputes at the breakdown of domestic partnerships. Monetary awards are the preferred remedy in these cases, but when a monetary award is inappropriate or insufficient to remedy the unjust enrichment claim a proprietary remedy may be required. The remedial constructive trust is a proprietary remedy in these cases. It allows the court to impose a trust despite the fact that there was no intention on behalf of the parties create one.

- **Background:**
  - Supreme Court of Canada delivers a single decision dealing with both cases, which need to be read together.
  - **Kerr v Baranow**
    - Common law couple living together for 25 years (Ms. Kerr & Mr. Baranow). Ms. Kerr has been paralyzed for last 15 years
    - Ms. Kerr argues: although legal title to their residence of 25 years is in Mr.B's name, he was holding part of the title in trust for her. He would be unjustly enriched to keep property all to himself.
    - Mr. Baranow argues: Ms. K was unjustly enriched by Mr. B's performance of housekeeping and caretaking for her for the last 15 years of their relationship
  - **Vanasse v Seguin**
    - Living together for 12 years. Ms. V gave up her employment so Mr. S could pursue job/entrepreneurship opportunity. She became housewife caring for 2 children they had together. Mr. S purchased home and registered in both their names as joint tenants. Most of Mr. S's net worth ($8.5 mill) placed in holding company which he withdraws from for investments and business opportunities.
    - Ms. V argues: entitled to full interest in family home (she had been granted one-half, but wanted his half-interest as well) and one-half interest in the investment assets held by his holding company. Claims Mr. S unjustly enriched if allowed to keep these interests.
    - Mr. S argues: Yes, he was unjustly enriched b/c he made a buttload of money while she stayed home with the kids, but he figures this is balanced out by him granting her a one-half interest in the house as well as providing her with a $44,000 RRSP. Constructive trust is inappropriate as a remedy anyway because her contributions (housework & childcare) weren't linked to the prosperity of Fastlane (his company).
- **Cases Held:**
  - **Vanasse**
    - The appeal allowed and the trial judge's order restored to award a share of the net increase in the family's wealth during the period of unjust enrichment. - Court of Appeal's order set aside, costs awarded throughout
• Trial judge found that there was a JFV and a link between Ms. Vanasse's contributions and the substantial accumulation of wealth (did not explicitly label as a JFV but works with the JFV analysis anyway)
• Trial judge made a reasonable assessment of monetary award appropriate, taking due account of Mr. Seguin's contributions
• Ms. Vanasse had been at least "an equal contributor to the family enterprise" whose contributions "significantly benefitted Mr. Seguin"
• Seguin retained a disproportionate share of the wealth from the JFV at the expense of Ms. Vanasse
• There was a clear link between Ms. Vanasse's contribution to the JFV and its accumulation of wealth
• Trial judge's approach to calculating an award was reasonable in the circumstances, but there may be many ways to reasonably quantify an award

Kerr
• The findings of the trial judge cannot stand -- new trial ordered
• JFV analysis not used for Ms. Kerr's claim, and cannot be redone on the record available
• Court of Appeal's order for hearing of Mr. Baranow's counterclaim affirmed
• Costs awarded to Ms. Kerr throughout

Issues:
• There were 5 main issues considered by the court. Issues 2, 3, 4 are relevant to the legal principles. 1 is obsolete and 5 is specific to these cases.

5 main issues to be resolved by the court
• What is the role of “common intention” resulting trust in claims by domestic partners?
  • No role, at least not in this context - “common intention” resulting trust is no longer relevant in resolution of property claims at breakdown of domestic relationships
  • Gives 4 reasons why it doesn’t apply → see bottom of pg. 485-486 if you actually need it (unlikely)
• What is the appropriate money remedy for unjust enrichment claims?
  • Rather than assessing remedy on a fee-for-services basis (treating one partner as “the hired help”), it should be assessed in a way that recognizes that the parties are co-venturers and money awarded should reflect the contributions of each party to the joint venture.
  • The court recognizes that you don’t have a legal obligation to provide domestic services in a relationship. By doing so, you confer a benefit on your partner that you can seek restitution for under an unjust enrichment claim (Peter v. Beblow)
  • See below for unjust enrichment legal framework
  • Unjust Enrichment remedies are restitutional – may be either a monetary award or a proprietary award
  • If seeking a proprietary award, P must show that a monetary award would be insufficient
• How and at what point in unjust enrichment analysis should mutual conferral of benefits be taken into account?
  • It should be addressed at the defence and remedy stage
  • Exception: Mutual benefits may be considered at the juristic reason stage only to the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, they are to be considered at defence and/or remedy stage
• What role should the parties (reasonable) expectations play in the unjust enrichment analysis?
  □ Limited role

• What is the appropriate date for the commencement of spousal support?
  □ N/a

Legal Framework for Unjust Enrichment

1. State the purpose:
   • to restore “a benefit which justice does not permit one to retain” (Ziff Reader, 487)

2. Plaintiff establishes three elements:
   □ An enrichment of or benefit to the defendant
     • The P gave something to the D that D has received and retained
     • The benefit enriched the D
     • The benefit can be returned as is or it can be assigned a monetary value
     • Benefit does not need to be permanent
     • Benefit must be tangible
     • Benefit can be positive or negative (negative – meaning that the benefit spared the D some expense he otherwise would have undertaken)
   □ A corresponding detriment to the plaintiff
     • P must show relationship between D’s benefit and P’s deprivation
   □ There is no juristic reason for the enrichment ⇒ meaning, “there is no reason in law or justice for defendant’s retention of the benefit” (488)
     • Two-step test for absence of juristic intent:
       □ Does it fall into an established category of juristic reason?
       □ If not, then need to consider the reasonable expectations of the parties and public policy considerations
   □ Common situations where recovery of benefit is denied: intention to make a gift, a contract, or a disposition of law

3. Court interprets flexibly:
   □ When applying unjust enrichment principle to family law, judges must interpret flexibly considering the particular factual and social circumstances of the claim (487)

Summary of Unjust Enrichment Framework for Joint Family Venture (JFV)

□ The monetary remedy for unjust enrichment is not restricted to an award based on fee-for-services approach
□ Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets from JFV and monetary reward is appropriate, it should be a share in the assets proportionate to the contribution the claimant made to the JFV
□ The claimant must show a) existence of JFV and b) link between contributions to it and accumulation of wealth/assets
□ Whether there was a JFV is a question of fact and may be assessed by all relevant circumstances including mutual effort, economic integration, actual intent and priority of the family

Determining Joint Family Venture and Appropriate Remedies

□ Where there is evidence of a joint family venture a remedy based on fees for services is not appropriate as it does not reflect the nature of the venture.
□ Court must choose whatever form of relief is most appropriate to give the plaintiff what he or she is entitled to.

The Approach to the Monetary Remedy
• Must focus on properly characterizing the nature of the unjust enrichment behind the claim
• If the unjust enrichment can be characterized as **one party unjustly retaining a disproportionate share of assets accumulated through a "joint family venture"** and there is a clear link between the claimant’s contributions and that venture, then the monetary remedy should be assessed by determining a share that is proportionate to the claimant’s contribution to the accumulation of the wealth
• The law should recognize and respond to the reality that there are unmarried domestic arrangements and relationships that are partnerships which use joint efforts to acquire assets -- **however, this sort of sharing should not be presumed, and it will not be presumed that wealth acquired by mutual effort will be shared equally.**

**Identifying Unjust Enrichment Arising From a Joint Family Venture (JFV)**

○ To apply this approach, must first identify whether the parties were actually engaged in a JFV

○ Cohabiting couples not a homogenous group and so the analysis must take into account the particular circumstances of each particular relationship -- **a JFV can only be identified if its existence is well grounded in the evidence** - emphasis on how the parties actually lived their lives, not on views of how they ought to have done so

**Framework factors for determining a JFV:**

○ This is not a closed or complete list, nor a checklist of conditions for JFV but a useful way to approach analysis and some examples of relevant factors that may be taken into account when considering if a JFV occurred

a) **Mutual Effort**

○ Did the parties work collaboratively towards common goals?

○ Indicators of the extent (if any) of a true partnership can be the pooling of effort, resources and team work, the decision to have and raise children together and the length of the relationship

○ *i.e.* in Murdoch Laskin J.’s constructive trust analysis was based on that the parties had pooled their efforts for the ranch operation. See also *Peter, Sorohan and Pettkus.*

○ Use of parties’ funds entirely for family purposes may indicate pooling of resources

○ Parties may also be said to pool resources where one spouse takes on all/greater proportion of the domestic labour and frees the other from those responsibilities, which enables the other to perform paid work

b) **Economic Integration**

○ To what degree of economic interdependence and integration can the parties’ relationship be characterized?

○ The more extensively the couple integrated their finances, economic interests and economic well-being, the more likely that they should be considered to engage in a JFV

○ *i.e.* Rathwell: existence of a joint bank account used as a "common purse" and family farm operated by family unit were key factors in Dickson J.’s analysis

○ Sharing of expenses and amassing of common pool of savings also indicators

○ A sense of "collectivity, mutuality and prioritization of the overall welfare of the family unit over the individual” may also indicate economic integration

c) **Actual Intent**
• Appropriate concern for the autonomy of the parties is a particularly important consideration in relation to domestic partnerships -- therefore actual intentions of parties must be given considerable weight in considering whether there was a JFV

• Looking for actual intent as expressed or inferred and not for what (in court’s view) “reasonable” parties should have intended in the same circumstances
  o I.e.: intention to engage in JFV may be inferred where the parties accepted that their relationship was "equivalent to marriage" or where they held themselves to public as married
  o Can look to stability of relationship and length of cohabitation (in long, stable relationships may be impossible to precisely weigh benefits conferred within relationship) -- also title to property can reflect intent to share wealth (i.e: where parties are joint tenants) or plans for property distribution on death in a will or verbal discussion

• Parties’ actual intent could also negate the existence of a JFV or support conclusion that certain assets were to be held independently.

**d) Priority of the family**

• -Whether and to what extent the parties have given priority to the family in their decision making -- has there been in some sense detrimental reliance on the relationship by one or either party for the sake of the family?

• -Focus is on contributions to the domestic and financial partnership and particularly financial sacrifices made by parties for the welfare of the family collective/unit
  o -i.e: leaving workforce to raise children, giving up employment to relocate the family for the other’s career, foregoing educational advancement for the benefit of the family and etc.

• **Mutual Benefit Conferral**
  o Domestic unjust enrichment analysis often complicated by fact that there was a mutual conferral of benefits, and analysis must take this into account -- how and where?
  o In cases of JFV where one party has retained a disproportionate share of accumulated assets, respective contributions of the parties are taken into account in determining the claimant’s share. --not necessary to engage in minute examination of give and take of daily life in these cases
  o However, more complicated in unjust enrichment claim where there is a monetary remedy based on fee-for-services approach

• **Reasonable or Legitimate Expectations**
  o The parties’ reasonable or legitimate expectations have little role to play in deciding whether services were provided for a juristic reason in an existing category, except for providing relevant evidence of a contract for services provided, a gift, or categories such as this
  o The parties’ reasonable or legitimate expectations do have a role to play at the second step of the JRA where D must establish a juristic reason to keep benefit, which does not fall into existing categories -- do the parties’ expectations show retention of benefits is just?

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**SOULOS V. KORKONZILAS (1997, SCC) - INSTITUTIONAL CONSTRUCTIVE TRUST**

*A constructive trust requiring reconveyance of the property can arise in absence of an established loss in order to condemn a wrongful act and maintain the integrity of the relationship of trust*

- **Facts:**
• Defendant Korkonzilas was a real estate broker used by the plaintiff Soulous in negotiating a deal to purchase a building. The vendor agreed to Soulous’ price but Korkonzilas didn’t tell Soulous. Instead, Korkonzilas’ wife purchased the building in her name and later transferred the property into name of Korkonzilas and herself as joint tenants. Trial judge found that Korkonzilas was acting as Soulous’ agent, that it was a fiduciary relationship and that Korkonzilas had breached his duty to Soulous when he acquired the property for his own use.

• **Issue:**
  - Can a constructive trust be imposed over the property even though there had been no enrichment / corresponding deprivation? [Because the property had actually lost value since it was purchased]

• **Held:**
  - Yes. (1) Korkonzilas was under an equitable obligation and he breached his duty of loyalty in allowing his own interests to conflict with Soulous (2) he got the assets from his agency activities as a direct result of his breach of his duty of loyalty (3) even though Korkonzilas wasn’t enriched, Soulous still wanted the property and returning the parties to the position they would have been without the breach is a proper remedy in equity. Court also cites policy reason of making sure that agents and other persons in positions of trust remain faithful to their duty of loyalty.

• **Discussion:**
  - Most of the cases up until this in Canada had focused on the remedial constructive trust and this didn’t quite fit, so they had to characterize it as an institutional constructive trust
  - See the personhood in this case – it wasn’t about money, the plaintiff just wanted the property
  - This case broadens the approach to imposing a constructive trust to encompass situations where “good conscience so requires” in addition to the situations where it has already been used
  - Constructive trusts are recognized in Canada in these 2 situations
    - for wrongful acts (like fraud and breach of duty of loyalty)
    - to remedy unjust enrichment / corresponding deprivation
  - One case can involve both of the above situations but both are not necessary. A constructive trust can therefore be imposed
    - property obtained where there is a wrongful act and no unjust enrichment / corresponding deprivation [institutional constructive trust]
    - property obtained where there is no wrongful act but there is an unconscionable unjust enrichment [remedial constructive trust]

• **Four conditions** to satisfy a constructive trust based on wrongful conduct:
  - the defendant must have been under an equitable obligation (of the type that the courts of equity have enforced) in relation to the activities giving rise to the assets in the defendant’s hands
  - the assets in the defendant’s hand resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff
  - plaintiff must show legitimate reason for seeking a proprietary remedy(either personal or related to the need to ensure that others like the defendant remain faithful to their duties)
  - there are no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case (i.e. must protect the interests of intervening creditors)
• **What interest does a purchaser acquire in a property in that period of time after the offer is accepted but before the closing date?**
  - The land is held upon a constructive trust but the trust is premised on the ability to be granted specific performance
• Specific performance if granted is available only once the time for performance has arrived (ie the closing date)
• Specific performance used to be considered the appropriate remedy because land was considered unique, but now its not considered that unique anymore
• If specific performance is available, the constructive trust dates back to the time the contract is made [Ziff says the courts in Canada hold this, normally without addressing it directly – *Martin Commercial Fueling v. Virtanen* (1997 BCCA case)]
• At common law the remedy for breach of contract is not an order of specific performance, but damages to compensate for losses suffered because of the breach
• To get specific performance, the plaintiff must demonstrate that damages would not be adequate. In the case of *Semelhago v Paramadevan* (1996 SCC case) Sopinka J. stated (in obiter) that it’s no longer appropriate to assume that specific performance would be ordered as a remedy as a matter of course. Even though it was obiter, the words have been influential:
  - *Cross Creek Timber Traders v. St. John Terminals* (2002 NB Queens Bench case) – specific performance granted but the court emphasized that it was only because property was unique and especially suitable for plaintiff’s purposes
  - *Raymond v. Raymond Estate* (2011 Sask CA case) – referred to Sopinka J.’s obiter statement in granting specific performance of transfer of family farm because of strong emotional and familial ties, proximity to his farm and that there was “no comparable substitute”
• My thoughts: in order to establish a constructive trust for land, have to also establish the uniqueness of the land in order to satisfy a court that specific performance of the contract is appropriate rather than just damages

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**BULUN BULUN V. R&T TEXTILES PTY LTD.**

**Ratio:**
- **express trust can be declared or inferred (ex. by conduct)**
  - commercial sale of property for individual profit is conduct that leads to inference of no intention to create express trust (must have intention to create express trust, therefore individual profit = no express trust)
- **fiduciary relationship between individual and group alone does not lead to collective ownership in equity** – it only creates an equitable right to enforce the fiduciary relationship
  - if individual breaches fiduciary relationship AND denies fiduciary relationship all together, court may impose remedial constructive trust

**Background:**
- Joint authorship of work by 2+ authors recognized by Copyright Act, but collective ownership by reference to membership of the author of a community whose customary laws invest the community with ownership of any creation of its members, is not recognized – i.e. cannot claim ownership merely through the fact that the author is part of the community. Evidence of Ganabalingu law and customs admitted in this case because it is recognized that customary indigenous law has a role to play within the Australian legal system.

**Facts:**
Aboriginal artist Bulun Bulun paints painting incorporating sacred subject matter of the Ganalbingu people. He obtained permission from Ganalbingu senior members. Work was reproduced with Bulun Bulun’s consent in a book by Issacs. R&T reproduced substantial aspects of the work. R&T admitted its copyright infringement and withdrew the fabric from sale. Claimants Bulun Bulun and Milpurrurru (senior member of the people) proceeded with the claim, seeking recognition from the court of the rights of the Ganalbingu people and the injury caused to them by the infringement.

- **Issue/Held:**
  - Claimants are proceeding on basis of equitable interest in the legal copyright of Bulun Bulun because no other avenue to claim interest was found → court says legal right to collective ownership and no express trust

- **Reasons:**
  - to recognize communal title would be contrary to established common law principles – the question is whether Aboriginal laws can create binding obligations outside the relevant Aboriginal community, either through common law or equity
  - **Reasons for rejection of legal interests**
    - even if common law allows collective ownership, s.35(2) of Copyright Act 1968 precludes any notion of group ownership in an artistic work, unless the artistic work is a “work of joint ownership” (as according to meaning in s.10(1) Copyright Act)
    - s.10(1) says joint authorship = contribution of each other to the work is not separate from the other
    - here, no evidence that anyone other than Bulun Bulun created the work
    - merely supplying ideas to the artist is not sufficient to be called joint author – *Kenrick & Co v. Lawrence & Co. (1890)*
  - **Reasons for rejection of equitable interests**
    - claimants argue that Bulun Bulun held the copyright as a fiduciary, or alternatively, on trust (express/constructive), for the collective group
      - because the group has, under customary law, the power to regulate and control the production/reproduction of the group ritual knowledge
    - no express trust
      - express trust depends on intention of the creator, and that intention must be manifest in some form or another
      - of course, intention to create trust may be inferred even where creator has not in words expressed such an intention (ex. may be inferred from conduct – Gissing v. Gissing, 1971)
      - no evidence that suggests ownership of the artwork should be treated separately from ownership of the copyright to the artwork
      - **commercial sale for individual profit suggests no intention to create express trust**
        - evidence = Bulun Bulun sold the artwork and kept the profit for himself + evidence shows that on many occasions, paintings which use the Ganalbingu ritual knowledge are used in artwork and commercially sold for the benefit of the artist alone
        - also, **cannot infer express trust from Ganalbingu law**, since Ganalbingu law and customs have no notion of copyrights
    - Bulun Bulun was acting as fiduciary, but no contract between him and the Ganalbingu people to create the artwork
2 sources of fiduciary duty (Breen v. Williams)
- relationship of agency
- relationship of influence by one party over another, or dependence on or trust

here, the existence of fiduciary relationship is said to arise out of the nature of ownership of artistic works amongst the Ganalbingu people – that the people allow the creation of the artwork through a relationship of trust + confidence with the artist
- evidence indicates that if no trust + confidence in artist, permission to use ritual knowledge in artwork will not be granted
- in exchange, artist must act in the interest of the Ganalbingu People to preserve the integrity of their culture and ritual knowledge, with respect to the artwork

the interests of the Ganalbingu in their ritual knowledge are worthy of protection from exploitation, and thus fiduciary obligation imposes on Bulun Bulun a duty to take reasonable care of, and not to exploit, his copyrighted artwork

however, without more, a fiduciary relationship does not vest an equitable interest in the ownership of the copyright in the Ganalbingu people
their equitable right is to bring an action against the fiduciary to enforce his obligation to them – and Bulan Bulan has already taken action against R&T and has upheld his duty
- thus, no reason for equity to intervene any further

what if Bulan Bulan had not taken action against R&T?
- other equitable remedies would have been available
- equity will impose a constructive trust on property held by a fiduciary where it is necessary to do so to achieve a just remedy and to prevent the fiduciary from retaining an unconscionable benefit (Muschinski v. Dodds – 1985)
- had Bulun merely failed to take action to enforce his copyright, an equity remedy might be to allow the Ganalbingu to bring the action in their own names against the infringer and copyright owner – but Bulan already brought the case, so equity not needed here
  - but there would still be no need of a constructive trust
- had Bulun denied the existence of fiduciary obligations and refuse to protect copyright from infringement, there must be occasion for equity to impose a remedial constructive trust upon copyright owner to strengthen the standing of the beneficiaries to bring proceedings to enforce the copyright – also not necessary here since Bulan already brought the case

CASE QUESTIONS/NOTES

- In what way, if at all, does the ruling the Bulan Bulan create a form of property right in favour of the Ganalbingu people?
  - perhaps only an equitable right to enforce the protection of the property at issue, if the fiduciary is unwilling to protect it
- By what means might Canadian law recognize a property right of the kind asserted in Bulan Bulan?
  - Canadian Copyright Act s.13(4) allows for assignment of the copyright by the author
    - however, it is “subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment” – so perhaps the size of the collective group that the right is being assigned to may be problematic
s.13(4) also allows right the granting of rights by the licence to the copyright, but it is subject to the same limitations so again may run into problem of scope.

