

**PROPERTY LAW**  
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**FINAL OUTLINE - DEC 2011**  
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# Nature of Property

## The "Properties" of Property

### Meanings of Property

- depends on the purpose that society/dominant classes expect the institution of property to serve (not constant)
- distinction between property and physical possession - property is a right (not a thing)
- **right/bundle of rights** - enforceable claim to some use or benefit of something
  - to share in some common resource (still a right of individuals)
  - right of some particular thing
  - right to exclude non-members
  - is a claim that will be enforced by society or the state (either by convention or law)
- state creates the right, individual has the right
  - right of distinct natural or artificial persons (legal title)
- corporate property - an extension of individual private property
- state property - rights which the state has created and kept for itself or taken over from private individuals/corporations
- property is the **legal title** - enforceable exclusive right - to or in the tangible thing
  - change in common usage to consider the things themselves as property came with the spread of capitalism
  - shift from limited rights in land, etc. to virtually unlimited rights
  - previously unsaleable rights in things now saleable - limited and not always saleable right *in* things were replaced by virtually unlimited and saleable rights *to* things
- institution of property needs justification in some basic human/social purpose
  - a right in the sense that it's an **enforceable claim**
  - enforceability makes it a *legal* right; depends on society's belief that it is a *moral* right
- contractual right - you against another party; property right - you against the world

### Right to Exclude

- give someone the right to exclude others from a valued resource and you give them property; deny exclusion - no property
- right to exclude generally comes with other rights
- is a necessary and sufficient condition of identifying the existence of property (single-variable - see below)
- *consensus...* that the institution of property isn't concerned with the scarce resources themselves but with the rights of persons with respect to those resources
  - includes tangible and intangible things
  - possession speaks to control; property refers to norms rather than facts (p. 7)
  - property cannot exist without some institutional structure ready to enforce it - the state, social ostracism, etc.
  - includes private property, common property, public property

- individual/small group rights
- versus all members of a qualified group/community have equal rights
- versus government entities have rights analogous to private property
- three schools of thought re: right to exclude...
  - single-variable essentialism
    - right to exclude is the irreducible core attribute of property
    - Felix Cohen: "To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state."
  - multiple-variable essentialism
    - right to exclude is a necessary but not sufficient condition of property
  - nominalism
    - property as a purely conventional concept with no fixed meaning - empty vessel to be filled by the legal systemic accordance with particular values/beliefs
    - right to exclude is neither necessary nor sufficient
    - gives huge authority to whoever gets to 'define' property

### ***Calder v. British Columbia* (1973, SCC)**

- issue: should the Nisga'a people's system of property ownership (Aboriginal title) be recognized?
- 6 of 7 judges affirm aboriginal (Nisga'a) title but...
  - 3 judges - Nisga'a had title but it was extinguished (explicitly) by early law by Douglas
  - 3 judges - you can't lose rights as important as property rights by an implicit law
  - final judge - Nisga'a didn't petition the Crown; doesn't have to render decision
    - 3 judges agreed with 7th judge - no decision rendered on their specific title
- outcome: case established validity of aboriginal title claims; property is a culturally relevant construct

### ***Yanner v. Eaton* (1999, Aust. HC)**

- issue: does state "own" local flora & fauna (Native man charges for hunting crocodiles without a licence)
- Mabo principle: Native title right is [not?] 'extinguished' by subsequent statute (i.e. *Fauna Act*) granting a right that is inconsistent with previous statute re: Native title right (i.e. *Native Title Act*) - see p. 12
- majority: highly nominalist approach - don't interpret the statute to say that the Crown has "absolute right" to all the flora and fauna
  - rather it's meant to say that the Crown has the power to preserve and regulate the resource - "imperium not dominion" - guardianship for social purposes
  - thus Native title right not extinguished; exempt from licencing requirement
- dissent: single-variable approach - meaning of property means that the right has been conferred on the Crown to the exclusion of all others

### ***Harrison v. Carswell* (1976, SCC)**

- issue: is picketing at a public mall trespassing; property rights v. labour law rights

- majority (Dickson): preventing trespass is a fundamental property right; only legislation should be able to take that right from an owner (becomes less legitimate over time)
  - pre-*Charter* case - we are not law makers in any global sense; we move in baby steps; leave law for the legislators
- dissent (Laskin): sides with social policy - must balance labour & property rights; shopping mall is more public than private; picketing should be allowed; invokes concept of privilege
  - shortly after Ontario put forward legislation allowing picketing on private property

## Novel Claims

### ***International News Service v. Associated Press*** (1918, US)

- INS (D) copying AP (P) news from public bulletins and re-using it for commercial purposes; AP seeking an injunction to stop INS from "reaping what they have not sown" - unfair competition
- issue: is the news property? once it is published in a bulletin, is it public?
- majority: quasi-property - creates a new property right (liable for unfair competition - appropriation of AP's 'property'); INS can't *immediately* publish news it hasn't gathered
  - publication serves the limited purpose of benefiting readers; not "abandoned" upon release
  - not framed as a right in relation to the public but rather between AP and INS
- minority: property depends on exclusion...
  - Brandeis - courts ill-equipped to determine social policy re: property rights of news; defer to legislature
  - Holmes - ground of complaint is the implied misstatement of INS publishing the news without crediting AP; can't call news property
- how should we approach the question of whether something is "property"?
  - "attributes approach": what are the essential qualities of property... does this meet enough of these qualities?
  - "functional approach": does it make social/economic sense to extend the definition of property in this instance?

