LAW 108B | private law: property

midterm study guide | 2012-2013

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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)

Arguments for Private Property		
Argument	**Pro**	**Con**
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)
    - **Locke**: have this right based on what you have done "special right" (based on transactions and relationships)
    - **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)
    - Perhaps, based on positive liberty and freedom
- Private property offers security and independence (don't have to depend on others)
    - 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 **
    - 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:
    - Right to property itself frustrates principle of justice requiring property for all
    - Private property is inherently promotes inequality, means of production (Marx)
- Posner suggests that property laws most efficient when they include:
    - Promotion of "exclusivity" (law should allocate rights and protect individual entitlements)
    - Universality should be promoted (as many goods and traders as possible)
    - 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"

Private	Anti-Private
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

	INS (D) **v. Associated Press** (P)	**Victoria Park Racing v. Taylor**
Facts	-INS taking info from AP and rewriting, publishing and selling as news	Pl 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 Pl claims to be losing ticket sales as people prefer to listen to the radio than to come to the race course.
Issue	1. Is news property in law? 2. *Can INS publish news acquired from AP without attribution?*	1. Is a spectacle property? 2. *Can Def. be charged with being a nuisance because his actions resulted in interference with the Plaintiff's use and enjoyment of their property?*
Decision	Pitney, J: 1. News is quasi-property 2. *Pitney approached issue as problem of unfair competition. Court held in favour of AP.*	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"*
Reasoning	1. 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.*	1. Law cannot provide injunction to "erect fences" that a plaintiff is not willing to build himself - Argument that the expenditure of money by the Pl created a "quasi-property" spectacle is rejected (Distinguishes *AP v INS*) - There is no traditional form of property similar to a spectacle – Attributes Approach of novel claims - A "spectacle" cannot be "owned" *2. You do not interfere with the use and enjoyment simply by overlooking into someone's property* Dixon, J (Concurring with Majority): - No case for nuisance - Def's actions do not detract from the Pl'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.

Dissent	*Quasi-property??* 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.* Brandeis, J: -AP freely communicated news to the public and therefore gave up right to exclude other from using -just because production requires money and labour and the fact that others are willing to pay for it is not sufficient grounds for (quasi)property definition	Rich, J: - Pl should recover on the grounds of **nuisance** - Def infringed upon one of the Pl's rights as a landowner – to make profit off his property - Property is the land (Did not touch on whether spectacle counted as property)
Why this case?	-Majority introduced "qausi-property" via the functional approach of novel claims -Dissent dismissed concept of "quasi-property" via the attribute approach of novel claims	-Majority rejected "quasi-property" concept from the US
Obiter:	This is not an issue of abandonment because abandonment necessitates intent and there is no intent to do so at moment of publication.	-Not a trespass case! (instead, nuisance claim by Pltf) -this case establishes definition of 'nuisance;

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 Pl 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)**
    - Re. argument about the medical implications if such lawsuits take place:
    - Increasing trends in patentability of human cells lines means that exchange of human materials is anything but 'free'
    - Moral argument = very strong; if the science is science for profit, dissent fails to see the justification to exclude the patient from those profits
    - Re. argument that the legislature should make this decision does not relieve the courts of their duty to address this matter
    - 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

Accepted as Property	Rejected As Property
Fishing Licence (*Saulnier v. Saulnier*)	"Know How" (*Roth v. R, within the income tax act)*
Distinctive sound of a singer's voice (*Midler v. Ford*)	Pre-embryos (*Davis v. Davis*)
Frozen sperm (*JCM v. ANA)*	Patents over mice (*Harvard)*
Domain names (*Emke v. Campana)*	Extracted human cells *(Moore)*
Genetically modified plant cells (*Monsanto)*	Next of kin to a human brain (*Dobson)*
One's personality or celebrity (*Athens)*	
University Degree (Michigan)	University Degree (Canada)

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 2: PROPERTY IN PERSPECTIVE

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.

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.

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

    - 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:
    - "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
    - 1 – annoyance in public place affects hundreds or thousands of people an hour
    - 2 – over weeks the number of people affected accumulates (not sure how that reasons distinct from the first, but there you go)
    - 3 – public nuisances unchecked encourage other misbehaviour – broken window syndrome
    - 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).