Canadian Copyright Act s.13(6) allows for assignment of the right of action of the copyright – “it is deemed always to have been the law that a right of action for infringement of copyright may be assigned in association with the assignment of the copyright or the grant of an interest in the copyright by licence”

Finally, I would think that the same concepts of fiduciary duty and apply, so that Canadian courts may recognize a fiduciary duty between the author and the group and impose an equitable remedy of remedial constructive trust if needed.
CHAPTER 7: QUALIFIED TRANSFERS AND FUTURE INTERESTS

This chapter concerns the limits to proprietary freedom—both of current owners as well as future ones

BASIC CONCEPTS

REVERSIONS AND REMAINDERS

- Estates can exist in possession, in remainder, or in reversion
  - Possession: when X is entitled to an immediate life estate, he is entitled to enjoy it in possession
  - Remainder: created when a person is given an estate but he is not entitled to possession until the expiration of a prior estate created by the same instrument
    - A grants Blackacre to B for life and remainder to C in fee simple → vested future interest (B gets life estate vested in possession, remainders to C)
    - A to B for life and remainder to C at 21 in free simple → contingent future interest (remainders to C OR reverts to A)
  - Reversion: estate retained by the grantor when he conveys away a lesser estate
    - A grants Blackacre to B for life → a vested future interest (reverts to A, who still owns the fee simple; A loses possession, but not ownership)

- The remainder interest is a present right which co-exists with the life estate, even though enjoyment and possession of the real property is postponed until termination of the life interest
- When estates are vested, they are presently existing, even though the owners are not all immediately entitled to possession – enjoyment is postponed (“vested in interest”)
  - Vested remainder = present estate is conferred although it is not to be enjoyed until a future time
  - Vested in possession (current) vs. vested in interest (future)

DEFEASIBLE AND DETERMINABLE INTERESTS

- Defeasible interests that divests or prematurely defeats a completely granted interest
  - A fee simple that is vested but subject to being divested by a condition subsequent
  - Event is on “top” of the words of limitation (not part of the limitation)
  - “But if” = words define a possibility
  - A defeasible fee simple subject to a condition subsequent is a “dark cloud” that hangs over fee simple and may or may not result in a downpour, allowing the original grantor to take back the fee
  - A defeasible fee simple is a not a fee simple absolute – the title is tainted with the condition
  - A stipulation may be framed as a condition subsequent – recipient’s interest vests in interest, but the entitlement may later be taken away should the identified event occur
- Determinable interest
  - The determinable fee simple is a vested interest, even though it might come to an end on the happening of the determining event; the right retained by the grantor is called a possibility, or a right, of reverter
  - The right of reverter is to be treated as vested
  - The fee is limited in time by the possibility of an event happening
CONTINGENT INTERESTS

• It is said that the interest is vested subject to being divested
  o Usually where the gift is contingent the words of futurity are introduced by the conjunction “if”, but prima facie the construction will be the same and the legacy will be treated as contingent when the reference to the future event is introduced by the word “when”
  o Other words include “at” a given age, “upon”, “as”, “from and after”
• A contingent interest can also be described as one subject to a condition precedent – it is the existence of a condition precedent that makes the interest contingent
  o A condition precedent is a condition of acquisition; you must satisfy this prior condition in order to acquire the interest in land
• This interest is not vested, it may vest
• The fee simple subject to a condition subsequent is regarded as being vested subject to divestment; the interest that the grantor retains is called a right of re-entry
  o It is contingent because before this right of re-entry can be exercised, an event must occur

CASES:

STUARTBURN (MUNICIPALITY) V. KIANSKY (2001)

• Facts:
  o Application brought to determine whether Kiansky, the Reeve of Stuartburn, was entitled to hold that office
    o Under Manitoba election law, in order to hold elected office, a person must be an owner of land (s. 5 of the Local Authorities Election Act)
    o Kiansky sold his home and moved from the relevant district, but he continued to hold an interest in other Stuartburn real estate, the entitlement to which was subject to a prior life estate in favour of his grandmother (therefore, a “remainder interest”)
• Question:
  o Did this land interest satisfy the ownership requirements of the election laws? Does a remainder interest in a life estate constitute being an “owner”?
• Decision:
  o Kiansky’s remainder interest allows him to be classified as a present owner of a freehold estate (right to freehold interest in fee simple) in the Municipality, which meets the election laws → application dismissed
• Reasoning/Concepts:
  o At all times, Kiansky was recorded in the land titles office in relation to the land as “registered owner of an estate in remainder expectant upon the decease of [the grandmother]”
  o The land is and was assessed in the latest revised realty assessment roll
o Court looked at two things: the context of the meaning of "owner" and the nature of the remainder interest
o **Owner:** must be the present owner of a freehold estate in land (so, Kiansky's remainder interest must be identified as a freehold estate owned by him)
  
  o **Freehold estate:**
    - Freehold is a measure of the nature and degree of a person's interest in land
    - Includes a life interest and a fee simple, both of which are for an indeterminate period
    - Estate is synonymous to "right", "title", and "interest"

Note: In a similar case (Michael Forestall), it was found that "seisin" is more than ownership, it is actual possession; therefore, an owner with a vested interest does not have seisin and therefore, cannot be a Senator

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**MCKEEN ESTATE V. MCKEEN ESTATE (1993)**

- **Facts:**
  - The testator Harry McKeen dies, and his will directs that his entire estate be held in trust for his wife for her life, and on her death, the trustees were directed, after completing several specific legacies (gifts of money) and a devise (gift of real property), to divide the residue of the estate “equally between my sisters, or to the surviving sister if one dies”
    - Neither sister survived the testator and his wife

- **Issue:**
  - Did the testator intend with his wording to make the gifts to his sisters contingent on their surviving his wife, or were they vested in interest at the effective date of the testator's will?

- **Decision:**
  - The residue of the estate of Harry McKeen vested in his sisters equally at the date of his death, subject to the possibility of divesting of the interest of the deceased sister if only one sister survived the life tenant
    - The reason for postponement of the distribution is simply that a life interest was previously given to the widow, so that the residue could not be paid until her death
    - The testator did not contemplate an intestacy
    - These were not condition precedents

- **Reasoning/concepts:**
  - The determination of the actual and subjective intention of the testator are important – the court should determine this intention from the words used in the will, but if the words do not express a clear intention, then the court can consider what the reasonable person might have intended in the circumstances
  - The presumption against intestacy – where the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either wholly or even partially intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion
    - The court inclines a construction that the will effects a complete disposition of the whole rather than the will leaving a gap
  - Construction in favour of vesting
    - A contingent interest is one that is subject to the prior happening of an event which may never happen (i.e. the birth of a child)
When the words are not clearly contingent, the courts are inclined to call a gift that is prima facie contingent, "vested"
The courts are inclined to hold a gift vested rather than contingent wherever the words used and the will as a whole admit of a construction that will result, as is said, in "early vesting" (especially where the property is land)

The rule in Browne v. Moody – a gift is prima facie vested if the postponement is to allow for a prior life estate

CAROLINE (VILLAGE) V. ROPER (1987)

Facts:
- Thomas Roper allowed a community group to build a community hall on an acre of his land; he retained title, and there was a strict understanding that it would be used for community purposes only
- He died and Rosina Roper (wife) inherited his land
- In 1949, representatives of the Community Associations told Mrs. Roper that they wanted to build a basement and it would assist them to do so if the title was transferred to them; the title was transferred, and a document was prepared that kept the condition
- In 1961, Rosina died and her son, the respondent, succeeded to her Estate
- In 1982, the community hall burned down and the Village now wants to sell the land to be used for a commercial purpose

Issue:
- Village claims that the document is void and unenforceable, because if it is a trust, it is one which by its wording offends against the rule against perpetuities

Decision:
- The document in its present form is void and unenforceable
- The key words are in the future tense and the future actions depends on something occurring which may not occur or may occur in the indefinite future, thus offending against the rule against perpetuities
- The words seem to make the fee simple that was given that day defeasible if a future event occurs, rather than putting a condition on the fee simple that it is good only so long as a certain use is made of it
- The document should be rectified to show that the transferees received title to the property as trustees for as long as the property was used as a community centre and to be conveyed back to the Ropers at the end of that use

Application dismissed

Reasoning:
- It must be determined first if the grant in question was a determinable fee simple subject to a right of reverter or a fee simple subject to a condition subsequent
- The essential distinction appears to be that the determining event in a determinable fee itself sets the limit for the estate first granted, whereas a condition subsequent is an independent clause added to a complete fee simple absolute which operates so as to defeat it
- Words such as “while”, “during”, “as long as”, “until”, etc. are apt for the creation of a determinable fee, whereas words which form a separate clause of defeasance, such as “provided that”, “on condition that”, “but if”, or “if it happens that”, operate as a condition subsequent
Private Law: Property

- **Note:** *St. Mary's Indian Band v. Cranbrook (City)* - because of the sui generis nature of Aboriginal rights, the interpretive devices used to distinguish between a condition subsequent and a determinable fee normally should not be determinative
  - Instead, the court must go beyond the usual restrictions and look at the respective intentions of the parties
  - “Common law real property concepts” do not apply to native lands because the court wants to prevent native intentions from being frustrated by an application of formalistic and arguably alien common law rules
  - It would be fundamentally unjust to impose inflexible and technical land transfer requirements upon these autonomous actors
- **Summary:**
  - A grantee can get a fee simple absolute, a fee simple determinable, or a defeasible fee simple
  - When the fee is not absolute, the grantor has 1 of 2 rights:
    - **Right of re-entry** if the fee is **defeasible** (with condition subsequent)
    - **Possibility of reversion** if the fee is **determinable**
  - Think about the “fence post” vs. the “dark cloud”
    - A determinable interest is an internal limitation of the grant, it is a “fence post” in the grant – look for the word “until”, which defines the end
    - The defeasible conditional interest is separate from the grant, like a “dark cloud” hanging over it – look for the words “but if”, which define a possibility

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### STATE LIMITATIONS ON PRIVATE POWER

#### INTRODUCTION

- Proprietary freedom is not absolute
- There are some limits
- “The effect of [an invalid transfer] depends on the form that the grant takes”
  - “An invalid condition subsequent is severed from the grant, destroying the grantor’s right of re-entry and thereby rendering the gift absolute.”
    - This would have happened in *Caroline v. Roper* had the judge not rectified the condition
  - “An invalid determinable limitation results in the entire grant failing”
  - “and invalid condition precedent to receiving a grant of real property will be voided and the grant with it.”

#### UNGER V. GOSSEN

- **Facts:**
  - Gossen’s were left equal shares of their aunt’s estate on the condition that they move to Canada
  - When she died, they had not moved to Canada, and it was not possible for them to do so.
  - All potential beneficiaries agreed that the estate should be distributed to the three nephews
  - Do they still get the equal shares?
- **Principles:**
- Describing *Re MacDonald*—"where a Testator grants a bequest, subject to a condition which is impossible, the dominant intent must be the gift, because to intentionally draft into a will a void condition is an absurdity."
  - Quoting Feeney (p 544) - “Conditions precedent impossible of performance (so known to the testator) are to be disregarded and the gift upheld. Also, where the condition is made impossible by the act or default of the testator the condition is void but the legacy is good.”
    - "where the condition cannot be performed because it is contrary to law...the bequest is absolute"
- Look at the INTENT of the condition
  - Clear that the overriding concern (intention) of the aunt was that the funds would not go to a beneficiary in a communist state
  - She was suffering from dementia when the nephews were able to emigrate from former USSR to Germany, and could not alter her will
    - Quoting Feeney—“It must be shown, however, that the performance of the condition was not the sole motive for the bequest.”

### UNCERTAINTY

- “Stipulations cannot be enforced if they cannot be interpreted with certainty”
- All that is required in interpreting a condition precedent is that one particular claimant has met the condition (don’t worry about drawing a clear line between who qualifies and who doesn’t) (Re Leonard Foundation Trust)
- In interpreting a stipulation for retaining property – “must know in advance of the event what will bring the grantee’s interest to an end.”
- In interpreting a condition subsequent one must know “what events will give rise to the grantor’s right of re-entry, and, with a determinable limitation, what will cause the grantee’s interest to revert to the grantor.”

### H.J. HAYES CO. V. MEADE

- **Facts:**
  - Hayes died—will provided “I give and bequeath to my son James...[property]...on the following conditions that my son James reside on said land and cultivate the same. Should my said son James desire not to reside on said property or cultivate same then that portion hereby bequeath to be the property of my son Harold he paying to my said son James the son of one thousand dollars.”
  - \( \pi = \) successor in title to Harold, \( \Delta = \) successor in title to James
  - \( \Delta \)
    - James took the property because...
    - Provisos for residency and cultivation in the will= conditions subsequent and void for uncertainty
    - OR
    - Conditions have been met
  - \( \Pi \)
    - Harold took the property because
      - James ≠ fulfil conditions OR
• **Adverse possession**
  o Harold never paid James $1000
  o James did not live on the land until 1968 – father died in 1929

• **Principles:**
  • Conditions precedent v. Conditions subsequent
    o “Conditions precedent must be met before the property vests in the beneficiary”
    o “Conditions subsequent allow for immediate vesting of the property subject to its loss if the conditions are not subsequently met”
    o “If a condition subsequent is uncertain it is said to be void for uncertainty” (547)
    o Quoting *Sifton v. Sifton*—“Where it is doubtful whether a condition be precedent or subsequent the court prima facie treats it as being subsequent for there is a presumption in favour of early vesting.” (547)
    o CARDINAL RULE = “effect must be given to the intentions of the testator” (548)
    o Oosterhoff—“If a condition is capable of being construed either as a condition precedent or as a condition subsequent and a construction as a condition subsequent is consonant with the will as a whole and is not contrary to the testator’s intention, it will be construed as a condition subsequent.” (548)
    o Preference exists for vesting construction
  • **Provisos void for uncertainty?**
    o *Clavering v. Ellison*—“where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.”
    o Translation: the terms under which a vested estate can be taken away must be clear
  • **Application:**
    • **Condition Subsequent:**
      o Treating the provisos affecting James and Harold as conditions precedent= both their claims fail because the condition affecting Harold was never met ($1000) and property could not vest in James at the time of his death
      o Intention of testator= benefit James (land or $1000 to James)
      o Justice= more likely if proviso’s read as conditions subsequent
      o Consistent with preference for a vesting construction
      o Consistent with presumption against intestacy
      o Gives effect to the intention to confer a benefit on each of his sons
    • **Void for Uncertainty:**
      o Uncertainty about time period within which the residency requirement must be met and as to whether it would be forfeited if he left the property for any period of time= condition does not meet the Clavering test
      o Therefore—James takes absolute title at the time of his father’s death.
      o (Adverse possession claim failed too—not exclusive and nothing notorious/open to give owner true notice that it had begun)

**CASE QUESTIONS/NOTES (PP 550)**

• When writing a will...
  • Ensure that you are clear about the terms of condition subsequent
• Ensure that you specify CLEARLY what will happen to the property if the subsequent conditions fail
• The effect of changing determinable interests into interests subject to a condition subsequent...
  • Determinable interests = revert back to original holder automatically
  • Condition subsequent = does not automatically revert back, there is an option to re-enter
  • Would perhaps give the executor more leeway in making a decision? --
• Comment on the meaning and validity of the following clauses:
  • perhaps a condition subsequent could be found because the words “live here” are sufficiently certain
  • absolute discretion = too uncertain perhaps, condition subsequent void for uncertainty
  • not void because it is sufficiently certain—must give money for building lot if requested within 5 years
  • what does “properly interred” mean? = uncertain

PUBLIC POLICY

• Courts have power to refuse to enforce terms that offend against public policy
  • “Contrary to good morals or public order”
• Renders the testator’s estate valueless in the hands of their heirs
• Allows prohibitions on carrying out public duties (i.e. can’t join military, can’t hold office) to be voided
• Protects institution of marriage (can’t prohibit/control marriage choice, can’t encourage the disregard of one’s spouse/parent) – discourages spite/discrimination
• -Even though not testable, the rule of perpetuities is based on the policy consideration that land should be freely alienable and in full control of the owner

RE LEONARD FOUNDATION TRUST

Responds to the demand that changing social values should be reflected in common law doctrine of public policy

• Facts:
  • Leonard develops scholarship based on race, religion, citizenship, ancestry, ethnic origin, and colour of the class
  • Only White, Christian Protestant, British nationals/heritage are eligible
  • A maximum of ¼ of the award can go to women
  • Preamble uses language to describe the motivations behind these requirements (overtly racist, elitist)
  • Public opinion had mobilized against this scholarship (media, letters, etc.)
  • Universities started to stop publicizing scholarship, complaints to Human Rights Commission, proclaimed “not in keeping” with Charter values and today’s societal values
  • Recommendation that the offensive terms are “read out” – keep awarding trust on modified criteria

• Decision:
  • Robins J.A. (majority)=
    o Recitals (preamble) can’t be isolated and disregarded from the rest of the trust document, “must be read as a whole”
Operative provisions usually prevail over recitals, but in this case they can’t be separated because the terms in the recital give meaning to the operative terms, “inextricably interwoven”
  - No contradiction in terms between operative and recital section, not the problem here

Language in preamble is too instructive, not just fluff that can be disregarded

Even if preamble was simply to give motive, in this case, it would still be problematic from a social policy view

Even though privately created, it had a public purpose, “quasi-public character”

“Court cannot close its eyes” to this trust

“Public policy is an unruly horse,” and should only be invoked in “clear occasions,” when “harm to the public is substantially incontestable, and does not depend on idiosyncratic inferences of a few judicial minds”

Freedom to dispose of one’s private property as they choose is an important social interest, which has long been recognized (not in this case though)

Two problematic propositions:
  - The White race is best qualified by nature to progress civilization
  - Attainment of peace is best promoted by educating White, Protestant Brits

“Notions of racism and religious superiority contravenes contemporary public policy”

“At variance with the democratic principles governing our pluralistic society”

Widespread public criticism serves to demonstrate this

“Cy-pres doctrine” allows for charitable trust to be revised as to carry out the settlor’s intentions as closely as possible, simply must advance a valid charitable purpose to qualify

Trust was practicable when created, but not anymore = therefore it should not fail, but should rather be amended

 Strikes out preamble and removes all restrictions related to race, colour, creed/religion, ethnic origin, and sex

**Tarnopolsky J.A. (minority)**

- Charitable trust = relief of poverty, advancement of education, advancement of religion, or benefits to the community
- Must satisfy 3 conditions = object is one of the above purposes, must be wholly charitable, and promote a public benefit (not harmful to public, and available to sufficient cross-section of public)
- Finds that all of these tests are met
- A condition precedent will not fail for uncertainty unless it is clearly impossible for anyone to qualify (not the case here)

**Turning to public policy**...

- *Human Rights Code* recognizes public policy, “promotion of racial harmony, tolerance, and equality is clearly and unquestionably part of the public policy of modern day (Ontario)”
- Reflected in laws, official declarations, the constitution, and the world community
- Therefore, this trust is clearly void on the grounds of discrimination
- However, this is not a blanket rule, should be “case by case”
- Sometimes discriminating trusts attempting to advance substantive equality is ok (i.e. the amelioration of inequality)
- Pay attention to the social and historical context of the group concerned
- Promoting women, Aboriginals, handicapped, languages would not be void
- Should use a balancing process: disposing of private property not an “absolute right”
However, this does not apply to private, family trusts (not charitable trusts)

**CASE QUESTIONS/NOTES**

- Human Rights codes have intervened to void discriminatory stipulations in many other cases:
- Race: Noble and Wolf v. Alley – struck down racist stipulations, can’t stipulate that land is never sold to certain race
- Religion: Re Ramsden Estate – did NOT strike down Protestant stipulation, says there is no “religious supremacy and racism” present, like in Re Leonard
- Restricting martial choice (religion related): Fox v. Fox Estate – Mother, acting as trustee, deprived her Son of residue estate because he married a woman of different religion, Court said no – must not discriminate this way, even if the testator would have deprived Son if he was alive to make a new will (court will reach in and correct), does this raise the issue of making a distinction between public and private trusts, as was found in Re Leonard?
- Ziff argues that Re Leonard balances: state disapproval of discrimination VS. the right to use property as one chooses (freedom)

**ZIFF, UNFORESEEN LEGACIES: LEONARD FOUNDATION TRUST**

- Private property rights allow:
  - economic efficiency producing material-well being
  - freedom promoting privacy and full human development
  - labour to be rewarded and thus productivity
- If X can effectively discriminate IRL via direct donations etc, why is X not permitted to exercise the same preferences through a trust?
- CoA in Leonard Foundation: private charitable trusts are quasi-public as they are designed to benefit the public (per Robins JA)
  - Also: awards tenable at publicly funded educational institutions
  - Distinguishes between charitable trusts and family trusts (per Tarnopolsky JA)
  - Leonard specifically regarded fortune as being held as a ‘public trust’ ergo a public duty arises
- **Public/private divide used to separate state (duty-bound to treat equally) from non-state**
  - Three categories:
    1. state action;
    2. private conduct in public domain (i.e. conduct of a private enterprise);
    3. private conduct treated as being outside public arena (i.e. family life, family trusts per Tarnopolsky JA)
- Charter applies to state (public) conduct; Leonard Foundation Trust treated as private for Charter purpose
- Ziff: Private and public categories overlap; all discriminatory action re: private prop can be seen as state action because:
  - Absent state sanction and enforcement, prop rights vanish – ergo state complicity
    - All private property dealings have a public dimension
    - Early cases re: refusal of services to black patrons (Christie, Franklin) failed; discriminatory conduct backed by the state
  - Property rights can be seen as the delegation of decision-making power re: property into private hands
• Ziff makes no sense to distinguish between (2) and (3) as gifts under (3) are still subject to legal enforcement
  • ‘Private’ only in the sense that recipients of such gifts are denied the status of being members of the public at large
  • Illogical to tolerate discriminatory action because it affects family members, not the community at large
    o Argument against: gift given conditional on marrying person of certain faith
      → can always not take gift – no harm done!
  • Ziff’s response: when X endows a scholarship, law demands adhere to certain level of fairness i.e. in Leonard
    o Should be the same re: a conditional gift to small set of outside world (i.e. gift to family members)
    o Relying on the private-public divide in Leonard obscures rather than clarifies what the law should be

### RESTRAINTS ON ALIENATION

#### TRINITY COLLEGE SCHOOL V. LYONS, 1995

- **Facts:**
  - Agreement gives TCS the right of first refusal on Thomas & Mildren Bennett’s lot and an option to purchase the lot on death of survivor
  - TCS’ option did not arise unless optioners had beneficial ownership at the death of the survivor
  - Option lands were conveyed by gift to Bennett’s daughters pre Mildred’s death

- **Held:**
  - Right of first refusal was not void as a restraint on alienation despite fixed price
  - Right of option triggered by death of the survivor was void as an unlawful restraint on alienation – daughters win!
  - Power of alienation is an inseparable incident of an estate in fee simple (Gulf Oil per Howland J A)
    - Where an estate is bestowed of which the power of alienation is an incident, one convening.. not have power to alter its character… an attempt not simply to convey away an estate but… to create a new form of property in land (Blackburn)
    - Conditions that would remove necessary incidents of estate (alienating land (even for a limited time) void as repugnant
    - Rationale: would keep property out of commerce, create concentration of wealth, prevent property improvement (Gulf Oil)
      - Ex 1: Condition req sell to governors at under 1/2 land’s worth → void as restraint on alienation (Cockerill via Gulf Oil)
      - Ex 2: Condition to sell at 1/5th value equivalent to absolute restraint against sale → void as repugnant (Re Rosher via Gulf Oil)
  - Option to purchase is more objectionable as a restraint on alienation than a right of pre-emption (Gulf Oil)
    - If the optionee need only pay a fixed price, or percentage of offered price, restraints alienation (Fratcher)
Private Law: Property

- Preemptive provision fixing price w/o reference to future increase in value void as restraint on alienation (Schnebly)
- *Gulf Oil* scenario: Stephens wants part of Palen’s land, needs concurrence of Gulf who Palen gave right of first refusal
  - Gulf approved but wanted the right of first refusal at a fixed price from Stephens → void as restraint on alienation
  - Palen gave Stephens a right of first refusal of Palen’s remaining land at a fixed price → not void as a restraint on alienation as Palen was not acquiring title but simply granting a right of pre-emption re: land which he already owned
- Ergo: right of option triggered by death of survivor in Bennett case was not void as a restraint on alienation nws a fixed price

**CASE QUESTIONS/NOTES**

- May restrict alienation by prohibiting a particular class of alienation, to a particular class of individuals or restricting it to a particular time (*Macleay*)
- If restraint violated, two options:
  - The language of the gift can necessitate that entitlement forfeited completely as would be result for breach of a condition subsequent
  - The transfer in violation of the restraint could be treated as void
    - A void act cannot operate as a forfeiture. The testator willed this land with prohibition to the devisee to alienate or encumber it. But what is the consequence if he attempts to alienate or encumber? Nothing else but the complete nullity of any act done in contravention of the prohibition, but not the forfeiture or nullity of the devise (*Blackburn*)

**THE LEGAL REMAINDER RULES**

- The holder of the fee simple interest can grant a life estate to a party and the remainder in fee simple to another party (*Stuartburn (Municipality) v Kiansky*).
- The remainder interest vests in possession on termination of the prior particular estate
- Remainders that are subject to a condition precedent are contingent remainders
- These are governed by legal or common law remainder rules

**ONTARIO LAW REFORM, REPORT ON BASIC PRINCIPLES OF LAND LAW**

- Legal remainder rules have been applied in Ontario and it has never been ruled that they are inapplicable
- **Rules**
  - There can be no remainder after a grant in fee simple to someone
  - Remainder must be supported by a prior particular estate of freehold created by the same instrument. It cannot be allowed to spring up in a future after hiatus. If someone is granted remainder with condition precedent that he must be 21 but he is 19 at the time, conveyance would be void – there must be an immediate passage of seisin at the time of grant
The remainder must await the regular ending of the prior particular estate – cannot give a third party an interest to take effect on the termination of a prior estate by reason of operation of a condition subsequent – this is because the grantor can only take advantage of a condition broken – circumvent this by giving a life determinable estate with condition subsequent and giving legal remainder to third party

When a remainder is initially valid under this rule but will be invalidated if it does not turn out to vest during or at the moment of determination of the prior estate, the validity of the remainder will depend on the date of termination of the prior estate.

**RE CROW, 1984 ONHC**

- **Facts:**
  - Testator had intended the life estates of Robert and William to be held as tenants in common with and should William or Robert die without children, the remainder should go to their nieces or nephews
  - William died with no children in 1944 – no nieces or nephews at this point
  - Robert died with no children in 1983 – nieces and nephews had been born
  - Nieces and nephews were entitled to Robert’s half interest
  - For William – was there no one whom the interest could have vested in interest before Williams died?
- **Held:**
  - Fourth rule of the rules governing legal remainders – remainder fails unless it is vested during the continuance of the particular estate or at the moment it determined
  - At the time of Williams deaths there were no nieces or nephews – the gift over to them was invalidated
Leases = “Chattels real” - A lease was initially regarded as personalty (a chattel) but it resembles other land (or real) rights

The Nature of a Lease

- Four kinds of leases recognized by common law: fixed term lease (e.g. for 10 yrs), a period lease (e.g. month to month), a tenancy at will (can be terminated at any time by landlord or tenant), a tenancy at sufferance (when a tenant overholds after the expiration of a term).
- Perpetual lease: w/o a certain term. It can be created by statute
- Lease must relate to a property between as persons (landlords and tenants).
- When tenancy is for fixed term, its starting date must be ascertainable and its max duration must be ascertainable at the beginning of the term
- Payment of rent not essential, a leasehold right can be given as a gift
- Lease must contain a grant of the leasehold interest - > a “demise”

FATAC LTD. (IN LIQUIDATION) V. COMMISSIONER OF INLAND REVENUE

Lease-licence distinction

- Facts:
  - Owner granted right to use land under a twelve year lease, renewable for a further three years.
  - Owner wanted to sell property
  - Parties used the expression “tenanted”
- Issue:
  - Was the land leased or licenced?
- Decision:
  - It was licenced. There was no exclusive possession. Another party had the right to certain material, and had a right to set up a screening plant.
- Distinction between tenancy and licence
  - Tenancy: interest in land conferring the right to possess it for a limited period
    - Creates an estate in the land
  - Licence: mere permission to be on the land with or without additional permission to perform specified acts there. Does not create an estate in the land.
- Rationale for the exclusive possession test
  - The right to exclusive possession has remained the core test in England
  - Exclusive possession allows the occupier to use and enjoy the property to the exclusion of strangers
  - Tenants: Enjoy those fundamental, if temporary, rights of ownership that stem from exclusive possession for a defined period
  - Licensee: Lacks the right to exclusive possession/
    - Can merely enter upon and use the land to the extent that permission has been given
    - Doesn’t have a recognition of estate in the land
The distinction is about different substantive rights granted to the occupier. The label doesn’t matter. It is sometimes said that distinction between tenancies/license turns on the intention of the parties.

- This can be misleading unless it is understood that the only intention that matters is intention as to substantive rights, not a legal classification.

**Refinements to the exclusive possession test**

- Don’t have to have rent in order to have a tenancy
- Limitations upon the purposes to which the occupier can put the land do not negate a tenancy
- No tenancy where the owner is prevented by statute from granting a tenancy, where the landlord’s right of entry to provide services is inconsistent with exclusive possession
- No tenancy where the right to exclusive possession can be terminated pursuant to some legal relationship extraneous to that of landlord and tenant
  - Eg. where an employee occupies an employer’s premises to perform employee’s duties
- Tenancies can be prematurely terminated for non-payment of rent/breach of a covenant relating to use of land
- Employee-occupiers can be required to vacate when they are dismissed
- Where the occupier enjoys exclusive possession of only a small proportion of the total area of land that is the subject of the overall K:
  - If the K is primarily concerned with the use of the land as a whole, and occupation of the exclusively possessed portion can be terminated for reasons other than its use and payment -> no tenancy
- Interpretation of the K conferring the right to occupation
- Whether the parties intended that the occupier would have the right to exclusive possession
- De facto exclusive possession can be an impt guide to contractual intentions
- Terminology used to describe a tenant’s right of occupation (eg. the right to “enter upon, use and enjoy” the land) significant only if and to the extent that it indicates an intention that the occupier enjoy exclusive possession
  - Exceptions to exclusive possession must be expressly stated
  - Requirement that the occupier not impeded the owner’s right to possession and control, or that the occupier move from one part of the premises to another at owner’s direction usually negates exclusive possession

**Should New Zealand return to exclusive possession?**

- They now take an intention approach. But yes, New Zealand should now use the exclusive possession test with some of the refinements discussed above.

**Conclusions as to the tenancy/licence distinction in New Zealand**

- The fundamental distinction between a tenant and licensee is that the former alone has the right to exclusive possession
- For exclusive possession to be meaningful there must be a minimum finite term, whether fixed/periodic
- Rent is an important indicator of an intention to be legally bound but its absence does not negate a tenancy per se.
- Terminology employed by the parties in describing their relationship will be immaterial unless it helps decide whether there is a right to exclusive possession.
o Restrictions upon the use to which the occupier may put the land are not inconsistent with exclusive possession
o There will be no tenancy where there is no intention to enter into a legally binding relationship or where a tenancy is precluded by statute
o No tenancy where the occupier’s right to possession can be terminated for reasons other than the occupation of the land
  • E.g. employment relationship

• Application:
  • Was the relationship in this case a tenancy or a licence?
  • The parties intended to be legally bound. The use of the word “license” in the docs is irrelevant, as is the purported “right of re-entry”. Focus is not on terminology but on the exclusivity of Atlas’ right of occupation. Puhinuii and associated companies had a general right of access to the land so long as they did not obstruct the permitted activities of Atlas. They even reserved the right to all quarried materials other than basalt. In association with its own right to quarry those materials, they enjoyed the right to set up a screening plant in the quarrying area and to stockpile/remove all material other than basalt so long as this did not impede Atlas’ quarrying operations. Atlas’ right of occupation far from exclusive. The point is reinforced by the dwindling area still yielding basalt rock. It could not be said that there was any clearly defined area of which Atlas would have the exclusive use, let alone an area that was substantial in relation to the licensed area as a whole. Thus, the agreement was a license.

CASE QUESTIONS/NOTES

• Parties have been careful to use words customarily used in leases, more important, words traditionally required to create an estate or interest in land (i.e. “demise”, “lease”)
  • Clear intention to grant a lease of the land in question with exclusive possession and control thereof
  • Although activity restricted to use as laundry facility, does not make the possession any less exclusive
  • Restrictive clause cannot negate the imperative words used in the lease agreement
  • The landlord demised the premises to the tenant except in unusual circumstances, restrictions should not be read into the document because of positive covenants on the part of the landlord
  • In the actual case it was held that the document was intended to and did in fact confer upon the appellant exclusive possession and exclusive control of the demised premises
  • Under this agreement the landlord had no right to possession and no right to control of the demised premises

• Comments: Formal requirements are mandated for leases of three years duration or longer. One of these formal requirements in the Statute of Frauds: If at law, possession had been taken under the parol demise, and rent paid, the tenant was regarded as a tenant, not at will merely, but a tenant from year to year, upon the terms contained in writing, so far as appropriate to such tenancy. (Rogers v. National Drug and Chemical Company)
THE NATURE OF THE LANDLORD’S AND TENANT’S INTERESTS

- **Tenancy**: lessee obtains leasehold interest in the land; confers upon lessee a right of exclusive possession (good even against lessor)
  - At common law, right of the lessor to enter the premises must be negotiated with lessee.
- **Reversion**: interest in property held by a lessor under a lease
  - Both reversion and leasehold interest may be transferred. Lease hold transfer can occur in two ways: i) tenant may transfer remainder of the whole term to an assignee (called an assignment); ii) tenant may transfer some smaller portion to a sub-tenant (called a sub-lease)
  - Assignee’s liability against landlord is controlled by the privity of estate and is governed by the common law **Spencer’s Case rule**: all of the real covenants in the lease run with an assignment (real covenant is one that is said to touch and concern the leased property).
  - No privity of estate exists between the landlord under an initial lease and a sub-tenant (default by sub-tenant gives landlord no direct recourse against that person) -> may not matter if the original lessee is unable to pay the head lease due to sub-lessee’s default

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**MERGER RESTAURANTS V. D.M.E. FOODS LTD (1990)**

- **Facts**: Two restaurants (Merger and D.M.E.) located on land owned by common landlord (Lakeview); after D.M.E. constructs additional buildings on its lot, has less parking spaces and drafts agreement with Lakeview allowing its customers to use some of Merger’s leased area for parking spots; Merger claims that it was granted right to exclusive parking (with previous, original lessor that was not Lakeview) on its lot (along with employees and invitees); Lakeview says that it has power to assign this property to D.M.E. under lease relationship; judgment for Merger in trial, appealed to Manitoba Court of Appeal

- **Issues**: Does Merger’s lease restrict use of parking areas in its lot to Merger and other tenants in lot/employees/invitees? is the lessor (Lakeview) entitled to alter common areas (like parking spaces for exclusive use of D.M.E.) does the granting of common area rights in Merger’s lease amount to a covenant running with the land (thus subsequently binding upon Lakeview as the successor to an earlier lessor)?

- **Analysis**: Traditional test for a covenant to run with the land is that it must “touch or concern” subject matter of lease (“nature, quality, value” of the land);
  - **Spencer’s Case rule** upheld by the court -> **covenants which touch or concern the land run with the land and are binding upon successors in title**;
  - Parking is essential to the well-being of both businesses and such rights cannot be considered as merely collateral to their demise;

- **Held**: Lease under which Merger claimed cannot be construed as to allow Lakeview to let D.M.E. use parking on Merger’s lost; granting of common area rights in this case DOES amount to a covenant running with the land; appeal dismissed, original verdict affirmed;
CASE QUESTIONS/NOTES

- **Test for “touch and concern” requirement** (as per *P. & A. Swift Investments Respondent v. Combined English Stores Group Plc* (1989):
  - covenant benefits only the reversioner for the time being, and if separated from the reversion, ceases to be of benefit to the convenantee
  - the covenant affects the nature, quality, mode of user or value of the land of the reversioner
  - the covenant is not expressed to be personal (neither being given only to a specific reversioner nor in respect of the obligations only of a single tenant
  - fact that covenant is to pay a sum of money will not prevent it from touching and concerning the land so long as the three previous conditions are satisfied and the covenant is connected with something to be done on, to, or in relation to the land
- Generally, lessee has the complete right to alienate the remainder of the lease. However, a given lease might limit or eliminate the lessee’s right of transfer. E.g. lease provides that term may not be transferred at all, or only on consent of lessor. It’s common for right to transfer to be conditioned on the consent of the landlord (provided that the landlord’s consent cannot be unreasonably withheld).

### SUNDANCE INVESTMENT CORP. V. RICHFIELD PROPERTIES LTD (1983)

- **Facts:**
  - Richfield Properties is the owner of a neighbourhood shopping centre that it leases to two lessees: Sundance Investment Corp (the appellant) and Beaver Lumber Ltd; Sundance wishes to sub-lease part of its leased portion to a Swiss Chalet restaurant; assignment clause in the lease between Richfield and Sundance states that any sub-lease requires the main lessor’s written consent -> this consent cannot be unreasonably withheld, but will not be held to be unreasonable if the other major tenant occupying the building objects to the business being conducted by the proposed sub-lessee or assignee; in this case, Beaver Lumber objected completely to area being sub-leased to Swiss Chalet for reasons of both parking congestion and static parking that will harm Beaver’s business; Richfield refuses to grant sub-lease, Sundance brings action for declaration that it was relieved from obtaining the consent of the respondent lessor on the ground that consent was unreasonably withheld
- **Issue:**
  - Whether the respondent (Richfield) has unreasonably withheld its consent to a proposed sublease by its lessee, Sundance;
- **Majority:**
  - Court finds that layout of the parking lot is of special significance in this case, in addition to the position of Beaver’s entrance in relation to where the majority of the parking spots are located and where Swiss Chalet’s proposed entrance will be;
  - Court also notes that customers of shopping centres tend to park as close as possible to the entrance of where they are going to shop (particularly for Beaver, as a large majority of its profits come from the sale of bulky plywood);
  - Court finds that congestion will clearly increase in parking lot if Swiss Chalet operates there, and Beaver also objects to the “static” nature of parking that the Swiss Chalet will attract (i.e. people parking for longer periods of time);
• Court finds, therefore, that this objection is clearly an objection to the “nature” (and not "use") of the business being proposed – a provision mentioned in the lease agreement with Richfield;
• Court finds that these reasons articulated by Beaver and relied upon by Richfield do not comprise an “unreasonable” withholding of consent;
• **Court upholds that the burden of proof is on the tenant to show that the landlord’s withholding of consent is unreasonable, not the other way around;**
• Also, **consent is not unreasonably withheld if the landlord’s own financial interest will be adversely affected** -> rents which Richfield receives from Beaver have increased over the years and that congestion involved in allowing Swiss Chalet to sub-lease would jeopardize rents enjoyed by Richfield from Beaver – not an unreasonable ground; **test of reasonableness can be thought of as what a reasonable landlord would do in the circumstances**

**Dissenting:**
• "Nature of the business" cannot be construed as broadly as including something inherent in every business (i.e. the parking); complaining about the parking is not complaining about the nature of the business, but its success -> not warranted;
• The provision in the original lease agreement with Richfield should be interpreted as trying to prevent competition between lessees (Swiss Chalet does not operate the same/competing business as Beaver -> matter of parking is not and should not be read into the provision as stated in the agreement;
• **A restriction on subletting in any lease agreement ought to be limiting of alienation** -> allowing Richfield to withhold consent in this case would, conversely, promote alienation;
• Minority also reasons that Richfield freely entered into agreement where it takes a share of revenue from tenants – if volume of shoppers increase, revenue increases...but if it decreases, **lessor should not be allowed to rewrite lease so as to not bear any risk;**
• **Lessor was bound by original lease agreement to deal with risk** of increased/diminished business of its tenants;
• Minority finds that, if submissions of Richfield are allowed, Sundance would be restricted to subletting only to unsuccessful subtenants for fear that a successful one would present a risk of parking congestion; **inadequacy of parking situation is something that should be borne by the lessor**

**Held:**
• Appeal dismissed, original verdict upheld; Sundance’s declaration rejected

**CASE QUESTIONS/NOTES**

• In **1455202 Ontario Inc. v. Welbow Holdings Ltd. (2003)**, court listed factors to consider when deciding whether a landlord had unreasonably withheld consent:
  • Burden is on the tenant to prove refusal of consent unreasonable: test to determine if this has been discharged is whether a reasonable person would’ve withheld consent
  • Information available to and reasons given by the landlord at the time of the refusal is what matters (and not any additional or different facts/reasons provided subsequently to the court); landlord doesn’t have to prove that conclusions which led to refusal were justified, as long as they were conclusions that might have been reached by a reasonable person in the circumstances
• Question must be considered in context of existing provisions of the lease that define the entire assignment arrangement (landlord is not entitled to require amendments to terms of lease that will make them more advantageous to the landlord); but, landlord can reasonably withhold consent if assignment will diminish the value of its rights under it (excluding refusals that aim to advantage the landlord but were totally unconnected with the bargain originally struck between the landlord and tenant)
• Possibility that proposed assignee will default in its obligations may be a reasonable ground for withholding consent;
• Financial position of proposed assignee may be a relevant consideration (has to do with “personality” of an assignee that was referenced in older cases)
• Question of reasonableness is essentially one of fact that must be determined on the circumstances of each case (including commercial realities of marketplace and economic impact of an assignment on the landlord); passed decisions are not precedents that will dictate outcomes in subsequent cases

OBLIGATIONS OF LANDLORD AND TENANTS

RIGHT TO QUIET ENJOYMENT

• Is essentially seen as inherent in a right to exclusive possession. It is more a question of the extent of this right, and whether a breach has occurred on the facts.

SOUTHWARK LBC V TANNER [2001] 1 A.C. (H.L.)

• Facts:
  • The appellants (this case looks at two appeals) live in two different flats owned by London Boroughs of Southwark and Camden. They can hear all the sounds made by their neighbours because the flats have no soundproofing.
    o No warranty from the landlord promising sound insulation, only to keep the flat ‘in repair’
    o Appellants try to claim under the common law covenant for quiet enjoyment. Both tenancy agreements contain such words along the lines of “right to enjoy the quiet occupation of”.
  • Issue:
    • Does the sound from other tenants constitute a breach of the covenant
  • Held:
    • No breach
  • Reasons:
    • Test: What should have been reasonable expected by the appellants at the time of signing the lease
      o The lease must be construed against the background facts which would reasonable have been known to the parties at the time it was granted.
      o The cause of the noise was fairly within the contemplation of the parties when the lease was signed (ie. there was a terrace on the roof implying that there would be people walking around up there)
• **Obiter:** the courts concedes that regular excessive noise could constitute a substantial interference. (thus disagreeing with some of the case law mentioned below)

• **What is an interference?**
  - *Browne v. Flower* (1911): physical interference, personal annoyance arising from noise or invasion of privacy is not enough. And *Owen v. Gadd* (1956): “some physical or direct interference”
  - *Jaeger v. Mansions Consol* (1903): ‘physical not metaphysical nature’
  - *McCall v. Abelesz* (1976): not confined to direct physical interference...extends to any conduct...that interferes with the tenant’s freedom of action

• **Who does it apply to?**
  - Does not apply to parties who have a better claim than the landlord (someone who has title paramount)
  - *Albamor Construction & Engineering v. Simone* (1995): other tenants causing a disturbance in which landlord could have done something but didn’t.
  - *Curtis Investments Ltd v. Anderson:* held that actions of other tenants do not constitute a breach.
  - *Woodfall’s Landlord and Tenant (publication):* there must be consent or active participation on the part of the landlord to be liable for breach of covenant. (see also *Malzy v. Eichholz and Report on Landlord and Tenant Law*)

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**IMPLIED OBLIGATION OF A LANDLORD NOT TO DEROGATE FROM THE GRANT**

**PETRA INVESTMENTS LTD V. JEFFREY ROGERS PLC ^2000,L. & T.R. 452 (CH.D.)**

• **Facts:**
  - Landlord of a large building complex wanting to rent out to a number of ladies’ fashion retailers which initially happened but proved unstable.
  - Lease included a paragraph listing things the landlord was entitled to do (including alteration of the building, the letting of for any purpose etc.)
  - Landlord then wanted to bring in a Virgin Megastore. With full knowledge of the proposal, the tenant agreed to accept a reduction in services charge as a settlement of any claim, which it may have had regarding ‘the creation of the unit’.

• **Issue:**
  - Does the reduction in service charges settlement negate or limit the tenant’s ability to bring an action
  - What constitutes a derogation

• **Held:**
  - For the landlord.

• **Reasons:**
  - a.) The settlement excludes actions regarding the creation of the megastore, but can bring action regarding the manner in which the landlord has allowed Virgin to do business (i.e. signage and monopolization of entrance way), but found that this is not a breach, its merely poor commercial judgement, which the landlord is entitled to make.
  - b.) If there hadn’t been a settlement, the claimant’s proposal to rent to Virgin ”risked being in breach” of the obligation to build a retail shopping centre.
Test: whether the action complained of rendered the premises unfit or materially less fit to be used for the particular purpose for which the demise was made (Browne v Flower)
Chartered Trusts v Davies: derogation from grant when a landlord leased out adjacent spaces to a pawnbroker who attracted clientele that deterred the tenant’s customers; and the landlord had the power to do something about it.

• Ratio:
  • In determining what is implicit, have to consider the particular purpose of the transaction:
    o Examine the circumstances, which include, but are not limited to the obligations expressly undertaken by the parties, but cannot be responsible for everything that might cause an adverse effect whether foreseeable or not.

TERMINATION AND REMEDIES

• How a tenancy can be terminated:
  • Lease for set term—expire once terminating date has been reached
  • Periodic lease—ended by either party giving the appropriate notice
  • Doctrine of frustration—if events lead to this occurrence, lease ended
  • Tenant surrenders the lease and surrender is accepted by landlord
    o Ex. Abandons property and landlord takes possession
  • Breach (Highway Properties)
    o Can lead to damages or action to collect unpaid rent
    o Landlord can levy distress
    o Can lead to termination of tenancy
      ▪ Either by explicitly stated conditions OR
      ▪ By a string of tenant obligations that a breach of any covenant gives rise to right of re-entry
      ▪ BUT a failure to follow appropriate steps for recovery of possession by landlord suggest right of forfeiture not being exercised and preclude landlord from terminating (doctrine of estoppel, pretty much)

HIGHWAY PROPERTIES V KELLY, DOUGLAS & CO. (BC SC, 1971)

• Facts:
  • A major tenant in a shopping centre ends an unexpired lease; landlord resumes possession with notice that tenant will be held liable for damages suffered because of wrongful repudiation of the lease
  • Clauses in the contract which P alleged D breached
  • Sent letter to D stating landlord treating the tenancy as over but reserving right to sue for prospective loss
  • P claiming damages for loss suffered of rescission of the contract AND for prospective loss resulting from the D’ failure to carry on a supermarket business in the shopping centre for full term of the lease

• Issue:
  • What is the measure and range of damages that the landlord may claim for repudiation by the tenant?