EXPROPRIATIO & 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 heath, 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:**
  - Nanabush tricks Deer into submission, kills and roasts Deer.
  - 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.
  - Marauding wolves happen by and despite Nanabush's attempts to distract them, the wolves find and eat Nanabush's kill.
  - Nanabush frees himself, eats the remaining brains, is trapped in deer skull, is mistaken for a deer and chased.
  - Nanabush is freed from skull when he trips, falls, and the skull is broken open.
- **Issue:**
  - Do Nanabush's actions violate the balance required by law in the relationship between humans and animals?
- **Held:**
  - 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:*
  - Nanabush failed to respect the body and dignity of Deer
  - 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
  - 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
  - Without Anishinabek, deer can live; however, without deer, Anishinabek cannot live
  - Anishinabek ask for forgiveness and how they can atone
  - 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.)*
  - Deer is partly responsible for his own death through prideful susceptibility
  - Rest of the Forest v. Birch Tree analogised:
  - Birch tree boasts about his strength and beauty and is then whipped by pine needles for his vanity
  - 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
  - Birch tree asserted his greater worth relative to others
- *Majority Reaction to the Dissent:*
  - Distinguish Rest of the Forest v. Birch Tree:

  - 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 an 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 cuncurrently. 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

  - 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

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.

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 depravation 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 hold outs 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:**
  - Electrical poles extend 6 feet into the air space above Didow's land. Didow claims the intrusion is a trespass.
- **Discussion:**
  - The rights of a landlord to air space must be balanced with the rights of the public. This balance is best struck when:
  - 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:*
  - 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
  - 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:**
  - 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

1. What rule governs the delimitation of a landowner's airspace rights according to *Didow*? What is the rationale for the rule?

    - 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

- According to the majority in Edwards v Sims, what rule governs the ownership of the subsurface?
    - "Cujus est solum…"
- What set of rules are argued for in the dissenting opinion? What underlying justifications are advanced by Logan, J.?
    - 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?
    - 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

COASE THEOREM

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

- 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:**
    - What legal rule promotes the most effective use of the contested airspace?
    - It would cost Didow $40000 to deal with the intrusion and protect his cows
    - It would cost AP $32000 to move the poles
    - 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.
    - 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**
    - 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)**
  - 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)**
  - 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)**
  - (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:

- govt. can't take more than 1/20th otherwise expropriation of land
- govt. has right to minerals but have to provide reasonable compensation
- govt. can take over water privileges for the purpose of mining or agricultural but have to provide reasonable compensation
- govt. can take natural resources for public works without compensation
    - b) govt. 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 Aquae***
  - 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:**
  - 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:**
  - Does a riparian owner have the right to construct wharves or other structures upon the foreshore?
- **Analysis:**
  - The general rule is based on the **summary of Halisbury Law of BC**
  - **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:**
  - No, therefore there was a trespass
- **Ratio:**
  - 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:**
  - Respondent owned land used for living & business
  - 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
    - 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
    - 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
    - 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
    - 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:**
    - La Salle installed carpets on payment plan in hotel and retained title as security until entire purchase price paid.
    - 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.
    - Priority over carpets therefore depended on if the carpets had become fixtures or not. If so, then CCI could claim them.
- **Rules:**
    - 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.

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 aso 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:**
    - 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:**
    - 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.
    - 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
    - Doubt re quantity is resolved in favour of the innocent party who is entitled to the whole mixture
- **Decision:**
    - 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.
    - -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.

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

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:**
    - **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"
    - **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
    - **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)
    - 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

- 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?

- A: Most likely yes, but this would not have granted him a right to seize the canvases prior to trial (that's a pure economic right) and so it is not fully considered in the judgement.

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.
  - Schmieser 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 round-up, 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

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 Schmeiser 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.

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 Trade-marks 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.

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".