• Held:
• In favour of the landlord—same damages as repudiation of a contract

• **Ratio:**
  
  - A commercial is a contract and has the full armoury of remedies ordinarily available to remedy repudiation of covenants
  
  - Damages are not limited to accrued rent to date of termination

• **Reasoning:**
  
  - Although by covenant or by contract the parties can add/modify/subtract from the common law, the “estate” element is still the pivotal factor in leases
  
  - **Three courses of action for landlord when tenant is in fundamental breach:**
    
    o Do nothing to alter relationship and insist on performance and sue for rent or damages
    
    o Elect to terminate the lease, retaining right to sue for rent that is due, or for damages to the date of termination for previous breaches of covenant
    
    o Advise the tenant that he proposes to re-let property on tenant’s account and enter into possession of that basis
  
  - In a business contract that does not involve a state in land, innocent party has an election to terminate the contract which results in its discharge when election is made and communicated to wrongdoer
    
    o Still may have a right to damages for prospective and accrued loss
  
  - **Parallel situation in leases: principles of surrender**
    
    o Surrender: On material breach or repudiation of a lease, the innocent party does an act inconsistent with the continued existence of that lease
    
    o Goldhar case: held that surrender where landlord re-let premise was not only a termination of contract, but also the obliteration of all terms of the lease that supported claims for prospective loss
    
    o BUT does not apply to cases where both parties “evidenced” intention in the lease itself to recognize a right of action for prospective loss upon repudiation
  
  - Artificial barriers to relief have resulted from overextension of the doctrine of surrender
  
  - Although it is correct repudiation by tenant gives landlord choice between holding the tenant to the lease or terminating it, at the same time a right of action for damages arises
  
  - Election to insist on lease or terminate it simply goes to measuring damages

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**JW LEM, “ANNOTATIONS: UNISYS CAN. INC. V YORK THREE ASSOCIATES INC”**

• Many academics and practitioners don’t like decision is *Highway Properties*

• Argue landlord in a commercial lease ought not to have the right in face of tenant repudiation to do nothing to alter relationship and insist on performance

• there is an obligation of landlords, like any other contract, to mitigate losses

• *Highway Properties* has been reaffirmed: 607190 *Ontario Inc. v First Consolidated Holdings Corp.* (Ont Div Ct., 1992)

• Almost overturned in *Unisys Canada Inc. v. York Three Associates* (Ont SC, 1999)

• Held landlord had duty to mitigate damages by not only finding a replacement tenant, but by also renegotiating with the repudiated tenant

• BUT overruled by Ontario Court of Appeal that trial judge erred in penalizing landlord for its failure to mitigate
CASE QUESTIONS/NOTES

• Since Highway Properties, held that a fundamental breach of the lease by the landlord triggers right of termination on part of the tenant (Shun Cheong Holdings BC Ltd. v Gold Ocean City Supermarket Ltd, BCCA, 2002)
• Letter important from Highway Properties—courts continue to require such notice if landlord wants to claim prospective damages; need to give sufficient and timely notice (Langley Crossing Shopping Centre Inc v. North-West Produce, BCCA, 2000)

THE PROPRIETARY STATUS OF LICENCES

• Licence: no more than permission to do that which would otherwise amount to a trespass
• Originally inherently revocable, now may be made irrevocable or revocable only on terms

DAVIDSON V. TORONTO BLUE JAYS 1999

• Management had no right to revoke patron’s licence to attend a game (he had not broken any laws) and contract terms were strictly construed against the party that drafted the terms

HURST V. PICTURE THEATRES LTD

• Purchaser of ticket has right to remain and attend performance: licence granted include K not to arbitrarily revoke the licence during performance (implied behavioural standards)
  • Being forced to leave wrongfully may invoke damages for assault + false imprisonment
• Licence is proprietary, to extent that it is a kind of personal property

DORLING V. HONNOR MARINE LTD

• Benefit may be capable of assignment (depending on terms)
  • A licence coupled with a recognized interest in land (ie profit a prendre) merely piggybacks on the valid real property right

TORONTO (CITY) V. JARVIS 1895

• Landowner (Severn Sr.) gave permission (conveyance) to Toronto to build drain through his land. Sold land to his son in 1879 and died in 1880. George (Severn Jr.) knew about father’s agreement with city. Conveyance was registered. Question: did the registry laws apply to the city’s interest?
• Severn Sr. made mortgages under which Jarvis Sr. became a purchaser of the property for valuable consideration: land later became vested in respondent (Jarvis Jr.) who duly registered his title.
• Jarvis then brought action to recover for trespass against the city when they entered property to perform certain works in connection with the drain as well as damages for maintaining the drain.
• Despite the fact there was no City by-law to authorize taking of land for drain, it was HELD that City of Toronto’s interest was an interest in land that could be registered
• If intention found to give either title or easement for the drain, then agreement must have been K for interest in land
• Further, since city acted on agreement by installing drain, court of equity would decree specific performance of a K for interest in land.
• If deemed licence rather than K, then the interest would be deemed irrevocable as soon as money spent on the drain by the City
• However, Court concluded Jarvis Jr. was not bound by the appellant's interest because he didn't have sufficient notice (dismissed) – Court doesn’t make determination re: if it is a licence or K

**LLOYD V. DUGDALE 2001:**

• No general rule that the court will impose a constructive trust on a purchaser to give effect to possible encumbrances or prior interests made known by a vendor prior to sale
• Stating possible encumbrances prior to a sale satisfies a vendor's duty: but there is no suggestion that a purchaser accepting such a K or conveyance is assuming a new liability in favour of third parties to observe the covenants benefiting another party
• Court won't impont constructive trust then unless satisfied that the conscience of the estate owner is affected such that it would be inequitable to allow the estate owner to deny a claimant an interest in the property
• Whether it is “inequitable” is determined by questioning whether new estate owner has undertaken a new obligation to give effect to the relevant encumbrance or prior interest
• Only if so will a constructive trust will be imposed
• A contractual licence is not to be treated as creating a proprietary interest in land so as to bind third parties who acquire the land with notice of it, on account of the notice alone
• Proof that a purchase price has been reduced w/agreement that new owner would give effect to relevant encumbrance/prior interest may indicate transeree has undertaken a new obligation to give effect to it

**RESIDENTIAL TENANCY REFORM**

• Intended to improve rights of tenants/provide greater security of tenure
• **Main elements:**
  • Increased termination notice periods
  • Fixing standard obligations in landlord/tenant relationship to allocate responsibilities and rights in a rational and fair manner
  • Increase in tenants' remedies while curtailing landlords' self-help remedies
  • Informal Dispute Resolution procedures designed to be effective/inexpensive/expeditious
  • Prohibitions on bargaining away of statutory rights
  • Landlord and tenant advisory boards
  • Rent control mechanisms (as regulation uncommon in Canada due to complexity of market)
• **Problems:**
  • Landlord may lower maintenance or other amenities in order to broaden profit margins in controlled-rent situation.
  • Heightens possibility property may be altered, reduces tenant security
  • Possibility of black market rentals arising under new scheme
**BAILMENTS**

- Like a "lease" of a chattel
- Important to distinguish between bailment and license (who has control?)
- Can be gratuitous or contractual
- If fixed term, doesn’t go back to bailor until term expires
- Used to matter who benefited – matters less today
- Bailor also has responsibilities to ensure quality of goods bailed (for example in rental agreements)

**Issues:**

- Did negligence of bailee lead to damage?
- Lower standards for gratuitous bailee
- Onus on bailee to rebut presumption (most able to know what happened)
- Figure out state of chattels on delivery and on return

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**LETOURNEAU V. OTTO MOBILES EDMONTON (1984)**

**Facts:**

- Letourneau (plaintiff) had his trailed stolen from a parking lot adjacent to his mechanic. He left the trailed after receiving instructions. The service (he’d used for other repairs) form had a waiver of liability for lost or damages goods.

**Issue:**

- Was there a bailment and did the mechanic meet the standard of care?

**Plaintiff Argument:**

- Plaintiff dropped off trailer on instructions from D. Thus possession, custody and control passed to defendant, who must demonstrate they took reasonable care.

**Defendant Argument:**

- D did not have actual possession; D never had control (and P had a key and could have accessed it at any time). No conformation that P dropped off vehicle, so they left it at their own risk.

**Held:**

- There was a bailment – although the D didn’t take physical possession, because P followed D’s instructions, there can be inferred possession.
- Possession occurred when P left the trailer, not when D was supposed to get it in the morning.
- Standard of care is a reasonable prudent owner – so there was a breach.
- Liability waiver didn’t apply because it was for past service and their was no waiver of liability for that current work order.

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**MERCER V. CRAVEN GRAIN STORAGE LTD. [1993] EWJ NO 736 (CA)**

**Facts:**

- Plaintiffs (3 farmers) deposited grain with defendants (Craven Grain Limited) for storage with instructions not to sell for less than £160 per tonne. It was mixed with other grain and sold for less. Craven Grain became insolvent and plaintiffs made claim to be paid for grain not returned.
• **Issue:**
  - Bailment vs. trade/barter

• **Defendant's argument:**
  - Relied on *South Australian Insurance Company Limited v. Randell* where it was held that farmers depositing wheat with a miller did not create a bailment.

• **Plaintiff's argument:**
  - Distinguishable from above since miller had discretion on what to do with wheat and contract in this case had language that indicated that farmers could decide what to do with it. Argued it was property in common with other farmers and that they were entitled to control over an aliquot of it (calculated based on proportion they’d contributed).

• **Held:**
  - Court agreed with plaintiff's arguments.

• **Note:** Reversed on other grounds (HL affirmed conclusion on mixing and title)

**CASE QUESTIONS/NOTES**

- Other cases that are similar with different results – *Randell* discussed above, *Crawford v. Kingston* where cows were given into care with agreement that he’d get same number of cows back at the end (person keeping cows had absolute dominion over cows so not bailment).

**M. ET AL. V. SINCLAIR C.O.B. SINCLAIR’S RIDING STABLES (1980) 15 CCLT 57**

• **Facts:**
  - Rented horses, son fell off because stirrup fell off.

• **Issue:**
  - Was there an implied warranty in bailment for reward? Was the waiver enough to avoid liability? Does *volenti non fit injuria* apply?

• **Held:**
  - Warranty implied – referred to *Hyman v. Nye* where court found person who lets out carriages is responsible for defects “which care and skill can guard against”
  - Waiver not enough: he was underage and couldn’t bind himself, also waiver too vague – didn’t include waiver against negligence
  - *Volenti Non Fit Injuria* doesn’t apply because would have to agree to risks of riding a horse with an improperly secured stirrup for it to apply

**PUNCH V SAVOY**

• **Facts:**
  - A (bailor) gave valuable ring to B (bailee) for repair. Ring was then sub-bailed to C in another city to obtain necessary work. C then sub bailed to D (CN - transportation) who was supposed to return it to B. Had to use CN transportation because of postal strike
    - D (CN) has exculpatory clause limiting liability to $50.00, and indicated that additional coverage should be purchased
    - Additional insurance was not purchased.
    - Item vanished in transit.
    - Bailor (A) sued D (CN), and B and C
Although no express authorization given from A to B to sub-bail, there was implied authorization

- **Issue:**
  - Are sub-bailors liable?
- **Held:**
  - YES – CN exculpatory clause didn’t apply to bailor because she didn’t expressly or impliedly agree to it, therefore she can sue them.
  - Found that B and C were liable as bailees because they didn’t get instructions from bailor regarding the means of carriage due to postal strike and failed to give proper account of how much ring was worth

**PIONEER CONTAINER**

- If bailment arises only if the bailor consents to the transfer of possession to the bailee, then bailor has to accept the terms of the sub bailment “warts and all”
- But if this consent is not a pre requisite to the establishment of a bailment (if all you need is that bailee voluntarily takes goods of another into custody) then:
  - Even a sub bailment on terms which were not authorized is still a bailment
  - Head bailor may sue sub-bailee for breach
CHAPTER 9: SHARED OWNERSHIP

BASIC CONCEPTS

ON. LAW REFORM COMMISSION, REPORT ON BASIC PRINCIPLES OF LAND LAW

Two Main Types of Shared Ownership:

• **Joint Tenancy:** two or more people together own the same interest, two main features:
  • **Four unities:** must be present for the creation and continuation of a joint tenancy
    o Possession: each joint tenant is entitled, concurrently with the other joint tenants, to possession of the whole of the land that is subject to the joint tenancy
    oInterest: each joint tenant has the same interest in extent, nature and duration
    oTitle: each joint tenant’s title must be derived from the same document or occurrence
    o Time: each joint tenant’s title must vest at the same time
  • **Right of survivorship:** the right of surviving joint tenants to take the interest of a pre-deceasing joint tenant
    o The death of one tenant does not cause the interests to pass to the survivors, but rather, they are left as before but simply share the ownership with one less person
    o This right passes immediately upon death of joint tenant
    o Key distinguishing feature of this form of shared ownership
  • Joint tenancy can insulate against creditors i.e., a creditor can seize a joint tenant’s share while the tenant is alive but when they die that right vanishes and the creditors can no longer seize
  • Joint tenancy can be converted into a tenancy in common through severance
• **Tenancy in Common**
  • Not defined by ‘four unities’
    o Only one unity required: possession
      • Tenants in common have equal rights of possession over the whole of the land
    o Other unities of interest, time, title not required, rather, tenants in common hold distinct, separate interests
  • No right of survivorship
    o When one tenant dies, interest passes to their estate in accordance with their will or intestacy rules
• **Other types of shared ownership**, such as tenancy by the entireties and coparcenary are infrequently used in Canada and are no longer important
  • **Tenancy by the entireties:** can only be created by married persons and allows spouses to own property together as a single legal entity
    o **Statutory override in BC, Land Title Act, s.12:** Spouses Separate
    o Spouses must be treated as two persons for the purposes of acquisition of land under a disposition made, or coming into operation, before or after this section comes into force.
  • **Coparcenary:** upon intestacy, two or more people inherit a title equally between them
METHODS OF CREATION

ON. LAW REFORM COMMISSION, REPORT ON BASIC PRINCIPLES OF LAND LAW

- At common law there was a presumption of joint tenancy so that a transfer of title to co-owners produced a joint tenancy if the four unities were satisfied and an intention to create a tenancy in common was not established
  - This presumption does not apply to pure personality
  - Also, there is a statutory override of this presumption i.e., legislation presumes tenancy in common unless an intention to create joint tenancy sufficiently appears on the face of the letters patent, assurance or will (s. 11 Property Law Act)
- In 3 types of circumstances there is an equitable presumption in favour of tenancy in common:
  - Partnership assets
  - Mortgages
  - Where the purchase price for the property is provided unequally
- Where two individuals purchase property and contribute equally, the property is put in the name of one person
  - The registered owner would be treated as if they hold legal title on trust for both parties, and the parties would own the equitable interest as tenants in common

LAND TITLE ACT, S. 173: SEVERAL PERSONS INTERESTED IN REGISTRATION

- The registrar may effect registration of the fee simple at the instance of a joint tenant or tenant in common, or of several persons, who together are entitled to the complement of the fee simple.

LAND TITLE ACT, S. 177: REGISTRATION OF JOINT TENANTS

- If, on the registration of title to land under an instrument or document, 2 or more persons are joint tenants, the registrar must enter in the register, following the names, addresses and occupations of those persons, the words ‘joint tenants’

RE BANCROFT, EASTERN TRUST CO V CALDER (1936, NS SC)

Facts:

Sam Bancroft: testator
- Widow: Clara Bancroft
- Children:
  - Percy (m), Aubrey (m), Florence (f); and
  - Minnie (f) (deceased)
  - Jean (f)
  - Paul (m) (deceased)
  - John, Hugh, Edward, Paul

- Eastern trust is the sole trustee under the testator’s will
- Testator divided his will into two shares:
  - First share given to wife for her life.
• Second share to be put into four equal shares divided amongst Percy, Aubrey, Florence and the last split between Minnie’s kids (note Paul deceased)

• **Issue:**
  • Should the share that had been given to Paul prior to his death, go to his surviving sister, to his estate, or to his children? More broadly, were Paul and his sister joint tenants or tenants in common?

• **Held:**
  • A joint tenancy was created. There is nothing in the will that shows an intention to divide the income between Paul and his sister (i.e., no words of severance) and thus create a tenancy in common. Common law presumption of a joint tenancy applies.

• **Reasoning:** Ross J
  • Note: we are dealing with personality, so s. 11 (2) of the Property Law Act does not apply. Instead, common law presumption in favour of a joint tenancy applies.
  • Presumption at common law of a joint tenancy, unless there is the slightest intention (typically via words of severance) to divide the property and create a tenancy in common
  • While the word ‘equal’ is used in the will, this is not one of the words of severance listed as creating a tenancy in common (but ‘equally’)
  • Just because the testator demonstrated that he wanted to benefit both of Minnie’s children following his wife’s death in another part of the will, doesn’t mean that he intended to create a tenancy in common during her lifetime.
    • The testator was dealing with the apportionment of the income at two entirely different periods - one before and the other after his wife’s death.
  • No indication in will of intention to divide the income between the children of Minnie B and which can be held to abrogate the idea of a joint tenancy and to create a tenancy in common.

### SEVERANCE OF JOINT TENANCIES

• The term **severance** is used in two different ways in the context of co-ownership:
  • In the determination of whether a joint tenancy or tenancy in common has been initially created, appropriate words of severance (e.g., ‘share and share alike’) are taken to denote a tenancy in common
  • To refer to the transformation of an existing joint tenancy into a tenancy in common

• **Three ways to sever joint tenancy:** *(Williams v. Hensman)*
  • **Unilateral act of severance**
    • Any act that destroys one of the essential four unities will sever a joint tenancy (e.g., alienating an interest)
      • Note, unilateral intention to sever will not work
    • Transfer interest to others: a transfer of a JT interest to someone else creates a new co-ownership of tenancy in common
      • Unities of time and title would be absent in new transfer converting JT to TinC
      • If there are 3 parties and one party acts unilaterally to convey their interest to a 4th party the result is:
        • 2 remaining tenants have a JT with right of survivorship for one another's interest
        • 1 new party now has solitary tenancy in common, whose interest has no right of survivorship
Transfer interest to self: under statute (impossible at common law) individual can transfer land to himself/herself as if it is transferring to someone else (e.g., s.18(1),(3) of Property Law Act

- Transfer to self has the same effect as transferring to another party by destroying unities of time and title

- Note: agreements can be made between parties not so sever, so that the risk of the other owner severing a joint tenancy unilaterally is avoided

- Mutual agreement between joint tenants
- Conduct that treats the interests as a tenancy in common not as joint tenancy
  - A course of dealing that is sufficient to show that the interests were all mutually treated as constituting a tenancy in common
  - Equity will intervene to estop the parties from attempting to assert a right of survivorship when their conduct suggests they had a tenancy in common
  - Severance may result even if the owners are not aware of the joint tenancy. This is to prevent the survivorship rule from being imposed unexpectedly.
  - I.e., failed negotiations over breaking up jointly owned interest, as the discussion of shares and separate interests represents an attitude that the joint tenancy has been abandoned (often arises following a marriage breakdown)
- Note: a sale or lease by all joint owners does not result in a severance (because joint ownership continues with proceeds of sale). If, however, the agreement is to sell and divide the proceeds, there will be a severance.
- Severance may occur for other reasons e.g., bankruptcy and judicial sale

**RE SORENSEN & SORENSEN (1977, ABCA)**

- **Facts**
  - Husband and wife divorce; they have joint tenancies on some lots of land
  - Wife is diagnosed with a terminal illness and wants to sever the joint tenancy so that the lots go to her mentally handicapped son
  - Wife makes several attempts at severance including the creation of a trust whereby she held the land in trust for her son: “...do hereby declare that I hold the said lands upon trust for my son.”
- **Issue:**
  - Was the joint tenancy severed through the creation of a trust?
- **Held:**
  - Trust severed the joint tenancy
- **Reasoning:** McDermid JA
  - Onus to prove severance is on those contending it
  - Successful act of severance was the declaration of the trust. In trust the presumption of advancement applies, and there is thus a valid gift of beneficial interest in property to the son.
    - She retained the legal title, but the son had the equitable title.
    - Even though gift is only of equitable title, it severs the joint tenancy
  - The other attempts to sever/arguments that there had been severance, beside the trust failed. They are as follows:
    - Divorce settlement agreement to sell the vacant lot next to the matrimonial home leads to inference that the lot the matrimonial home was on to be severed
• Court: both parties treated the joint tenancy as surviving the settlement negotiations (seen by wife's further attempts at severance and there is no evidence that husband treated it as severed)
  o Part of the settlement agreement involve husband leasing the property to the wife for her life
    • Court: Lease for life will not sever a joint tenancy (on wife's death the lease would terminate, on husband’s she would succeed to the whole)
  o The husband in the settlement agreement agreed to pay monthly maintenance, and to ensure he paid it, it was secured as a charge against his interest in the lots
    • Court: this doesn’t affect the four unities
  o Transferred interest to her son: executed the transfers, but left them with her lawyer with instructions to register them when she died
    • Not a completed inter vivos gift (no delivery, as solicitor was the wife’s solicitor and not the son’s)
    • Can’t make a DMC gift of realty
  o Wife altered her will just before she died to leave her interest to her son
    • Court: you cannot sever a joint tenancy by will. The moment you die, the right of survivorship crystallizes.
    • Court notes that if both joint tenants left wills leaving property to the other, that would show a common intention to sever.
  o Wife commenced an action to partition the lots and have the court order that they be sold and the proceeds divided, but the day that position was to be heard she died.
    • Court: this was merely a unilateral intention to sever, not a unilateral act of severance.

PROPERTY LAW ACT, SECTION 19: WORDS OF TRANSFER

• In the transfer of an estate in fee simple, it is sufficient to use the words "in fee simple" without the words "and his heirs"
• A transfer of land to a person without words limiting the interest transferred, or to a corporation sole by his or her corporate designation without the words "successors" passes the fee simple or the greatest estate or interest in the land that the transferor has the power to transfer, unless the transfer expressly provides that a lesser estate or a particular interest is being transferred
• A voluntary transfer need not be expressed to be for the use or benefit of the transferee to prevent a resulting trust
• Subsections (1) and (2) do not prevent an instrument from operating by way of estoppel.

RESOLVING CONCURRENT OWNERSHIP DISPUTES

• Rights and Responsibilities of Co-Owners
  • severance of joint tenancy converts joint tenancy into a tenancy in common
  • i.e. Co-owners remain co-owners without right of survivorship
  • each co-owner has the right to possession of the whole property, regardless of ownership share

ON. LAW REFORM COMMISSION, REPORT ON BASIC PRINCIPLES OF LAND LAW
• **General Rule:**
  o **Unity of possession:** i.e. each co-owner has same right to possession of the whole property
  o Non-occupying co-owners cannot make a claim (for compensation) against another co-owner who is lawfully exercising his/her rights

• **5 Exceptional situations where one co-owner may be required to account to other co-owners for benefits of occupation:**
  o **Ouster**
    ▪ Liability to pay occupation rent when one co-owners unlawfully “ousted” another
    ▪ Includes expulsion, violent or threatening conduct, making conditions for joint possession intolerable
  o **Agreement**
    ▪ Co-owners must agreed to having sole possession
  o **“Statute of Anne”**
    ▪ Action against co-tenant for receiving more than just share
    ▪ Note: account for what he receives from third party, not what he takes from the soil of his own exertions
    ▪ E.g.: *Henderson v. Eason* (1851): one co-owner in sole occupation farmed property. Not liable for profits because of exertions rule.
  o **Waste**
    ▪ Tenants in common are liable to their co-tenants for waste
  o **Equitable Accounting**
    ▪ What is just and equitable depends on circumstance of each case
    ▪ If one tenant has made improvements which have increased selling value of property, other tenant cannot take advantage of increased price without submitting to an allowing for improvements (Mastron. v Cotton)

• **Claiming for Expenditures Related to Property**
  o Reimbursements have been obtained for: mortgage payments, improvements, taxes, fire insurance premiums, upkeep and repairs, expenses from litigation with 3rd party

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**TERMINATING CO-OWNERSHIP**

• **4 ways:**
  o 1. If the property can be divided without destroying its value, the co-owners could divide the co-owned whole into parcels that former co-owners will own individually
  o 2. Co-owners could sell undivided property to 3rd party and divide proceeds
  o 3. Co-owner has right to sell his/her interest to remaining co-owners
  o 4. Co-owner may apply for an order for partition or sale of property

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**“ANNOTATION” BY J.W. LEM AND B.G. CLARK (2002)**

• Partition Act governs co-ownership arrangements where there is no K
• Act provides that where co-owners cannot agree on how to govern then one co-owner can demand the co-ownership relationship will be ended by court order -> “partitioned”
• Partitioned definition: divided up, with portions of fee granted exclusively to each co-owner

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• Where impossible (e.g.: single buildings) court can order it be sold and proceeds divided
• Note: consequences of forced sale are not always equitable
  ○ Very small minority co-owner compelling sale against wishes because prima facie right to force a sale (Greenbanktree Power Corp, 2002)
  ○ Judicial attitude is hesitant to enforce when seemingly malicious intent (Greenbanktree Power Corp, 2002)

LAND TITLE ACT, RSBC 1996, CHAPTER 250

Part 15 — Instruments
Effect of a mortgage

• 231 (1) Subject to other applicable provisions of this Act being complied with, a mortgage that complies with this Division operates to charge the estate or interest of the mortgagor to secure payment of the debt or performance of the obligation expressed in it, whether or not the mortgage contains words of transfer or charge subject to a proviso for redemption.
• (2) Whether or not a mortgage referred to in section 225 contains words of transfer or charge subject to a proviso for redemption, the mortgagor and mortgagee are entitled to all the legal and equitable rights and remedies that would be available to them if the mortgagor had transferred the mortgagor’ interest in the land to the mortgagee, subject to a proviso for redemption.
• (3) Subsections (1) and (2) do not
  ○ (a) validate a mortgage that, at law or in equity, is void or unenforceable,
  ○ (b) operate to change the general law of mortgages or the legal and equitable rules that apply between mortgagor and mortgagee, or
  ○ (c) preclude the inclusion of express words of transfer or charge subject to a proviso for redemption in a set of standard or express mortgage terms referred to in section 225 (5).