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 grumpycat 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

- ***Yes***
- **Brown J's arguments (minority):**
  - Concerned that "the flow of ideas will be curtailed if the right to exclude is denied" (290) b/c people will be less likely to develop new intellectual property if they can't control it's access and distribution (references Napster b/c that was topical in 2003)
  - Same w/ online newspapers charging for access – won't be able to pay their bills if they don't charge for content
  - I think Brown is taking a problematic and unconvincing "all or nothing" approach here – some websites may have paywalls, while other's don't – that doesn't mean we need to privatize the whole internet – but this judgement dates itself cause this was pretty much pre-paywall
- **Epstein's arguments (prof): "Economic Efficiency"**
  - Servers shouldn't be treated as personal property (having to show injury to it) but should be treated akin to land rights - -> the Internet should be treated as a physical space (287).
  - Companies will be able to authorize transmission of information (through e-mail, web searches, page links, etc.) -> so gives them more control over incoming / outgoing content
  - Economic argument: this would create a market in computer-to-computer access – if a web site owner were to deny access, a system of "simple" negotiations would occur to procure the necessary licenses for use
  - Note that the court dismisses this argument it because it wouldn't impact the case outcome here regardless if land rights were applied
- **Further considerations:**
  - Once a legal right is created, it's very difficult to undo -> so courts resistant to create legal property rights for new media / technology?
  - If you create these property rights for one party, are you taking them away from another? How to balance interests of different parties?

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 of 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:
    - Unequivocal intention to appropriate the fox
    - deprived the fox of it's liberty
    - 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)
    - Doctrine of First Occupancy
    - Locke: ownership as tied to "sweat of hunter's brow"
  - reasonable prospect of killing it
- **Note: Seal hunting cases**
- Clift v Kane
    - Majority held Pierson v Post (killing = possession)
    - Dissent favoured industry specific view (putting corpses on ship = possession due to likelihood of losing seal post-killing)
- Doyle v Bartlett
    - 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)

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)**
    - 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**
        - 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
        - open, notorious (ensures the adverse possession is discoverable)
        - adverse (no permission of the title owner)
        - exclusive (discontinued use by title owner)
        - peaceful (not by force)
        - actual
        - 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?

  - 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 copy hold 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

- 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
    - Passed to the "heirs of the body" of the first taker until the particular line of descent became extinct
    - 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"
    - If son succeeded in inheritance while still holding tail, he would be owner in fee simple
    - 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 husbands 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:**
  - Man has wife (Martini) and is close with sister neighbours (Christensens)
  - All live in duplex owned my man and his ex-wife
  - 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:**
  - Preferable interpretation is that testator gave wife a life estate without power of encroachment in the undivided half-interest he owned at death
  - "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."
  - In this case it is apparent testator intended to benefit both wife and Christensens
  - 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:**
  - Capital vs. income - which should be used to pay for certain things?
  - Capital is investment; income is interest generated from that investment (e.g. Mutual funds)
  - So, different people may pay, depending on what source is used to pay for something:
  - Income: the person with the life interest has income reduced by equivalent amount
  - Capital: the person with the eventual fee simple will have the Estate capital reduced by that amount
- **Facts:**
  - The will granted life estate to mother, then life estate to brother, then fee simple to last brother
  - 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
  - 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
  - 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

    - Generally - life tenant is responsible for paying annual taxes and utilities out of the income of the property
    - 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:**
    - How are certain things to be paid - out of income or capital?
- **Judgment:**
    - Heating
        - Paid out of income
    - 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
    - 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
    - **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
  - Ameliorating: Waste which results in benefit and not an injury, improves the inheritance
  - Voluntary: Committing positive, wrongful action that diminishes value of land
  - Permissive: Damage resulting from failure to preserve or manage the estate
  - 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
  - Amount to decrease in value of the reversion, less an allowance for immediate payment
  - Sometimes exemplary damages
  - 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 to
    - 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 heir-less 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 dispossessing them from their lands.
- ***St. Catherine's Milling & Lumber Co. v. Ontario***
  - Interpreted *Royal Proclamation* to giver 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***
  - S. 25 of *Constitution:* Fiduciary duty requires justification for infringement of aboriginal rights.
- ***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 approached 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?