FAMILY RELATIONS ACT, RSBC 1996, CHAPTER 128

Equality of entitlement to family assets on marriage breakup

• 56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when
  ○ (a) a separation agreement,
  ○ (b) a declaratory judgment under section 57,
  ○ (c) an order for dissolution of marriage or judicial separation, or
  ○ (d) an order declaring the marriage null and void
• respecting the marriage is first made.
• (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
• (3) An interest under subsection (1) is subject to
  ○ (a) an order under this Part or Part 6, or
  ○ (b) a marriage agreement or a separation agreement.
• (4) This section applies to a marriage entered into before or after March 31, 1979.

Family asset defined
• **58 (1)** Subject to section 59, this section defines family asset for the purposes of this Act.

• **(2)** Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

• **(3)** Without restricting subsection (2), the definition of family asset includes the following:
  - (a) if a corporation or trust owns property that would be a family asset if owned by a spouse,
    - (i) a share in the corporation, or
    - (ii) an interest in the trust owned by the spouse;
  - (b) if property would be a family asset if owned by a spouse, property
    - (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or
    - (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;
  - (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
  - (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
  - (e) a right, share or an interest of a spouse in a venture to which money or money’s worth was, directly or indirectly, contributed by or on behalf of the other spouse.

• **(4)** The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

*Excluded business assets*

• **59 (1)** If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

• **(2)** In section 58 (3) (e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

*Onus of proof*

• **60** The onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.

*Marriage agreements*

• **61 (1)** This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after March 31, 1979.

• **(2)** A marriage agreement is an agreement entered into by 2 people before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
  - (a) management of family assets or other property during marriage, or
o  (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

- (3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.

- (4) Except as provided in this Part, if a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

- (5) A minor who has capacity to marry has, with the prior consent of the Supreme Court, capacity to enter into a valid marriage agreement.

- (6) If a minor who has capacity to marry has purported to enter into a marriage agreement without the consent required under subsection (5), the Supreme Court may at any time order that the marriage agreement is binding on and is for the benefit of the minor.

- (7) In a marriage agreement, a dum casta provision that applies if the spouses are living separate and apart is void.

- (8) A provision of a marriage agreement that is void or voidable is severable from the other provisions of the marriage agreement.

- (9) If a marriage agreement provides that specific gifts made to one or both spouses are not disposable without the consent of the donor, the donor is deemed to be a party to the marriage agreement for the purpose of enforcement or amendment of the provision.

Judicial reapportionment on basis of fairness

- 65  (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
  o  (a) the duration of the marriage,
  o  (b) the duration of the period during which the spouses have lived separate and apart,
  o  (c) the date when property was acquired or disposed of,
  o  (d) the extent to which property was acquired by one spouse through inheritance or gift,
  o  (e) the needs of each spouse to become or remain economically independent and self sufficient, or
  o  (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

  the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.
"disposition" means any disposition by an act between living persons that is required to be executed by the owner of the land disposed of, and includes

(a) a transfer, agreement of sale, assignment of an agreement for sale, lease or other instrument intended to convey or transfer any interest in land,

(b) a mortgage or encumbrance intended to charge land with the payment of money, and required to be so executed,

(c) a devise or other disposition made by will, and

(d) a mortgage by deposit of duplicate indefeasible title or indefeasible title, or other mortgage not requiring the execution of any document;

"entry" means an entry made in the register of land titles under section 2;

"homestead" means land or any interest in it entitling the owner to possession of it that is registered in the records of the land title office in the name of the spouse and on which there is a dwelling occupied by the spouses as their residence, or that has been so occupied within the period of one year immediately preceding the date of the making of the application under section 2.

Application for charge under this Act

2 (1) If a spouse or a person's spouse on the person's behalf applies to the registrar for an entry on the register that a homestead is subject to this Act the registrar must make the entry

(a) if the application is in the prescribed form,

(b) the application is accompanied by an affidavit of the applicant spouse in the prescribed form, and

(c) the registrar is satisfied that there has been compliance with this Act.

(2) The application for an entry may be made by a spouse in person or on a person's behalf by that person's spouse, solicitor or authorized agent.

(3) The person making the application must reside in British Columbia and must be 19 years or older.

When disposition without consent of spouse is void

3 (1) If an entry has been made on the register under section 2, a disposition of the homestead by a spouse during the life of that spouse if the interest of that spouse must or may vest in any other person at any time during the life of that spouse, or during the life of the spouse of that spouse living at the date of the disposition, is void for all purposes unless made with the written consent of the spouse on whose behalf the entry is made.

(2) A conveyance designed to avoid the right given by this Act has no effect.

Application of Estate Administration Act

4 (1) If an entry has been made on the title under section 2, section 77 (1) of the Estate Administration Act applies to the devolution of the homestead.

(2) Despite any testamentary disposition or rule of law and subject to the liability of the land comprising the homestead for foreclosure or the payment of debts, a personal representative holds the homestead in trust for an estate for the life of the surviving spouse.

Spouses living apart
• 5 If at the time of death of a spouse, the surviving spouse is living apart from the deceased spouse under circumstances disentitling the surviving spouse to alimony, no life estate vests in the surviving spouse and the surviving spouse does not take any benefit under this Act.

**Effect of divorce**

• 6 This Act ceases to apply on the pronouncement of a decree of dissolution or nullity of the marriage of the spouse with respect to whom the entry is made under this Act to the spouse in whose name the homestead is registered.

**Filing of consent on disposition**

• 7 (1) Any consent required for a disposition during the lifetime of a spouse that takes effect during the lifetime of that spouse, of a homestead under this Act must be produced and filed in the land title office with the instrument by which the disposition is effected.
• (2) The consent may be embodied in or endorsed on the instrument effecting the disposition.
• (3) The execution of a disposition referred to in subsection (1) by the spouse on whose behalf the entry is made constitutes a consent under this Act.

**Dispensing with consent and notice**

• 8 (1) On application by petition and on being satisfied that it is fair and reasonable under the circumstances to do so, the Supreme Court may dispense with the consent of a spouse, on whose behalf an entry is made, to a proposed disposition if
• (a) the spouses are living apart,
• (b) the spouse on whose behalf the entry is made
• (i) has not since the marriage lived in British Columbia, or
• (ii) unreasonably withholds consent, or
• (c) the whereabouts of the spouse referred to in paragraph (b) is unknown.
• (2) An order under subsection (1) may be made on terms and conditions as to payment into court or otherwise that the court in the circumstances thinks proper.
• (3) If the court is satisfied that the spouse on whose behalf the entry is made has not, since the marriage, lived in British Columbia or the whereabouts of that spouse is unknown, it may dispense with the giving of notice of the application for the order or give other directions as to service of the notice.
• (4) If the spouse on whose behalf entry is made is a mentally disordered person or person of unsound mind, notice of an application to dispense with the consent of that spouse must be served in the manner provided by the rules of the Supreme Court for the service of writs on those persons.
• (5) On the order being filed with the registrar at the proper land title office, and on compliance with the Land Title Act, the registrar must register the transfer.

**Presumption of consent from participation in sale**

• 9 (1) If the spouse on whose behalf an entry is made has executed a contract for sale of the homestead, joined in the execution of it with the other spouse or given written consent to the execution of it, and the consideration under the contract has been totally or partly performed by the purchaser, the spouse on whose behalf the entry was made is, in the absence of fraud on the part of the purchaser, deemed to have consented to the sale in accordance with this Act.
(2) If a subsequent disposition by way of transfer of the homestead is presented for registration under the Land Title Act, the consent previously given or the agreement executed, if produced and filed with the registrar, is sufficient for the purposes of this Act.

Abandonment by spouse of benefits and privileges

10 (1) A homestead or part of a homestead and the benefits and privileges conferred on the spouse on whose behalf an entry is made under this Act in respect of the homestead or any part of it may be abandoned by that spouse by a document, in the prescribed form, abandoning the homestead rights.

(2) The registrar must cancel the entry on receiving an application in the form prescribed for applying for the cancellation of an entry, accompanied by the document referred to in subsection (1).

Cancellation on protected spouse predeceasing other spouse

11 On application in the form prescribed for applying for the cancellation of an entry, accompanied by evidence satisfactory to the registrar that the spouse on whose behalf the entry was made has died, or that a decree has been pronounced dissolving or annulling the marriage of the spouse on whose behalf an entry was made to the spouse in whose name the homestead is registered, the registrar must cancel the entry.

Spouse may be required to show why entry should not be discharged

12 (1) A spouse or the personal representative of the spouse may by summons call on the other spouse to attend before a court of competent jurisdiction to show cause why an entry should not be discharged if

(a) an entry under section 2 has been made on the register, and

(b) the spouse in whose name the homestead is registered, or that spouse’s personal representative, claims

(i) that the land affected or a part of it is not a homestead, or

(ii) that the entry for any other reason should not have been made.

(2) On proof that the spouse has been summoned as required by subsection (1), and on evidence that the court may require, the court may make an order that it considers appropriate in the circumstances.

Appeal from registrar’s decision

13 If a person is dissatisfied with a decision of the registrar under this Act, that person may, within 21 days of the receipt of notice of the decision, appeal to the Supreme Court in a summary way by petition, and section 309 of the Land Title Act applies to the appeal.

Repealed

14 [Repealed 2004-66-65.]

Power to prescribe forms

15 The Lieutenant Governor in Council may prescribe forms for the purposes of this Act.
SHARED OWNERSHIP OF PERSONALITY

- Personal property and real property can be co-owned either by joint tenancy or tenancy in common
  - The statutes that reverse presumption in favour of joint tenancy don’t typically extent to personal property
  - Words of severance apply
  - Right of partition and sale not available for chattels.
- Co-ownership of bank accounts (*Pecore*): person who deposited money in joint account could retain beneficial ownership of entire balance in account while living
  - Also could make gift of right of survivorship to other holder

CASES OF NOTE

FROSCH V. DADD (1960)

- **Facts:**
  - P and her brother, D, were siblings of deceased Henry Dadd. Henry and his brother invested money into rental properties and proceeds were deposited in joint account in their names. D argues discussed with deceased that survivor would be entitled to money in account. Property was tenants in common but made different arrangements with money. Before Henry’s death made informal will leaving everything to Plaintiff sister and brother-in-law. The day before Henry’s death D withdrew entire balance in joint account of $28,399.68.
- **Reason:**
  - Disagrees that the formal deposit agreement signed by the parties is anything more than compliance with requirements to open joint account. Agreement signed with bank does not show any corroboration of alleged oral agreement.
  - Allowing survivorship would be creating joint tenancy by inadvertence: which won’t allow.
  - Deposit of deceased share in joint account raises presumption of resulting trust in his favour to portion D was unable to rebut.
- **Decision:**
  - Trial judge correct, appeal dismissed.
- **Ratio:**
  - Joint bank accounts are presumed in equity to be resulting trust to the proportion that each party put in (except for in marital situations where they are considered joint property)

CASE QUESTIONS/NOTES

- With shared beneficial owners of bank account (either joint tenancy or tenancy in common), who owns items purchased from the account?
- Passage from Rathwell v Rathwell discussing 3 cases with different views:
  - *Jones v. Maynard*
- When husband and wife have joint bank account, beneficial ownership and assets acquired from it will depend on intentions of party
  - If money pooled (common purse), each has $\frac{1}{2}$ interest in purchased items
    - *National Provincial Bank Ltd v. Bishop* (disagreed with)
      - Where joint account with cheques that can be drawn by either, the investment purchased from account belongs to spouse who make purchase.
    - *Daly v. Brown:*
      - “in a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself”

### CO-OWNERSHIP THROUGH FAMILY PROPERTY LAW

- Remedial constructive trust (Chapter 6): provided non-title holding partner with a claim in equity to property held by partner if the non-title partner had contributed
  - Usually by work to it’s acquisition, maintenance or preservation
- Family property regime began in 1970’s
  - System of deferred sharing: spouses maintain rights as owners during marriage
    - Obligation to share title only when separation, divorce or death
  - Strong presumption of equal sharing

### ONTARIO FAMILY LAW REFORM ACT

- **1978**
  - Items used by family were “family assets”: equal sharing
  - Business assets acquired during marriage not shared
- **Ontario Family Law Reform Act, 1990**
  - Family or business property shared equally if acquired during marriage
  - **Section 4 defines property as:**
    - … any interest, present or future, vested or contingent, in real or personal property and includes
      - a) Property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself
      - b) Property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and
      - c) In the case of a spouse’s rights under a pension plan that have vested, the spouse’s interest in the plan including contributions made by other persons.
  - Property acquired subject to division EXCEPT:
    - Received by gift to one spouse only (as long as not family home)
    - Damages from personal injury
    - From life insurance policy
  - Equal sharing unless one can prove equal division would be unconscionable: strong presumption for equal sharing
  - Court has several options to award division:
    - May order equalization payment: spouse with more net property makes a payment to the other
• Property of one spouse charged with security interest in favour of the other
  ♦ To ensure payment of support obligation or settle family debts
• Can order spouse to transfer property to other spouse or third party
• Ontario Act allows for partition or sale of specific property

- Western Canadian homestead protections:
  • Prevent one spouse form unilaterally disposing of family house.
    Requires spousal consent to any disposition
  • Does not prevent spouse from conveying his or her interest in family
    him to their self in order to sever joint tenancy and destroy right of
    survivorship
  • One province, Newfoundland and Labrador, marriage gives rise to immediate
    right of ownership in family home

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**Braglin v. Braglin Q.B. 2002**

*Occupation rent*

- **Facts:**
  ♦ Couple divorce, husband stays in house. Wife asks for occupation rent. Husband pays for
    house mortgage and marital debts.
- **Issue:**
  ♦ Is she entitled to occupation rent?
- **Decision:**
  ♦ Ms. Braglin does not contribute to mortgage payments on home or repayment on home
    renovation loan, occupation rent not given.
- **Rules:**
  ♦ A departing joint tenant who has left voluntarily and not “outset” is not prevented from
    bringing claim for occupation rent
    ♦ Should only be awarded in family law context with great caution (Kazmierczak)
  ♦ Family law: departing joint tenant who does not contribute to support of property is
    prevented from occupation rent
  ♦ Applied flexibly and on discretion

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**Stonehouse v. Attorney-General of British Columbia (1961)**

- **Facts:**
  ♦ P and wife registered owners of land. Wife without telling husband conveyed “all
    interests in and to” this property to her daughter from former marriage. From time of
    execution until wife’s death, three years later, P unaware of deed which remained
    unregistered. Daughter registered it day after mom’s death without Registrar of Titles
    inquiring whether grantor alive. P brought action for recovery of assurance fund under
    s. 233(1) of Land Registry Act RSBC 1948.
  ♦ Trial Judge ruled for P, Court of Appeal: action should be dismissed. P appeals
- **Issue:**
  ♦ Did unregistered deed sever joint tenancy OR did the P’s rights of survivorship vest once
    wife died?

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• **Decision:**
  o Appeal dismissed. Deed severed joint tenancy and therefore Registrar did not make omission.

• **Reason:**
  o Effect of deed to change husband’s interest from joint tenancy to tenancy in common.
    ▪ Extinguish his rights of survivorship
  o Unregistered deed operative to sever joint tenancy in common law, Registrar under no obligation to inquire if dead or alive
  o S. 35: unregistered deed could not operate to “pass any estate or interest either at law or in equity”
    ▪ Mrs. Munk did not pass estate, but changed character from joint tenancy to tenancy in common

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**LAND REGISTRY ACT RSBC 1948, S. 223(1)**

• Any person sustaining loss or damage caused solely as part of any omission, mistake or misfeasance of the Registrar, or any of the officers of clerks, in the execution of their respective duties under this Act, may bring and maintain an action in the Supreme Court against the Attorney-General as nominal defendant for the purpose of recovering the amount of loss or damage and costs from the Assurance Fund.

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**WILLS VARIATION ACT [RSBC 1996] CH. 490**

• s.2 Maintenance from estate:
• regardless of law or statute to the contrary, if will does not adequately provide for spouse or children (in court’s opinion) the will may be altered as is adequate, just and equitable in the circumstances.

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**TATARYN V. TATARYN SCC 1996**

• **Facts:**
  o Husband (deceased) does not want to leave any of his estate to his son John (J). Fears that if he leaves estate to his wife she will pass on portion to J in her own will.
  o Wife gets life estate in marital home (remainder to other son Edward (E) upon her death). Rest of estate (money, a rental property) is put into trust to be administered by E to wife’s benefit. E is allowed to encroach on the capital.

• **Issue:**
  o Plaintiffs (wife/sons) bring action against the estate; call for it to be amended by relying on s.2 of the Wills Variation Act. Estate argues that s.2 should only be used in cases of “need” (spouses in financial difficulty/dependent children).

• **Reasons:** (McLachlin J.)
  o Wills Variation Act should be read as providing for “need” based remedies and moral remedies.
  o “Adequate, just and equitable” provides extensive jurisdiction to courts. Should be judged in light of current social norms. (legal obligations/moral obligations).
  o Use relevant statutory law to determine legal obligations (Divorce Act; Family Relations Act; etc.).
• Estate reapportioned here. Wife contributed to the estate (employment, upkeep, etc); it is within the intention of the act to allow the court to reflect her contribution (the estate would be split if they had been divorced - uses this as a guideline/principle).

• **Judgment:**
  - Wife gets title to the matrimonial home. Life interest in the rental property. Entire estate minus the gifts to the sons.
  - Sons (both) get immediate gift of $10k. Upon wife’s death rental property is split 1/3 to J; 2/3 to E.

• **Ratio:**
  - Courts have broad jurisdiction to vary wills where they believe that legal or moral obligations to spouse/children are not being met. “Adequate, just and equitable” is to be determined in light of current societal norms. Can look beyond a strict “need-maintenance test” to the more inclusive “moral duty approach.”

**NOVA SCOTIA V. WALSH SCC 2002**

• **Facts:**
  - Walsh is claiming the Marriage Property Act is discriminatory under s.15 of Charter because it does not allow the division of property for common law couples.

• **Judgment:** (Gonthier J.)
  - Can’t extend understanding of ‘marriage’ in property division to common law couples because they are exercising their liberty to not take part in the system.
  - Contrasts spousal support regime and division of matrimonial assets regime. Spousal support was found to require extension to common law (and same-sex couples at that point) because legislation had a social objective (needs of spouse/children). There is a societal interest in not having to have the state provide care for them. Division of matrimonial assets (When married there is a presumption of equal division upon divorce) is based in contract law/property regime. Not as clearly tied to social objectives. (see also: Quebec (AG) v A 2013 SCC)

**PARTITION OF PROPERTY ACT [RSBC 1996] CHAPTER 347**

• s. 2(1) Joint tenants/tenants in common can be compelled to partition or sell land (or a part of it) by this Act.

**PARTITION AND SALE FOR JOINT OWNERS**

**ESTATE ADMINISTRATION ACT, RSBC 1996, CHAPTER 122**

*Actions of account*

• 71 (1) Actions in the nature of the common law action of account may be brought and maintained against the executor or administrator of a guardian, bailiff or receiver, and also by one joint tenant or tenant in common, the executor or administrator of the joint tenant or tenant in common, against the other as bailiff for receiving more than comes to that person’s just share or proportion, and against the executor or administrator of the joint tenant or tenant in common.

• (2) The registrar or other person appointed by the court to inquire into the account
• (a) may administer an oath and examine the parties touching the matters in question, and
• (b) is entitled, for taking the account, to receive the allowance that the court orders from the
party that the court may direct.

PROPERTY LAW ACT, RSBC 1996, CHAPTER 377

Remedy of co-owner

• 13 In addition to the owner’s other rights and remedies, an owner who, because of the default of
another registered owner, has been called on to pay and has paid more than the owner’s
proportionate share of the mortgage money, rent, interest, taxes, insurance, repairs, a purchase
money installment, a required payment under the Strata Property Act or under a term or
covenant in the instrument of title or a charge on the land, or a payment on a charge where the
land may be subject to forced sale or foreclosure, may apply to the Supreme Court for relief
under section 14 against the other registered owners, one or more of whom is in default.

Court may order lien and sale

• 14 (1) On hearing an application under section 13, the court may do one or more of the
following:
• (a) order that the applicant has a lien on the interest in land of the defaulting owner for the
amount recoverable under subsection (2);
• (b) order that if the amount recoverable under subsection (2) is not paid by the defaulting
owner, within 30 days after the date of service of a certified copy of the order on the defaulting
owner or within another period the court considers proper, the defaulting owner’s interest in the
land be sold under the Supreme Court Civil Rules governing sales by the court;
• (c) make a further or other order, including an order that the applicant may purchase the
interest in the land of the defaulting owner at the sale.
• (2) The amount recoverable by the applicant is the amount the defaulting owner would, at the
time the application is made or repayment is tendered, have been liable to contribute to satisfy
the defaulting owner’s share of the original debt if it had been allowed to accumulate until that
time.
• (3) If there is a sale under this section, the transfer to the purchaser must be executed by the
registrar of the court, and, on registration, passes title to the interest in land sold.
• (4) Surplus money received from the sale must be paid into court to the credit of the defaulting
owner.

HARMELING V HARMELING 1978 BCCA

• Facts:
  o The husband appealed from the trial judgment directing a sale of the jointly-owned
matrimonial home. When the marriage took place in 1960 the husband was 53 and the
wife 45 years of age. The property was purchased in 1967, most of the money coming
from the proceeds of sale of another property which the husband had owned before the
marriage. The house was built mainly with the husband’s money; the wife made a
contribution to its cost from an award of damages, which she had received. The house
was built for the comfort of the parties during their retirement years. The husband had
heart problems. In 1975 the wife left the home and went to live with another man. She then brought proceedings for partition and sale of the home.

- **Held:**
  - The appeal was allowed. In Evans v. Evans, [1951] 2 D.L.R. 221, 1 W.W.R. 280, the British Columbia Court of Appeal had concluded that the jurisdiction under s. 3 of the Partition Act to compel partition or sale was discretionary without placing any limits upon the exercise of that discretion. Since then the decision of the Ontario Court of Appeal in Davis, v. Davis, [1954] 1 D.L.R. 827, had been interpreted as deciding that want of good faith, vexatious intent or conduct, and malice were the only factors which should deter the court from granting an application by a joint owner for partition and sale of the jointly-owned property. This interpretation of the Davis decision had been accepted and applied by the British Columbia Supreme Court. The judicial discretion ought not to be so limited. The Court, however, accepted the general statement that a joint tenant had a prima facie right to partition or sale, and that partition or sale would be ordered unless justice required that such an order should not be made. The circumstances in this case justified the refusal of an order. If the order stood, the husband would be ousted from the home, which was built largely from his money to provide for his retirement. It was particularly adapted to his interests. His half of the proceeds of a sale would not be sufficient to provide him with similar accommodation. It was too late in life for him to start again: he should not be turned out at the age of 70 years.

**THE NATURE OF COOPERATIVES AND CONDOMINIUMS**

### COOPERATIVES

- A form of concurrent ownership structured to provide members with shared right of use and governance over subject-matter of association
- 2 main forms in housing context:
  - **Equity Co-ops**
    - Members contribute financially to enterprise to:
      - Defray costs associated with premises (e.g. repairs, mortgage)
      - Augment value of their investment (usually)
  - **Non-profit Co-ops**
    - Purpose: to provide low-cost accommodation and ability of members to participate in governance of their housing community
      - Operate on principle of "one member, one vote" in which members have right to participate fully in collective operation/management of the co-op
      - Members individually have right of occupancy/security of tenure if comply with by-laws

### CONDOMINIUMS

- 3 main features:
  - Portion of property divided into individually owned units
  - Balance of property owned in common (e.g. elevator, roof)
  - Condo corporation established to manage property
Private Law: Property

- Mainly a creature of statute because although condos may be created under common law, common law is limited in ability to:
  - Deal with questions regarding rights of individual owners upon destruction of the premises
  - Create a satisfactory mesh of rights/obligations of individual owners
  - Provide appropriate mechanisms to settle disputes between owners

- The various provincial Condominium Acts combine law relating to individual ownership, joint ownership, easements and covenants, and corporations to deal with common law limits
  - Easements and covenants because unit owners have rights to compliance by others to allow access to units
  - Corporations because of the nature of condo administration with unit owners being in position akin to shareholders

ALTERNATIVE CONCEPTIONS OF SHARED OWNERSHIP

- Religious Communal Property
  - Held by groups whose religious convictions prevent them from owning property individually
    - E.g. Hutterian colonies

HOFER V. HOFER SCC 1970

- Facts:
  - Hutterian colony purchased land for creation of “daughter” colony
  - Articles of Association (which govern the conduct of the colony and must be signed by all members of the colony) list the respondents as joint tenants;
  - Articles of Association also provide that:
    - All real and personal property shall be owned, used, occupied, controlled and possessed by the said Colony for the common use, interest and benefit of all members
    - Any members expelled shall not be entitled to any of the property or interest in it
    - Appellants were members of the daughter colony who were expelled and are seeking a declaration that they are still members and an order to divide all assets equally among themselves and the respondents

- Held:
  - Because there is no allegation in pleadings that Articles of Association signed by the appellants were signed under any duress, it follows that their expulsion makes them ineligible for continued membership and they have no right to remain or claim a portion of the colony’s assets
  - In concurring opinion, Hall J. expresses abhorrence re the treatment of the appellants and suggests that legislation may be used to soften the harshness of such situations which would permit some contribution to dissident members for their contributions to the community

A.J. ESAU “JUDICIAL RESOLUTION OF CHURCH PROPERTY DISPUTES”

- SCC in the Lakeside case (1992 - another Hutterian colony dispute) held that when voluntary associations expel members, court may judicially review the process to ensure association has
followed own internal rules (customary or written) and that the process complies with basic principles of natural justice in terms of notice and fair opportunity to be heard by an unbiased tribunal

- So long as these expulsion meets these criteria, then members have no claim to share of colony’s assets
- How courts would deal with church property in wake of schism (where is not just a few dissident members, but at least two significant groups formed) is unclear
  - In second round of Lakeside case, courts nearly had to adjudicate property entitlements of the two groups after schism but they ended up coming to own voluntary agreement regarding how to divide assets

**ABORIGINAL TITLE**

- In common law, Aboriginal title regarded as communal (Affirmed in Delgamuukw)

**J.S. YOUNGBLOOD HENDERSON, “MICKMAW TENURE IN ATLANTIC CANADA”**

- **Property**
  - “More of a management right to ensure discipline in the consumption of resources, rather than a concept of ownership” (awareness of this is called Netukulimk)
  - Few distinctions exist between personal and real property. Distinctions exist to enable sharing, gifting etc.
  - Closer to “bundle of rights” (and duties) understanding of property. Purpose: provide incentives to 1) conserve and 2) share.
  - No distinction between collective and individual interests. Not fee simple ownership.
  - Emphasis was on stability and minimization of risk not growth and the accumulation of wealth.

- **Land Tenure**
  - In indigenous tenure the role of the family or individual is managerial, not proprietary.
  - Land was “held in trust” as an “endowment” or “legacy.” Ultimate ownership of land was held by future generations.
  - Rights of use are relative among members of kinship groups. No one could claim exclusive use or entitlement to a particular site. No family could lose their relationship to a site.

- **Sharing**
  - Family with wide administrative authority (a legacy) has no right to exclude ‘insiders’
  - Sharing manages demand, and serves to mitigate many of the incentives to consume a resource. Compare with Non-profit Co-ops.

- **Renewal Ceremonies**
  - Property rights obtained through kinship not use or purchase. Right of succession or inheritance is based on actual services to elders and management of the resource, not just kinship. Legacy “vests” in family after 7 generations of sound management.
  - Songs and stories (indigenous narratives) describe “rights” to use certain resources.
  - Family claims are asserted and readjusted; periodic equalization of shared rights among the collective families.

- Geopiety: awareness of reflection of spiritual world in the natural or human world.
The foregoing more-or-less comports with Delgamuukw. Aboriginal title is not a 'form of inalienable fee simple' because it contains the Inherent Limit. It comprises the right to use land for a variety of purposes. It is sui generis but comparable with doctrine of equitable waste in cases of life estate in real property. Or you could look at it like the fiduciary duty of a trustee.

**DERRICKSON V. DERRICKSON SCC 1986**

- **Facts:**
  - Appellant (wife) brought petition for divorce and made application pursuant to Family Relations Act (FRA) for ½ interest in properties that the respondent (husband) holds Certificates of Possession for pursuant to the Indian Act, or for compensation in lieu of division
  - Is the FRA, which deals with division of family assets, applicable to lands on a reserve?

- **Held:**
  - The FRA conflicts with provisions of the Indian Act and is provincial legislation so cannot apply to the federal domain of reserve lands
  - However, the FRA can still be used to award compensation for the purpose of adjusting the division of family assets between the spouses

**PAUL V. PAUL SCC 1986**

- **Parties:**
  - Pauline Ester Paul (the Appellant)
  - Edward Gordon Paul (the Respondent)
  - The Attorney General of Canada (Intervener in support of the Respondent)
  - Attorneys General of B.C. and Quebec (Interveners in support of the Appellant)

- **Facts:**
  - Appellant and Respondent are members of Tsartlip Indian Band. They lived in a home acquired by the respondent by way of Certificate of Possession under s. 20 of the Indian Act, RSC 1970, c l-6, ss. 20.
  - They separated and appellant was granted interim possession of the matrimonial home pursuant to s. 77 of the Family Relations Act, RSBC 1979, c.121, s. 77.

- **Issue:**
  - Constitutional Question:
    - Are the provisions of the provincial Family Relations Act invalid, inapplicable, inoperative, or of no force and effect, when applied to families on land in an Indian reserve?
  - Specific Question:
    - Is this case distinguishable from Derrickson v Derrickson; viz. Is an interim order for possession any different from the division of shared matrimonial property on an Indian Reserve?

- **Case History:**
  - Trial Level: BCSC orders interim possession of matrimonial home to Mrs. Paul
  - Appeal: BCCA sets aside lower court decision, interim order overturned.

- **Held:**
• Appeal Dismissed. This case is indistinguishable from Derrickson. The Family Relations Act provisions related to “occupancy” are also inapplicable on Reserve Lands. Even if applicable, they would be inoperative.

• **Reasoning:**
  - The Court just follows Derrickson and therefore, this provision of provincial statute is inapplicable to Indian Reserve.
  - The Certificate of Possession is in the husband’s name and gives right of possession. “Occupation is a part of possession,” and therefore the two schemes are in conflict.
  - The respondent has a right to lawful occupation of the home under the federal Indian Act. The wife has right of “exclusive occupancy” under provincial Family Relations Act. Even if this provision of the provincial legislation applies on the Reserve, it is in direct conflict with the federal legislation and would therefore be inoperative.

**COMPUTER SOFTWARE**

*Internet has given rise to sharing arrangements that have look and feel of common property but tension exists with expansion of intellectual property rights*

**GNU GENERAL PUBLIC LICENSE VERSION 3, 29 JUNE 2007**

• **Free Software License:** Grants recipient broad rights to modify, redistribute &c. works in ways which would normally be prohibited by copyright law.

• **Free Software:** Doesn’t refer to $. ‘Free’ means licensee has the right to:
  - use the software for any purpose,
  - change the software to suit needs,
  - share the software with others, and
  - share the changes made.

• **Copyleft:** Work is copyrighted but the license means everyone who receives the work has the right to modify, reproduce, and redistribute the work. This wide permission is conditioned on the fact that users pass on the same rights to subsequent users. The software is ‘free’ and always remains so, regardless of how it is modified &c. Reproduction need not be gratis.

• **Copyleft is contrasted with copyright.** The latter restricts users rights to modify, redistribute and adapt the subject of the copyright. Copyleft ensures these rights. Note Economic and Moral Rights from first term. GPL rights are for the term of the copyright. Fair Use is allowed.

• **General Public License:**
  - **Purpose:** Guarantee the freedom to share and change all versions of a program. Can also be applied to other works (literary, artistic &c.)
  - **Foundational Assumption:** You have the right do all of these things; and copyright law forces you to surrender this right. Copyright Law seen as restricting freedom of user as opposed to protecting interests of creator.

• **The GNU GLP does 2 things**
  - Asserts copyright on the Software. The creator has copyright.
  - Offers license giving legal permission to copy, distribute, and/or modify it.

• There is no warranty for free software. This protects the developers. Changes must be indicated to avoid wrongful attribution of blame for problems. Can offer warranty protection for a fee.

• **Software patents** cannot be used to render software un-free (ie. Restrict users’ right to modify the programs)
• **Disclaimer of Warranty**: The entire risk for defective programs falls on recipient
• **Limitation of Liability**: No cause of action for defective software.

**QUESTIONS**

• **How, if at all, does the GPL create a commons (let us call it a cyber-commons)?**
  o Private property over which other members of society have traditional rights is, technically, a part of the commons. This is basically what the GPL provides for. The creators hold copyright but recipients have broad rights to use and modify the program to suit their needs. The emphasis is on inclusivity, as opposed to exclusivity. This is like the commons.

• **Do you predict that there will be a tragedy of the cyber-commons?**
  o No, the Tragedy of the Commons supposes that there is a finite amount of a given resource. In this case, if a program is modified or copied, the resource base is increased and not depleted. Therefore, the GPL will encourage the opposite of a tragedy. Use of software by a recipient does not in any way abridge the use and enjoyment of previous users and the License specifically provides that the recipient cannot abridge the right to use for subsequent recipients.

• **Or, could the privatization of cyberspace produce the converse, namely, a tragedy of the anticommons?**
  o Probably not, The Tragedy of the Anticommons occurs when private interests serve to frustrate broader societal goals. The profit motive seems to have driven innovation in the internet, software &c. Without this the internet would not be seen as an area of opportunity for developers. The law of Fair Use provides limited exceptions to copyright and this discourages the anticommons.
CHAPTER 10: SERVITUDES OVER PROPERTY

• Servitudes are possessory entitlements of an owner of a freehold or leasehold estate can be burdened with non-possessory rights (meaning, others have use of the property)
• They grant an incorporeal interest in land to a non-owner (meaning you have an interest in someone else’s land that is less than an estate and does not involve a right of exclusive possession)
• They can pass with a transfer of property
• Remedy is usually an action for nuisance rather than trespass
• Examples of servitudes:
  o Easements (primary form)
  o Profit à prendre: the right to extract minerals or other natural products from the land, such as the in oil & gas industry
  o Restrictive covenants: planning devices in residential & commercial development
  o Rent-charge – a right to exact payment against a freeholder in complex real estate developments
  o Servitude-like features of some rights – some circumstances can be seen as creating rights of access, such as public property

THE NATURE OF EASEMENTS

• “An easement is a privilege without profit to utilize the land of a different owner... or to prevent the other owner from utilizing his land in a particular manner for the advantage of the dominant owner.” (p. 754)
• E.g. access to common hallways in a building.

ELEMENTS OF AN EASEMENT (RE ELLENBOROUGH PARK)

• There has to be a dominant tenement (which enjoys the benefit of the easement) and servient tenement (which is burdened).
  o An easement cannot exist in gross in Canada. That is to say, it cannot exist independent of the land; it cannot be carried by a person from place to place. (Cemetery plot is an exception.)
• The dominant and servient tenement’s have to be different people.
  o An easement over your own land is unnecessary because ownership of servient land carries a far more extensive option of exploitation and use than an easement could provide.
• An easement must accommodate the dominant tenement
  o Test: Does the easement make the dominant tenement a better and more convenient property? (Without depriving the servient owner of legal possession.)
  o Policy: Burdens on one parcel of land will only be tolerated if another is improved.
  o Self-Holdings Ltd v. Husky Oil – Pipeline has a physical presence on servient lands. It is inevitable that the dominant tenement will interfere with the servient tenement to an extent. Therefore, the dominant tenement has to be seen as a limited interest in land. But servient tenements can impose restrictions on it; the benefit is subject to compliance with certain terms and conditions.
• Easement must be capable of forming the subject matter of a grant
• Easements are incorporeal rights, meaning non-possessory, so transfer of possession is not possible. Thus a grant is required to transfer the easement.
• There must be a capable grantor and grantee, rights under the easement must be sufficiently precise, the grant cannot require servient owner to spend money (except for fencing easements) and it cannot confer a right to possession or control of the servient lands.
• Easement cannot give exclusive or unrestricted use of the land, as though would amount to interest in the land.
• In the case law, even if easement satisfies all 4 criteria, it may still not be held to be an easement based on policy reasons.

• **Categories of Easements**
  
  o **Positive easements** → Right to do something on someone else’s land. E.g. a right-of-way.
  
  o **Negative easements** → Right to restrict someone else’s use of their own land. E.g. discharge pollution, fluids, etc. Uncommon.

### CREATION OF EASEMENTS

• **Express Grant**: Easements may be acquired through an express grant made by the owner of the servient lands.
  
  o This grant can still include a reservation for the benefit of the servient tenement.
  
  o Grants should identify parties, nature and scope of easement, time period for which it is valid and any rights and responsibilities of the respective parties in relation to the easement.

• **Implied Grant**: An easement may be implied as a necessarily incidental to a property transaction, such as when the property is landlocked.

• **Is it an implied easement? (Wheeldon v. Burrows)**
  
  o Consider how a parcel of land was used before it was divided into separate parcels under separate ownership. (E.g. when property is divided into separate parcels, pre-existing access lanes can become *quasi*-easements, because there were no dominant and servient tenements but without them parcels of land are inaccessible.)
  
  o Upon division, it can become an actual easement by implication if:
    
    ▪ The *quasi*-easement must have been used by the owners or occupiers of the whole property at the time of the grant for the benefit of the part to be granted
    
    ▪ The existence of the *quasi*-easement must have been continuous and apparent
    
    ▪ The *quasi*-easement must be necessary to the reasonable enjoyment of the property granted

• **Easement of Necessity**: An implied grant. Must prove that the easement is necessary for the enjoyment of the land and not merely convenient or efficient use of the land. E.g. there is no other access point/landlocked parcel.

• **Intended Easements**: An implied grant. Arises by implication to give effect to the common intention of the parties, considering the purpose for which the land has been granted.

• **Doctrine of Prescription**: An easement established “as of right”. That is to say, without force, without secrecy and without permission, used since time immemorial. Courts have set a lower evidentiary burden regarding temporal aspect (“since time immemorial” can be hard to prove). Some jurisdictions have even legislated setting a minimum period, such as 20 years, to assert such an easement.
Prescriptive easements have been abolished in many places throughout Canada either
- Completely (e.g. in Alberta through Law of Property Act),
- Through the registration of lands under the titles registration system (e.g. in Ontario through Land Titles Act), or
- In relation to particular easements (e.g. in Ontario through Real Property Limitations Act).

**Doctrine of Proprietary Estoppel**
- “When the parties to a transaction proceed on the basis of an underlying assumption... on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.” (Lord Denning’s description from Amalgamated Investment & Property Co. Ltd. V. Texas Commerce International Bank Ltd., 1981; p. 761)
- “Proprietary estoppel [is] to protect a person who acts to his or her detriment in expending money on the land that he or she occupies but does not own, under and expectation created or encouraged by the landowner that the occupier will be able to remain there.” (p. 761)
- Claimant must prove that denying their legal right to access is unconscionable.

**Statutory Easements**: For example, The Condominium Act, which creates easements for the benefits of individual units and the common property within the building.

**Easements through Dedications**: Owner can dedicate land as a public highway. May be express or implied. There are three requirements: 1) an intention to dedicate, 2) intention carried out by allowing public use, 3) and use has been accepted by the public.

**NELSON V. 1153696 ALBERTA LTD.**

**Facts:**
- Nelson and Stelar owned adjoining properties. Stelar constructed and leased the road to the resort (Rabbit Hill) property. Nelson later purchased land that was only accessible by crossing Stelar’s land; he was not a part of the lease. Nelson used the land to access property, Stelar knew, but they never were able to settle a formal written easement. Stelar sold and new owner will not let Nelson use the road.

**Issues:**
- Had the road been dedicated to the public?
- Should an easement of necessity be granted?

**Analysis:**
- A public highway can be created by statute or common law, by proof of education and acceptance by the public of the land.
- Dedication is based on two conditions:
  - There must be on the part of the owner the actual intention to dedicate
  - It must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted
- Intention can be inferred if it is not written or expressed. An inference of intention can arise from long, continuous and uninterrupted use of the way by the public (Folkestone Corp v. Brockman).
- Must consider all evidence and longstanding public use is not necessarily sufficient. Dedication of land = loss of all proprietary value.
An easement of necessity can be granted when the implied right of way is absolutely necessary for the use of the property. Without the easement the land would be rendered useless and unusable.

The necessity must have also existed at the time of the severance of title of the servient and dominant tenements.

**Application:**
- Lease inconsistent with the intent to dedicate, thus had not relinquished any control.

**Held:**
- Land was not dedicated for public use. However, easement granted on the basis of necessity.

**Ratio:**
- The requisite intention required to dedicate the land must be greater than mere permission to use the land out of a “neighbourly spirit” but an actual intention to relinquish all property right by the absolute owner. – If a property when severed is inaccessible without an easement over another’s property, it will be granted to ensure use of the land.

**SCOPE, LOCATION, AND TERMINATION**

- The scope of an easement (where, how, and for how long) is a matter of the parties intention at the time the easement was original granted
  - Physical nature of the servient lands, past use of the area by the parties, and the extent to giving an expansive scope to the easement may throttle activity on the servient tenement are factors to determine intention. *(Malden Farms v Nicholson)*
- The grantee is not entitled to increase the burden on the servient lands beyond the rights initially conveyed. However, it may have been contemplated or taken as implied that the easement’s use would change over time. If this is the case, an apparent increase in the burden can be a valid use of the initial right. *(Laurie v Winch)*
- See *Laurie v Winch* and *Malden Farms v Nicholson* below for examples of determining scope
- An easement over servient lands for the benefit of the designated dominant tenement cannot be used in a colourable way to benefit some other property. *(Harris v Flower)*
  - Ex – Easement over Lot 1 for benefit of Lot 2, but the easement-holder is in reality using both Lot 1 and Lot 2 for the primary purpose of gaining access to Lot 3.
- Termination
  - An easement may be released by express agreement between the holders of the dominant and servient tenements. It can also be extinguished by implied release (abandonment). The onus of proving an intention to abandon and non-use rests with the party seeking to establish that an easement has been extinguished.
  - Dies of natural causes when the time limit set for its duration runs its course
  - End when unity of ownership and occupation of both tenements is held by same person

**OTHER SERVITUDES AND SERVITUDE-TYPE RIGHTS**

- **Profit a prendre**
  - A profit a prendre is defined as “a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil.” *(BC Tener)*
  - Can be held independently of the ownership of any land – i.e. may be held in gross *(BC Tener)*
• Are extinguished by unity of seisin – i.e. if the holder of the profit gives it to the owner of the land, or becomes the owner of the land. (*BC Tener*)
• Also known as a working interest
• A common form of arranging exploration and production in the oil and gas industry of Alberta
• A profit a prendre is a type of incorporeal hereditament
  o At common law, an interest in land could not issue from an incorporeal hereditament
  o However, now the court has recognized it as an interest in land (i.e. a proprietary interest) (*BMO v Dynex*)
  o An exception to the numerous clausus principle.
• English common law recognizes ancient customary rights
  o May run with land even though the necessary features of an easement are absent
  o Require: Customary use must be certain, reasonable, continuous, and existed since time immemorial
• Aboriginal rights can be recognized under the common law or by way of treaty
  o Right to hunt/fish may be established when it is shown that the practice, custom, or tradition was a central and significant part of the claimant Aboriginal group’s culture at the time of European contact.
  o To find such a right, therefore, the courts do not have to resort to the English law governing customary rights based on usage from time immemorial.
  o *Remember test from the Aboriginal Chapter*

**ACCESS TO PUBLIC AND PRIVATE PROPERTY**

**PUBLIC PROPERTY**

• Freedom of expression requires the use of a physical space, to limit it to places owned by the person wishing to communicate would deny the very foundation of the freedom. (*Committee for the Commonwealth of Canada*)
• A public place may be enjoyed by the public for any reasonable purpose, so long as it does not constitute a nuisance. (*Eg peaceful protest on a highway - Director of Public Prosecutions v Jones*)
• The Charter applies to state action including the state’s power of exclusion over its property

**ACCESS TO PRIVATE PROPERTY**

• The Charter does not apply to a private owner’s power to exclude
  o Human rights legislation prohibits private discriminatory conduct in relation to the provision of goods, services, and rental accommodations.
  o Under the common law, innkeepers and common carriers are obliged to accept all patrons unless there are reasonable grounds to refuse service.
• American Law – access to private property is dependent on the state constitution
  o New Jersey: the right of the public to enter privately owned places which have a quasi-public nature (private colleges, shopping centres) may be protected.
    • In Canada, *Harrison v Carswell (1976)* found that a mall owner was entitled to exclude a picketer from the premises. (This was a pre-Charter case and has been inconsistently followed. The position of Canadian law on “quasi-public” property is unclear.)
NJ Courts are directed to consider:
- The normal use of the private property
- The extent and nature of the public’s invitation to use the property
- The purpose of the expressional activity undertaken in relation to both private and public use.

NJ Law in State v Shack – A farmer attempted to prohibit a lawyer from entering his land and meeting with the migrant workers. Proprietary rights must be balanced with human values. **A private owner is not allowed to exclude individuals from their property when to do so would interfere the workers of the land the opportunity to live with dignity, enjoy normal associations, or deprive them of practical access to things they need.** These rights are too fundamental to be denied by property rights and to fragile to be left to unequal bargaining.

### COVENANTS RUNNING WITH A PROPERTY

#### COVENANTS

- A valid contractual undertaking made by a covenantor (assumes the burden of the promise) in favour of a covenantee (obtains the benefit).
  - Servient tenement: the land burdened by the covenant.
  - Dominant tenement: benefitted by the covenant.
- Can be used to create rights enforceable by one landowner against another, even in the absence of privity of K and estate between the parties.
- Resemble public land use controls
- Functions - regulate land use such as commercial practices or business competition or create planned communities (economic ghettos, NIMBY)
- Provide a means to allow contractual promises (both the benefit and burden of the promise) to be attached to land and run with that land to new owners.
  - The circumstances under which the burden of a covenant will run with the land so as to bind subsequent owners is of critical importance
  - Under law, a burden of a covenant cannot run with the land, in equity it can.
  - The usual remedy for a breach of covenant is injunction (an equitable remedy)

#### BURDENS IN EQUITY

- **Tulk v Moxhay:** a burden of a covenant may run with the land in equity. Notice was essential to bind the purchaser, now, 4 more requirement are required:
  - **The covenant must be negative** – only restrictive covenants will be enforced. A covenant is negative when compliance is possible by doing nothing. Eg. a covenant on undeveloped land that provides that the land shall not be used for commercial purposes.
  - **The burden must have been intended to run with the servient land, and the land must be sufficiently described in the covenant.** Equity will not impose an obligation on a new owner if the original did not intend to do so.
  - **The covenant must be taken for the benefit of the dominant lands,** and must also be sufficiently identified in the document. This ensures that the covenant is not a personal one, and that two properties are involved (the dominant and servient tenements which
must be proximate but not contiguous). The covenant must touch and concern the
dominant land.
- **Equity must otherwise be prepared to enforce the covenant.** The general rules of
equity must apply.

**BENEFITS IN EQUITY**

- There are 3 ways to transmit a benefit: by annexation, through contractual assignment, or via
building scheme.
- **Annexation**
  - The benefit of a covenant can be annexed to run automatically with the land
  - Three requirements: 1) the benefit must touch and concern the dominant land, 2) it
    must have been intended that the benefit run, and 3) at common law, the transferee
    must acquire the entire interest of the original holder of the benefit.
  - It is not necessary that the transferee of the benefited lands have notice of the benefit.
  - There is no requirement that a covenant be registered on the title to the dominant land.
  - Canadian law does not allow for the possibility of implied annexation – the holder of the
    burden must know who it is that might seek to enforce the promise.
- **Assignment**
  - The benefit of a restrictive covenant can be expressly assigned
  - An express assignment is only required when annexation has not occurred
- **Building schemes**
  - The widespread imposition of covenants upon multiple lot owners in a commercial
    complex or residential development
  - Provides a reciprocal set of rights and obligations that attach equally to all parcels
    within the designated area.

**ACTS OF NOTE**

**LTA S. 219**

*Creates conservation, positive, covenants.*

- Known as the “BC Special”
- Permits covenants to be registered in favour of the Corwn or a public interest group
- Can be negative or **positive** (Like a positive duty to maintain the land)
- Defines “amenity” widely – any natural, historical, heritage, cultural, scientific,
  architectural, environmental, wildlife or plant life value relating to the land
- Must be registered

**LTA S. 220**

- Allows for creation of “Building Schemes” – covenants run with the land for sub-developments

**LTA S. 221**

- Registrar can’t register a restrictive covenant unless:
It is negative or restrictive (not positive, unless the BC Special)
- The land subject to the benefit and the land subject to the burden are described
- The title of the land is registered

Registration of a restrictive covenant is not a determination by the registrar of its essential nature or enforceability (open to later litigation)

**LTA S. 223**

- Discriminating covenants are void (racists, etc.)

**CASES OF NOTE**

**PHIPPS V. PEARS AND OTHERS QB 1965**

*Servitudes over property, Other servitudes and servitude-type rights, from Moodle.*

**Facts:**
- Owner of two adjoining houses rebuilt one house. Owner sold the rebuilt house to a buyer. The other house was conveyed to person named in owner’s will. The person named in will tore down house. Buyer’s house was exposed to weather and suffered damages.

**Issue:**
- Is buyer entitled to easement of protection from weather?

**Held:**
- No, buyer is not entitled to easement of protection from weather.

**Reasoning:**
- Negative easement does not recognize protection of shade and shelter, because such protection is more suitable under contractual agreement between neighbours. Here, buyer does not make contractual agreement with person named in will.
- Easement of protection from weather must not prevent desirable improvement on property, because easement of protection from weather may restrict neighbour’s enjoyment of own land. Here, the buyer restricts person name in will’s enjoyment to tear down house.

**Disposition:**
- Court declares person named in will as winner.

**ERICKSON V. JONES BC 2008**

*Servitudes over property, Other servitudes and servitude-type rights, Moodle.*

**Facts:**
- Owner used old road in neighbour’s land. Owner and neighbour agreed to make new road that went along second neighbour’s land. New buyer purchased second neighbour’s land.

**Issue:**
- Can new buyer prevent access to new road?

**Held:**
No, new buyer cannot prevent access to new road.

- **Reasoning:**
  - Easement by equity under doctrine of estoppel: Parties cannot go back on promise when transaction is made under consideration of mutual contemplation. In this case, all parties participate in construction of new road. The participation entitles owner and neighbour to rely on continued access to new buyer’s land.

- **Disposition:**
  - Court declares owner and neighbour as winners.

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**LAURIE V. WINCH SCC 1953**

- Farmland (dominant tenement) was subdivided into residential lots. The easement, which was granted as a perpetual right-of-way over a slender lot near the farm, was split into a large number of easements, one of these being attached to each new lot.
- **P**, owner of the slender lot, wants to get rid of right away, which was granted years ago.
- **P** argued the use of the slender lot, when the easement was granted, was for farm access only, and was no intended for the type of residential use that occurs today.
- The SCC ruled in favour of the **D** and allowed the easement to remain:
  - There was nothing to suggest that when the grant was given, the parties contemplated that the lands would always be used for agricultural purposes, or that changes in the use of the dominant lands would affect the continued existence of the easement.
- The original easement of access remained available to the owners of the dominant lands, even though now there were a number of owners using the land as residential property, not as farmland.
- This holding is consistent with the rule of construction that provides than an easement is presumed to attach to every part of the dominant lands.

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**MALDEN FARMS LTD. V. NICHOLSON**

- **Facts:**
  - **P** owned a parcel of marshy land used primarily for duck hunting. **P**’s predecessors obtained an express grant of a right of way from **Barron**, who owned an adjoining property to the east.
  - The grant gave the predecessors, “their heirs and assigns and their agents, servants and workmen, a free uninterrupted right of way ingress and egress for persons, animals and vehicles through along and over” a 20-foot strip of land running toward the lake along the easterly boundary of Barron’s land from a public road called the Lake Shore Road, and then running across the southern portion of the servient tenement to the boundary of the dominant tenement.
  - The owners of the dominant tenement were also granted the right to “maintain a gate at each of the said way with the privilege of having the said gates opened or locked, whichever they desire”.
  - **Barron** later sold land on the servient tenement on both side of the right of way to predecessors in title to the **D**, **Nicholson**, together with a right of way over the right of way already granted to the **P**.
  - **P** later obtained the rest of the Barron’s land, including the right a way. **P** is now suing the **D** for making excessive use of the right away, contrary to the terms of the
Easement granted to the D’s predecessors in title and using the southern portion of the original right of way for picnic tables and other purposes connected with the operation of a beach resort.

- Essentially – easement now has increased traffic from a commercial business, when it was granted for just private use.

**Held:**
- Court found the D’s use of the way “constitutes as unauthorized enlargement and alteration in the character, nature and extent of the easement.”
- A grantee cannot increase the original burden, unless the increase was intended at the time of the grant. It was not here, different from Laurie.

**Note:**
- Ziff mentions at one point the easements were owned by the same people. This should have destroyed the easements, as the dominant and servient owners cannot be the same.
- **Comparing Laurie to Nicholson**
  - In both cases, the use of the dominant tenements changed (farm>houses, hunting>recreation centre)
  - However, the servient tenements were much different. In Laurie, it was a thin piece of land that looked exactly like a lane with no other purpose. In Nicholson, it was a marsh used extensively for hunting.
  - Servient properties aren’t supposed to be full time servants of the dominant party, they are supposed to have a purpose themselves.

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**BANK OF MONTREAL V. DYNEX**

- In this case, Dynex had gone bankrupt and had given overriding royalty and net profit interest in oil and gas mines (PROFIT A PRENDRE) to other companies. This means that Dynex was giving a share of the profits from resource extraction to other companies in exchange for money or services.
  - Later, Dynex defaulted on a loan from the Bank of Montreal, which had a security claim to the property of Dynex and was petitioned into bankruptcy.
  - The bank brought an action against Dynex and the other companies claiming that it had priority to gain access to liquidated assets because of its security claim to the property of Dynex.
- However, it was held that the other companies’ actually had proprietary interests in the royalties and therefore, their interests came before the banks non-proprietary interest.

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**MICHELIN & CIE V. CAW CANADA 1997**

- **Facts:**
  - Workers at a Michelin tire plant distribute protest leaflets containing the word “Michelin” and the image of the corporate logo (Michelin Man). Michelin sues for breach of trademark and copyright. The union claim the right to freedom of expression protects their actions.
- **Issue:**
  - Can private property be used in the course of free expression? Is this type of expression protected under s. 2(b) of the Charter?
• Discussion:
  o Right to free expression on private property under s.2(b)
    ▪ The use of private property is a prohibited form of expression (Committee for the Commonwealth of Canada).
    ▪ A property owner has the right to determine who uses his property for what purpose.
    ▪ The Charter does not extend to private actions, therefore, s.2(b) does not confer a right to use private property as a form of expression (Commonwealth).
  o Right to free expression on government (public property) under s.2(b)
  o Not all publicly owned land can be treated as a public forum. Expression rights are protected in places where one would expect constitutional protection.
  o Consider:
    ▪ 1) the historical or actual function of the place, and
    ▪ 2) whether the objectives of free speech (democracy, truth-finding, self-fulfilment) are furthered (Ziff, Principles pg 397)
  o S.2(b) protection is granted if the expression is compatible with the primary function of the property.
  o The exercise of a Charter right will not be allowed to interfere with the present use of the land. (Weisfield v Canada, from Ziff Principles pg 397)
  o Conduct a s.1 Charter analysis to balance the government's interest in the property with the individual's right to free expression on that property.
  o Application to this case:
    ▪ Use of Private Property
    ▪ s.2(b) would not protect someone from using a privately owned printing press (without permission) to create leaflets, even if the leaflets are a form of protected expression.
    ▪ Unclear whether a copyright, which already has meaning, is analogous to the use of a printing press.
  o Public/Private Distinction
  o The Plaintiff’s copyright is private property. The copyright cannot be characterized as a piece of quasi-public property b/c the it is registered under state legislation.... otherwise, a private house would become public property b/c it is registered under the land title system.
  o Therefore, no need to balance public property and free expression under s.1 of the Charter
  o The threshold for prohibiting forms of expression is high, but a form need not be violent to be prohibited.
  o There is no precise rule to determine prohibition but the use of another's private property is not a permissible form of expression.
  o The balancing of parties interests conducted in public property cases is extended to private property:
    o The Defendants have alternate means for expressing their views while the Ptf would have little left of its right to private property if it loses the right to control its copyright.
  o Held:
    ▪ Judgment for the plaintiff. The copyright claim is upheld.
Exclusion from Private Property

- **Facts:**
  - Mr Wu was banned from Sky City casino. Wu claims it is b/c he was a successful gambler. Sky claims it is b/c Wu threatened an employee. Sky claims protection under the common law, and confirmed by s.67 of the Casino Control Act, that a landlord is entitled to exclude people from its property without giving any reason. There were no claims by Wu of discrimination.

- **Issue:**
  - What are the obligations of a private owner in excluding a patron?

- **Discussion:**
  - Sky owes a “special duty to the public” – when property owners open their doors to the public in the pursuit of their own property interests, they must not exclude people unreasonably. The property owner has a duty not to act in an arbitrary or discriminatory manner towards people who come onto the premises.
    - S.67(1) of the CCA qualifies this common law rule. It empowers the owner to require people to leave and everyone must comply with this request unless they can point to a statutory right to remain.
    - This does not mean the owner can unreasonably require people to leave.
    - In exercising this power, the owner is subject to public law constraints.
  - A business is “affected by a public interest” where the operator enjoys a monopoly (ie the only casino in town), and the operator’s right to exclude members of the public is qualified by the obligation to only do so for an articulated good reason, unless there is a statutory provision to the contrary.
    - Here, s.67(1) expresses a legitimate statutory contra-indication.

- **Held:**
  - The exclusion is valid.

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**TULK V. MOXHAY 1848**

*Covenant burdens run with the land (in equity)*

- **Facts:**
  - Agreement to leave a green space in the heart of a Leister Square for people to enjoy. The plaintiff was the initial owner and sold the land to Elms, who sold the land on to Moxhay. Moxhay wants to build on the green space.

- **Issue:**
  - Can a covenant restrict subsequent purchasers of the land?

- **Discussion:**
  - A covenant between vendor and purchaser on the sale of land will be enforced in equity against all subsequent purchasers with notice, independent of whether the covenant runs with the land.
  - A party cannot use the land in manner that is inconsistent with the contract entered into by his vendor (given that knew about the terms of contract when he bought it).
  - The covenant would likely reduce the price of the land, so it would be inequitable to allow the land to be sold for a higher price than it was bought for by allowing the new buyer to escape the obligation of the covenant.
• If an equity is attached to the property by the owner, any person purchasing the property with notice of the equity is bound to the same extent as the original buyer.

  • Held:
    o It would be unjust to allow a buyer, who knows about the covenant, to break it.
CHAPTER 12: PRIORITIES AND REGISTRATION

- Property rights are divisible and manifold, and title is relative so doctrines are necessary to order competing claims.
- Common law approach: first in time first in right.
- Sometimes latecomers are preferred (e.g. adverse possession)
- Equity usually adheres to the importance of temporal priority ranking claims
- With land legal principles have been supplemented by statutory measures for the registration of land claims. These regimes provide procedures for recording and validating property claims
- Systems may affect priority ranking and may alter substantive rights

PRIORITIES AT COMMON LAW AND IN EQUITY

“VARIETY & UNIFORMITY IN TREATMENT OF THE GOOD-FAITH PURCHASER”

- Highlights difficulty in determining who’s claim should prevail, that of an owner or a innocent purchaser from a thief
- Where a defective transaction has occurred, and whether the original owner and purchaser are without fault, the law must determine who should be entitled to what remedy
- Reasonable people can easily disagree over whether the owner or buy should prevail. Some legal systems may allow the owner’s claim to prevail, while others may do the opposite and look to the owners to take better precautions against thieves. Still others may allow the owner to reclaim only in certain circumstances, where his precaution-taking ability is believed to be outweighed by a potential purchaser’s ability to depress the market for stolen property.
- Empirical evidence is likely to be difficult to gather so rules can be expected to vary in reflection of the different judges at different times

NOTES

- Before registration systems, conflict were resolved through the combined effect of legal and equitable principles. Given that property rights can be legal and/or equitable, four conflict permutations can arise:
  - Where there is a legal interest followed by another legal interest.
    - E.g. Lease and then a sale. The sale was a bona fide purchaser for value without notice.
    - The rule is first in time first in right. Lease is still allowed
    - Two principles: nemo dat and caveat emptor
  - A legal interest followed by an equitable interest.
    - E.g. A sells blackacre to C, C obtains deed and takes possession all the while oblivious to any defect in the title. As it turns out, A had earlier transferred to land to B.
    - Legal interest prevails and Nemo dat applies and B gets the title, the transaction to C, while valid on its fact, is a complete nullity
    - The caveat is that it may be that the owner of the prior legal title had engaged in some conduct that may lead the court to hold that they
  - An equitable interest followed by a legal interest (equitable principles apply)
o Depends on whether or not the buyer had notice of the prior interest. If the bona fide purchaser for value of the legal title buys land without notice of equitable interest then they are not bound by that interest

- An equitable interest followed by a second equitable interest (equitable principles apply)
  - When equal, first in time prevails. Equity will, however, look at the cleanliness of both party’s hands.

**NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE V. WHIPP**

- Case considers the issue of equitable interest and whether a first mortgagee’s legal interest could be postponed to a later second mortgagee’s equitable interest and the legal estate holder deprived of his interest
- What circumstances justify the court in depriving a legal mortgage of the benefit of the legal estate?
- **Facts:**
  - Manager of the plaintiff insurance company borrowed money from the company pursuant to a mortgage arrangement. Insurance company acquired the title deeds to the manager’s property and the documents were handed over to the company and placed in the company safe. The manager had one of the keys to the safe and opened the safe and handed the title documents over to the defendant as security for a further loan transaction, which created an equitable mortgage in the defendant, because the legal interest had already been conveyed to the insurance company. The defendant had no knowledge of the previous legal mortgage. When the manager became bankrupt, the defendant claimed that the prior legal mortgage was void against his subsequent equitable mortgage. Authorities seem to state the following
- **Held:**
  - Where the legal interest holder allows a subsequent interest to be established by making the title deeds available, the interest of the legal estate holder can only be postponed through evidence of a clear fraud.
  - If the prior legal interest holder stands by and lets another lend money on his estate without giving any notice of the prior interest, this conduct will be sufficient to amount to a fraud which will postpone the initial interest.
  - Mere carelessness on the part of the prior legal interest holder will not be sufficient to postpone the legal interest
  - In this case, the carelessness of the company in placing the deeds in a company safe of which the manager had a key did not amount to fraud or gross negligence.

**SECURITY OF PROPERTY RIGHTS AND THE LAND TITLE REG’N SYSTEM**

- Equitable interest is not enforced against a bona fide purchaser who has not had notice of the prior interest
- We were only enforcing uses (trusts) against people conscientiously bound to them - however this raises the spectre of fraud
- **Constructive notice doctrine**
  - If purchasers are only held to honour uses they have notice of, they have an incentive to try to receive notice… this isn’t good
So if they do not do due diligence in trying to discover prior uses, then they will be taken to have received constructive notice.

Conversely, if they have taken due diligence they are protected against prior interests that they failed to find.

This limit is good as equitable interests can be sneaky – can arise from purely oral transactions, and solidify before legal formalities are completed.

Posner says this system promotes the efficient use of resources, by holding the original owner liable for the mistake, as they are able to alert at a lower cost.

However by limiting the purchaser’s level of diligence needed, this isn’t actually the case where it is difficult for a third party to assert their right without a land registration scheme.

So costs are really split.

CHIPPEWAS OF SARNIA BAND V. CANADA (AG) 2000

• Facts:
  - 1839 sale of indigenous land to Cameron, which goes against the common law rule saying the land was alienable only to the crown through surrender
    - Order in council agreeing that Cameron had been sold the land was consistent with the idea of surrender
  - Letters patent were apparently issued under the mistaken belief that there had been a valid surrender
  - The land had subsequently been divided and resold many times all to owners unaware of the error
    - Now the band is disputing the sale

• Findings:
  - Motions judge found that the land had never been lawfully surrendered
  - Court of appeal affirmed that conclusion, and held that the claim was not barred by limitation period
  - Issue remains as to whether they are entitled to possession of the land?
  - Public Law: a remedy must be refused for an injury caused by a government proclamation, where the delay in time between the statement and the action creates a hardship or prejudice to the public interest
  - Private Law:
    - Nemo dat doesn’t apply in this case
      When the issue concerns validity of a crown patent, the interests of innocent third parties must be considered
    - Delay in asserting right gives rise to the equitable doctrine of Laches and acquiescence
    - Which gives the defendant a defence to an equitable claim (not a legal one) if he can show that the plaintiff’s delay constituted an acquiescence to the defendant’s conduct or b) caused the defendant to alter his position in reasonable reliance or otherwise permitted a situation to arise which it would be unjust to disturb
    - The Chippewas acquiesced because not only did they know, they sought and received payment of proceeds
Private Law: Property

- Good faith purchaser for value without notice has her rights protected, even if there is pre-existing claim
- Should be no special extensions of the time to bring a claim just to protect aboriginal title
- The Chippewas’ delays and the reliance of third parties is fatal (in equity) to the claim
  
  • Held:
    - The Chippewas delay and subsequent reliance by innocent third party purchasers mean although the land was not unlawfully surrender the Chippewas cannot be granted possession

J. REYNOLDS, “ABORIGINAL TITLE: THE CHIPPEWAS OF SARNIA”

- No justification for applying the bona fide purchaser doctrine
  - The at only applies to defeat equitable interests
  - The interest was not a purely equitable one
- Since landowners were claiming under a patent made in violation of the royal proclamation, how could they have had a legal interest to assert
- Interests in law rank in order of creation
  - The Chippewas interest was first
- Good faith of purchaser cannot create title where none exists
  - It is not exception to nemo dat
- Doctrine of bona fide purchaser applies with regards to classification of relevant interest in land, not the nature of the relief sought

RICE V. RICE

- What is the rule of a court of equity for choosing between to adverse equitable interests.
- First in time first in right only applies when there is no other ground for determining which interest should prevail.

THE ADVENT OF REGISTRATION

CANADIAN IMPERIAL BANK OF COMMERCE V. ROCKWAY HOLDINGS (1996)

- Licence agreement granting Rockway right to remove gravel
  - Didn’t register license until 18 months later
  - Bank registered charge on property owned by someone
  - Bank wants charge priority of Rockway
- Did bank have notice of Rockway license?
  - Registered instrument holder, bank, did it have info to cause reasonable person to make inquiry? Bank failed to make property inquiry into prior instrument...
  - Rockway is prior instrument for purposes of Registry Act

T.G. YOUDAN, THE LENGTH OF A TITLE SEARCH IN ONTARIO (1986) –
Establishes proof of title at common law

- At common law title to land not absolute, based on possession
  - Person owns land when has better right to possession of it than others
- Initially practice for proof of title in England private system
  - Established in 18th c
- Proof of title facilitated by use of abstract
  - Summary of documents and events relevant to the vendor’s title
- Purchaser then had period, fixed by contract, to examine abstract and underlying docs
- **2 parts to process:**
  - Vendor verified abstract by producing for examination by purchaser original deeds or documents abstracted, copies of wills, other docs, along w evidence of facts material to title
    - Enable purchaser to check matters in abstract were correct
  - Examination of abstract
    - Done by conveyancing counsel, instructed by purchaser’s solicitor, who put forth objections and requisitions arising from abstract
- **Rule for demonstrating previous dealings w/ land:** in absence of contractual provision to contrary, vendor required to show chain of title back to good root of title at least 60 years old
  - Good root of title – instrument dealing with or proving on its face the ownership of the whole legal and equitable estate in property sold, containing description by which property can be identified, and showing nothing to cast doubt on title
    - This became starting-point for abstract
    - Effect limited in 3 ways:
      - Only applied in absence of contrary contractual provision – parties free to bargain for longer or shorter period
      - Title proof period didn’t generally affect claims of third parties unless earlier party’s right is equitable – rules re legal/equitable priority of interest still apply
      - Didn’t determine quality of title to which purchaser entitled – only concerned w length of affirmation of proof of vendor’s title

### TITLE REGISTRATION

### HISTORY OF TITLE REGISTRATION IN CANADA

- **Title registration** has prevailed as the system for recording interests in land in the provinces from BC to Ontario and some maritime provinces. Quebec uses a different system
  - **Title registration defining features:**
  - **Curtain:** Title registration draws a curtain between registry and all prior transactions. The person registered as the title holder is the title holder and all prior transactions are irrelevant to the registered title once it becomes **indefeasible.** (deferred or immediate)
  - **Mirror:** The registry accurately reflects the state of the title and a purchaser need not look past the registry. (LTA s. 23(2)): “An indefeasible title, as long as it remains in force and uncancelld, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the
person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to...").

- Note: Exceptions for fraud (LTA ss. 23(2)(i), 29)

- Net - An assurance fund is set up to compensate those who because of fraud and because an innocent purchaser is now the registered title holder, lose title that would have been unassailable at common law.

- Cures defects in title: with few minor exceptions registration cures any defects in title.

- Main goals of Title Registration System: Facilitate transfers, simplifies and reduces the costs of conveyancing. Security of title owner enjoyed at common law is sacrificed for these goals, as the innocent purchaser is favoured over the current owner by reducing the risk of the innocent purchaser at the current owner’s expense. (Ziff)

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**D.C. HARRIS. INDEFEASIBLE TITLE IN BRITISH COLUMBIA:**

- Common Law of Conveyancing: traditionally, common law protected settled interests in land over those acquired in good faith, and the risk fell entirely on the purchaser.
  - Nemo dat quod non habet (no one can give that which they do not have) placed the onus on the purchaser to confirm the vendor’s title.
  - The purchaser would have to trace title back 60 years and if there was a forged document or fraudulent activity, the purchaser’s title would be subject to the claim of a person who lost their interest.
  - A good faith purchaser who acquired property from a rogue would acquire nothing except a cause of action against the rogue
  - Common law: protected settled interests in land over those acquired in good faith.

- Indefeasible title: Unless the registered owner of property is a party to fraud in acquiring the interest, the registered owner of an interest is the owner of that interest. (Fundament distinction between Title registration and deeds registration or common law conveyancing)
  - Immediate indefeasibility - Title becomes indefeasible as soon as the interest is registered. Thus a person acquiring an interest in in land holds indefeasible title even if they acquire their interest, acting in good faith, on the basis of a forged instrument
  - Deferred Indefeasibility - Indefeasible title is delayed until the person acquiring the interest does so from the person who is the registered owner and is therefore at least one step removed from the rogue and the forged instrument.

- Examples
  - O = Owner, R = Rogue, B = Buyer
  - Suppose R forges O's signature on a transfer instrument which B registers.
  - Immediate Indefeasibility: The fact that B has dealt with a rogue does not matter, once B registers the transfer instrument she holds indefeasible title. O would receive compensation from the assurance fund since at common law O would retain title.
  - Deferred Indefeasibility: B’s registered interest would be subject to O’s claim to recover title. However, if B sells the interest to C prior to O’s discovery of the fraud, then C who has dealt with the registered owner would hold indefeasible title.
• **Facts:**
  o Ownership of Susan Lawrence’s home is fraudulently transferred to a Rogue (Thomas Wright). The rogue registered the fraudulent transfer instrument. The fraudster then entered a mortgage agreement with Maple trust who put a charge on the fraudulently registered property.

• **Issue:**
  o Maple Trust innocently acquired the interest (charge) in the property in good faith for valuable consideration and without notice of fraud. Is the charge against the property valid and enforceable?

• **Discussion:**
  o **3 parties:**
    o Original Owner
      ▪ Mrs. Lawrence
    o Intermediate Owner (person who dealt with the fraudulent seller)
      ▪ Maple Trust
    o Deferred Owner (Bona fide purchaser for value without notice)
      ▪ None in this case
  o **Possible Outcomes**
    ▪ At Common law: Maple Trust’s charge is void by the nemo dat principle: Fraudster could not give better title than he had.
    ▪ If Immediate Indefeasibility: Maple Trust’s charge is valid. The fraudster registered the instrument and title is deemed effective by virtue of registration. Maple trust is not a party to the fraud and is thus entitled to rely on the registration.
    ▪ If Deferred Indefeasibility: The transfer to the fraudster is void, thus the fraudster never became the registered owner. Maple trusts interest is subject to the claim of the Original owner but would be able to pass valid title to a third party so long as the third party is a bona fide purchaser without notice.

• **Held:**
  o (Note: this is an Ontario Case) **Deferred Indefeasibility adopted by the court.** Thus the party acquiring the land from a party responsible for the fraud “intermediate owner” is vulnerable to a claim from the true owner. Despite registering its charge Maple trust loses in a contest with the true registered owner.

• **Ratio:**
  o Deferred indefeasibility consistent with s. 155, ss. 68(1), 78(4) of the Ontario's Land Title Act.

**TITLE REGISTRATION AND PRIOR UNREGISTERED INTERESTS**

**HOLT RENFREW & CO V. HENRY SINGER LTD ABCA 1982**

• **Facts:**
  o Thompson & Dynes (vendor) were the owners of a building
  o In 1950 the business was sold to Holt Renfrew & Co Ltd (tenant), and the property was leased to it
  o Lease was for 10 years, with an option to renew for 10 years
1957 lease extended to 1973
1969 Holt Renfrew’s owner drew a new lease to extend to 1990, sent to the office of the tenant, where it was not filed – caveat (notice) of the lease was filed only after the property had been sold to Henry Singer Ltd whose agent had filed a caveat
Both caveats were filed before the transfer from Thompson & Dynes to Singer was registered
In 1978 one of the appellants, Mr. Pekarsky (lawyer) called Mr. Dickson (owner of Holt Renfrew) and said he might have a client interested in the property
Pekarsky indicated in a letter to Dickson that he did not believe the existing lease would be a deterrent to his client’s interest
Dickson sent Pekarsky financial statements and a copy of the lease, Pekarsky then advised Dickson that his client was interested in purchasing the property
Trial Judge found that Pekarsky had examined the lease and concluded that his client was not interested in buying the real estate subject to the lease. He did not advise Dickson
September 1978 Pekarsky made an offer of $800,000, with an attached photocopy of the certificate of title
- The offer was made subject only to the encumbrances endorsed upon the photocopy, which only included the tenant’s caveat (not title)
- Negotiations ended in $1.32 million
Offer accepted by Dickson on behalf of his client in March 1979, the next day he filed a caveat (after which the tenant’s caveat was filed)
Trial judge found that the vendor acted openly and honestly throughout
Trial judge found that the vendor had always intended to convey the property with the lease, and that Pekarsky had realized after examining the lease that he could get the property for his client without it

**Issues:**
- Did Pekarsky commit fraud within s.203 of the Land Titles Act?
  - McDiarmid (dissent) – Yes
    - When Pekarsky made a statement that the lease would not deter his client, and then realized it would, he was bound to correct it
  - Moir (Majority) – No
    - Only true that this is fraud if the party to whom the representation was made relied upon that presentation

**Held:**
- No fraud (judgement for the appellant Singer Ltd)

**Judgment:**
- **Moir (Majority)**
  - Dickson did not rely on Pekarsky’s representation, and there were no dealings between Pekarsky and the tenant
  - Dickson thought that the tenant had filed a caveat to protect their lease, he did not rely on any representation of Pekarsky
  - To amount to fraud the representation must be relied upon and induce the contract
- **McDiarmid (Dissent)**
  - Pekarsky made a representation, which became untrue, which he knew
  - He was under a duty to correct what he had written when he discovered it was no longer true (i.e. that the lease was a deterrent to his client)
Was there a fraudulent representation?
• Here there is more than knowledge of the unregistered interest, we have the representation made by Pekarsky
• He never corrected that representation, even when he knew that the vendors believed and acted upon the belief that the sale of the land was subject to the lease

Was Dickson misled/did he rely on the representation?
• Dickson considered the purchaser accepted the lease and it was reasonable for him to do so
• Dickson relied on the misrepresentation constituting the fraud and was misled by it
• Only true that this is fraud if the party to whom the representation was made relied upon that presentation

ALBERTA (MINISTRY OF FORESTRY) v. MCCULLOCH ABQB 1991

Facts:
• March 1, 1978 the Ministry (department) sold some land to Svedberg Lumber Co (Svedberg) consisting of two parcels: residential parcel and millsite parcel
• Written agreement provided that the lands must be utilized only for the use of the Millsite and operations and accommodation of existing residences
  ▪ The Minister also retained as a covenant running with the land, a vested interest in the land
  ▪ The purchaser (Svedberg) may allow a third party to use the land provided that they enter into an agreement with the Minister similar to the purchaser’s agreement
  ▪ If purchaser discontinues use of the land for 1 year, the Minister has the option to buy back the land for a set price. If not, the Minister will discharge his Caveat and release the purchaser from the agreement
• Original certificate of title given to Svedberg, and a caveat filed against this (original caveat) by the Minister
• (Purchaser Svedberg replaced by receiver Ernst & Whinney Inc)
• Original certificate cancelled March 7, 1986 and replaced by a separate cert for each parcel, both subject to the original caveat
• Later 1986, the receiver put the millsite up for sale by tender, with the encumbrance of the original caveat included
• Mr. McCulloch bought the millsite parcel, he was aware of the department’s interest, and the department approved the sale
• 1987 the department arranged to sell part of the residential parcel to the Svedbergs, and as part of the transaction discharged the original caveat as to the residential parcel
• A mistake made in the land titles office led to the caveat also being discharged from Mr. McCulloch’s title
• When Mr. McC learned the caveat was discharged, he phoned the department to offer to sell the land back, a department rep told him the discharge was a mistake and that he wanted to investigate the situation
o Mr. McC shortly thereafter transferred the site to a numbered company, of which he was a shareholder, officer and the director, claiming it was for tax reasons and to pay back his mother

o Mr. McC in May 1988 phoned the department again to ask if they were interested in buying it from the new owner (his company). Department phoned back and offered to purchase only at the price set in the original agreement, Mr. McC disagreed, and the department notified him that they had filed a new caveat, claiming the right to repurchase

• Issues:
  o Was the transfer of the millsite parcel from Mr. McCulloch to the numbered company tainted with fraud?
  o S.195 – except in the case of fraud, no purchaser shall be bound to inquire into the circumstances in which the owner of the land is or was registered, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud

• Held:
  o Circumstances in which the property transferred amount to fraud (judgement for plaintiff)

• Judgment: Sinclair J.
  o Knowledge alone cannot constitute fraud, needs the doing of something which that knowledge made it unjust or inequitable to do (Union Bank of Can v Boulter Waugh Ltd [SCC 1919])
  o When the company acquired the title it knew the department had an unregistered interest, Mr. McC knew this (obviously)
  o Mr. McC’s purported reasons for the transfer (tax and pay his mother back) and its occurrence mere days after he learned the caveat was discharged, seem more than a coincidence
  o Judge believed the transfer was also made to defeat the department’s interests and relieve Mr. McC of his obligations

• Notes:
  o Here the transferor controlled the transferee, their intents were joint, therefore the transferee had more than mere knowledge (appeal dismissed)
  o How, if at all, can McCulloch be distinguished from Holt Renfrew?
    ▪ Both are cases of mistake in caveat registration resulting in opportunistic action
    ▪ In Holt, the fraud was between the purchaser and a third party tenant, not privy to the contract. In McCulloch, the department was party to the contract
    ▪ Reliance is not mentioned by the court in McCulloch
  o SCC held that, in Ontario’s Land Titles Act, actual notice of a prior unregistered interest would bind a subsequent purchaser (United Trust Co. v Dominion Stores Ltd [1977]). This would seem to accord with McCulloch, but not with Holt.

CREELMAN V. HUDSON BAY INSURANCE CO. 1919

• Facts:
  o Creelman purchasing land from HBC
  o Payment in instalments
  o Creelman had duty to discharge existing mortgages upon property
Creelman defaulted obligations
HBC requests relief entitled to them by terms in the bargain
Dismissed at trail
BCCA found for HBC
No appeal as to the matters of law, but instead upon the grounds HBC had no title in fact to dispose of the land, contract is null and void
HBC is a company incorporated by Dominion Statute of 1910 and powers of holding and disposing real estate are limited by s. 14 of the incorporating Act - "The new company may acquire, hold, convey, mortgage, lease or otherwise dispose of any real property required in part, or wholly, for the purposes, use, or occupation of the new company..."

Findings:
Creelman argues property was not acquired wholly or in part for the purposes, use or occupation of the company
Court does not base decision on that matter, instead they look at the primacy of registration
BC statute regulates registration of title bought and sold: s. 22 of Land Registry Act registered certificate is conclusive evidence in law and equity that party named therein has seized estate in fee simple against the world
D (respondents here, Creelman) argues the act HBC did not buy it for purpose in the Act, registration is unlawful and no title is granted
If registration trumps the Act, provincial legislation is trumping federal legislation does not accept this, suggests Attorney-General can take steps to rectify registration had he thought fit to do so
Register remains unaltered and unchallenged

Held:
Creelman must accept the title is for HBC and HBC is free to recover under the bargain.

Ratio:
So long as the register remains unaltered and unchallenged, the party named on the certificate is the indefeasible titleholder and holds such rights and obligations.

WOODWEST DEVELOPMENTS LTD. V. MET-TEC INSTALLATIONS LTD. 1982

Facts:
Purchaser P’s action for possession of leased premises
P purchased building from 3rd party
Prior to purchase, P was informed of unregistered lease by held by D
P argues P is unaffected by notice of lease because it is unregistered - P entitled to possession under s. 29 of Land Titles Act
D (lessee) says lease is binding on P

Findings:
P contends he did not know of the unregistered lease until after the purchase and notified tenants of this and requested they vacate
Court finds P did know of the lease prior to purchase (on evidence) and also knew that the vendor had intended for the lease to be honoured
s. 29 states fraud is the only exception to the requirement of registration in order to protect an interest in land
Private Law: Property

- Court decision turned on definition of fraud - positive intentional commission or inferred by circumstance?
- "To hold that section inapplicable to him, he must, I think, be guilty of conduct equivalent to laud [sic]." (I expect the word is supposed to be 'fraud')
- "A person who purchases with notice of the title of another is guilty of fraud [cannot] avail himself of the provisions of a statute..."

**Held:**
- Lease binding on P because P’s fraudulent behaviour provides exception to s. 29.

**Ratio:**
- A purchaser entering into a contract for the purchase of land after express notice of an unregistered adverse interest will be presumed acting fraudulently and will not benefit from the protection of statute, in this case s. 29 of the Land Titles Act. Therefore the unregistered lease encumbers the purchaser.

### ASSURANCE FUNDS IN TITLE REGISTRATION

- Indefeasible title is meant to protect the bona fide purchaser
- Assurance funds compensate in equity the person who has lost their interest
- This system promotes the transferability of land
- Compensation is sought from the fraudster, minister must be named as nominal party defendant
- If fraudster is dead or cannot be located in BC claimant proceeds against minister
- In order to recover, the claimant must prove he would have been able to recover the land under a common-law conveyance system in court

### TITLE REGISTRATION AND ABORIGINAL TITLE

- Courts have tended to exclude Aboriginal title from title registration systems. Attempts to register notice of claims to Indian reserve land has also been unsuccessful.

### SKEETCHESTN INDIAN BAND AND SECWEPEMC ABORIGINAL NATION V. REGISTRAR OF LAND TITLES

**Facts:**
- Appeal from the refusal by the Registrar of Land titles, pursuant to s.168 of the Land Title Act, RSBC to register a certificate of pending litigation against lands in the Kamloops Land Title District, which the Crown had granted in fee simple to predecessors in title of Kamlands Holdings Ltd which holds these lands under a certificate of indefeasible title
- Claim an aboriginal right to these lands
- AG does not join the issue with the appellants. Says such a claim is not one of which a registrar under the Act can take any cognizance because his or her duties are confined by the Act

**Held:**
- Registrar is correct and claim to these lands was denied
- Certificates of lis pendens (suit pending) are governed by a number of sections of the Act:
s.215(1) A person who has commenced or is a party to a proceeding, and who is:
  • Claiming an estate or interest in land, or
  • Given by another enactment a right of action in respect of land,
  • May register a certificate of pending litigation against the land in the same manner as a charge is registered...
  • The land affected by the certificate of pending litigation must be described in a manner satisfactory to the registrar

s.216(1) Can't change anything charging, transferring, or otherwise affecting the land until the registration of the certificate is cancelled

- Question is are they claiming an estate or interest in land? (since they clearly don't meet other criteria)
- Question for the Registrar upon an application to register a lis pendens was whether, if the plaintiff succeeded in his action, he would be entitled to a registerable interest in the lands in issue because you can't have a good safe holding and marketable title to an interest unknown to the law.
- Nothing to warrant the conclusion that the legislature intended the claims put forth here by the appellants to be registrable. No 'estate or interest in land'.
- Therefore, the appellants have no right to registration under s.215

OTHER FEATURES OF TITLE REGISTRATION

- Vary between provinces
- Some Torrens jurisdictions accord less protection to parties receiving gratuitous transfers (volunteers) than purchasers for value. A donee can acquire no greater interest than that held by the donor.
  - E.g. Under Ontario Land Titles Act: Subject to any unregistered estates, rights, etc but otherwise, when registered, in all respects has the same effect as a transfer of the same land for valuable consideration
    - E.g. A grants lease to B, who fails to register the document. A passes away deeding her interest in the subject property to C, who becomes the registered owner. C (a volunteer) cannot acquire title free from B's leasehold.
- Canadian Land titles statutes do not certify that the boundaries described in a certificate of title are correct
- Unregisterable interests
  - In Alberta, under the Alberta Land Titles Act, an agreement for sale cannot be registered although it can give rise to an equitable interest in land. Also the equitable interest of property held under a trust cannot be registered but the Act hold that the trustee is "deemed to be the absolute and beneficial owners of the land for the purposes of the Act"
  - Interests that cannot be, or are not, registered are vulnerable to being defeated by a transfer from the registered owner to a third party.
    - To protect against this all land titles systems allow for the filing of a document that serves as notice to the world of such interests (caveat).
    - The filing of a caveat or its functional equivalent provides notice and no more. It does not work to validate the interest being claimed.
    - The timing of registration is determinative, just like with registered interest
• **Overriding Interests**
  
  - Some interests will bind subsequent purchasers even though they have not been registered. These stand as an exception to the mirror principle of land titles registration.

• **Sample Legislation**

• The Land Titles Act, 2000, S.S. 2000
  
  - S.18(1) Subject to subsection(2), every title and the land for which the title has issued, is, by implication and without any special mention in the title, deemed to be subject to the following exceptions, reservations and interests:
    
    - any subsisting reservation or exceptions, including royalties, expressly contained in the original Crown grant or reserved in or excepted from the Crown grant pursuant to any Act or law contained in any other grant or disposition from the Crown
    
    - Any right or interest …that does not have to be registered (i) to enter, go across or do things on land, including an easement or right of way for the purposes specified in the enactment (ii) to recover taxes…or assessments by proceeding with respect to land (iii) to expropriate land (iv) to restrict use of land (v) control, regulate or restrict the subdivision of land
    
    - any public highway or right of way or other public easement
    
    - any subsisting lease or agreement for lease for a term not exceeding three years where the is actual occupation
    
    - any subsisting tenancy agreement
    
    - any claim, right, estate or interest set out in section 21
    
    - reservation of any minerals that become vested in the Crown
    
    - any consent, right of way or easement…to construct and maintain a pipeline pursuant to a program established for the purpose of supplying natural or manufactured gas to one or more persons residing in that area
  
  - (2) The exceptions, reservations and interests that are implied against a title pursuant to (1) do not apply if the title expressly states that they do not apply
  
  - (3) Do not apply if an Act, and Act of the Parliament of Canada or any other law expressly states or implied that they do not apply

• The list of overriding interests found in land titles legislation is not exhaustive

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**GILL V. BUCHOLTZ 2009 BCCA**

• **Facts:**
  
  - 2005 - Mr. Gill owned property
  
  - Random rogue forged Mr.Gill's signature to transfer property to Gurjeet Gill
  
  - Gurjeet Gill took out a $40,000 mortgage from Mr and Mrs Bucholtz, who advanced $ to her relying on the register
  
  - Mortgage & transfer filed with Land Title Office Nov. 10, 2005
  
  - Gill negotiated a second $55,000 mortgage with corporate defendant
  
  - Both mortgagees confirmed Gurjeet's ID, and no knowledge of fraud

• **Trial Judgment:**
  
  - Mr. Gill's title to the property restored, but title remains encumbered by the 2 mortgages. He can apply to the Assurance Fund to recover for the mortgages.

• **Issue:**
  
  - Whether the mortgage can continue to validly encumber P's title
• **Arguments:**
  o TJ erred in misunderstanding s.23(2) and failing to use the exception to the indefeasibility of title established in para (i)
  o s.23(2) limits indefeasibility to person named as registered owner - does not extend to people with lesser interests
  o Para (i) = True exception (no temporal limits) so negates indefeasibility even while fraudulent title still "in force and uncancelled"

• **Held:**
  o Appeal allowed
  o Mortgages cancelled as encumbrances against Mr. Gill's title (mortgagees bear the risk)

• **Reasons:**
  o Goal of Torrens system = protect any person relying on the register
  o Use modern approach to statutory interpretation (everybody's favourite :( = context, G&O meaning, scheme, object, legislative intent, etc.)
  o Not all Torrens systems/legislation are the same - pay attention to specifics in each province
  o **3 Principles of Indefeasibility:**
    ▪ Indefeasible title that is in force and un-cancelled is subject to exception against fraudulent titleholder, as true owner can recover title
    ▪ Act doesn't give to a registered charge the indefeasible quality afforded to a registered fee simple interest
      • Specifically - Mortgage forged by a fraudster who was purporting to be the registered owner remains a nullity even though it had been registered and then assigned to a bona fide lender
    ▪ Act preserves *nemo dat* principle = one cannot give away that which one does not have
      • Even when holder relied on the register and dealt bona fide with a non-fictitious registered owner
  o TJ incorrectly understood s.23(2)(i) to concluded the Act gives any registered owner an indefeasible right to deal with property
    ▪ Exception in s.23(2)(i) to the indefeasibility of title applies
    ▪ 'void instrument' in s.25.1(1) includes mortgages taken from someone who obtained title fraudulently
  o Gurjeet had no title interest to give when she obtained the mortgages, so the mortgagees did not acquire any estate or interest in the property when they registered their instruments
    ▪ True at both common law and under s.25.1(1)

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**POLICY CONSIDERATION:**

• The Legislature of British Columbia intents the lenders themselves to bear costs of frauds perpetrated against mortgagees, so the public (that funds the Assurance Fund) does not pay this cost

**LAND TITLE ACT**
LAND TITLE ACT S. 23(2):

- Establishes indefeasible title is conclusive evidence against all persons that the registered owner is "indefeasibly entitled to an estate in fee simple to the land", with listed exceptions (including para (i)). [18].
  - This is a true exception as not applicable to lesser interests and no time limitations

LAND TITLE ACT S. 26(1):

- "The registered owner of a charge is "deemed to be entitled" to the estate or interest on the register, subject to appropriate exceptions" [19]

LAND TITLE ACT S. 26(2):

- "warns that registration of a charge does not constitute a determination by the registrar that the charge in fact creates an interest in land or that it is enforceable" [20]

LAND TITLE ACT S. 25.1(1):

- "a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument"
  - I.e. Gurjeet Gill's mortgage remains void notwithstanding registration

LAND TITLE S. 27

- registration of charge gives notice of content of documentation as it relates to that registered interest
- I.e. if document creates two interests, each must be registered separately
- Point of Interest - Land Registry Act became Land Title Act in 1978

DONE! WOOOO.