### ***Victoria Park Racing and Recreation Grounds Ltd. v. Taylor*** (1937, Aust.)

- Victoria Park (P) operating a race track with paid admission; Taylor (D) - property owner next door; builds a platform and publicly broadcasts the races
- issue: does VP "own" the spectacle of the races and have the right to exclude people from viewing them? do Taylor's actions constitute a nuisance (indirect effect of another's action to enjoy my rights to my property)?
  - VP made three claims: viewing was a nuisance/unlawful interference with a spectacle; spectacle belongs to VP so broadcasting is taking of property; neighbours are unnatural users of their own property
- decision: no - the act of looking over a fence and telling other people what you saw doesn't impede VP's enjoyment of its property rights
- majority: can't "own a view" - won't let the law erect a fence that the property owner isn't willing to erect themselves; VP can build a bigger fence

- won't extend the concept of property to include a view of the spectacle
- minority: one can use their land for profit; profit may require excluding others - neighbour can look but use of platform/equipment is unusual use of land and qualifies as nuisance (Rich)
  - situation is not a nuisance (Dixon) but idea of owning spectacle is new area of law - look to legislation

***Moore v. The Regents of the University of California*** (1990, US)

- Moore (P) received medical treatment for leukemia; cells excised and used for research purposes with commercial potential (no disclosure of purpose); D. developed and patented cell line from P's cells; brings two causes of action:
  - breach of fiduciary duty based on doctor-patient relationship and lack of informed consent (accepted)
  - conversion - tort re: converting someone's property into something for your own benefit/use when it's not your property (question at hand)
- issue: does Moore have a sufficient proprietary rights over the excised cells to have a cause of action in conversion?
- decision: no - no precedent; can't extend the law of conversion
- majority: California statutes provide restrictions - health policy implies lack of control re: excised tissues
  - excised cells and patented cell line are factually and legally distinct
  - also notes that the cells weren't unique even if the end product was
  - fair policy - role of balancing the policy implications (patient autonomy vs. scientific research) is the role of the legislature
  - tort of conversion not needed to protect patient rights - accomplished through consent
- minority: rejects the six basic arguments of the majority...
  - no precedent - so what... courts have the power to shape the law
  - statutes leave enough room in the "bundle of rights" to extend property rights
  - rejects distinction between cell and cell line - regardless of the patent
    - without cells the patent couldn't exist - P is joint inventor
    - compensating for lack of disclosure doesn't account for lost profits
    - if he had been aware of his cells' value he could have contracted to another company for profit
  - majority overstates the liability danger - outweighed by considerations of justice, fairness, etc.
  - legislation takes (too much) time; torts especially are a creature of the common law
  - inadequate to decide there's no pressing need to address the conversion because there's another cause of action; conversion is the superior cause of action

Numerous clausus principle - recognition of a limited (though not fully closed) set of property entitlements

- promotes economic efficiency - reduces information costs; fracturing/diffusion of interests; problem of irreversibility - doctrinal mistakes can't be easily corrected
- strikes a balance between proliferation of new forms & excessive rigidity
- channels legal changes in property rights to the legislature

# Property in Perspective

## Sources of Canadian Property Law

"[A]n estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time, for he who has a fee simple in land has a time in the land without end, and he who has in tail has a time in the land or the land for a time as long as he has issue of his body, and..."

- *Walsingham's Case* (1573)

### Aboriginal Legal Traditions

- family as a unit of ownership
- property more important than a commodity
- feasts as an economic unit - witnesses for legal transactions

### English Common Law

- 1066 (Norman Conquest) - shift from allodial (you own something and its yours) to tenurial (King owns all the land - allowed him to take the land of opposing Lords)
  - William the Conquer - declares himself Lord over all the lands of England
  - grants huge tracks of land to major supporters (Tenant-in-Chief)
    - in turn they grant tracks to lesser Lords (Tenant) with permission - "subinfeudation" (vs. later system of "substitution")
    - lifelong relationship... can't sell, inherit, etc.
    - neither the Lord nor the tenant owed the land - "seisin" (possession of land by freehold)
  - reciprocal relationships - protection, loyalty, etc.
    - Lords "purchased" services in exchange for land - service is at the heart of the arrangement; free tenures - services defined; unfree tenures - services undefined
    - services of free tenure:
      - knight service - security
      - sargeantry/aristocrat - ceremonial roles
      - spiritual tenure - religious roles
      - socage/subsistence tenure - agricultural
    - incidents of tenure ("death duties") - arise mostly on death of a tenant; expectation heir will get the land evolves in a right (end of 12th C); ensures benefits to the Lord now that he can't choose his tenant
      - escheat - tenant dies with no heir; land reverts back to the Lord
      - relief - payment heir makes to the Lord to live on the land; removed by the Magna Carta
      - wardship - underage heir; Lord can take the land (and do what he wants with it) until the heir comes of age
      - marriage - daughter left upon death; Lord can "sell" the marriage

- does not apply to the unfree tenures - "copyholders" (serfs who belong to the Lord)
  - no rights until considerably later
- feudal (custom) courts move to Royal (King's) Court; Lords begin to defer to the King; exercise less discretion over their own court
  - common law begins to develop...
- historical overview of common law:
  - 1200 - inheritance - ancestor dies; law decides who is heir with right to the land; idea of a will abhorrent to common law - must pass down through kinship group
    - can subinfeudate; can't sell
  - 1290 - Statute of *Quia Emtores* - makes land alienable without Lord's consent; ends subinfeudation
    - feudal pyramid stops expanding and begins to contract
    - can substitute buyer for seller in Lord/Tenant relationship
      - eventually everyone become a Tenant-in-Chief - holds land directly from the Crown
  - 1540 - *Statute of Wills* - able to make a legal will
    - land is inheritable, divisible - increased commodification
    - still a strong inclination to keeping land in the family
  - 1660 - *Statutes of Tenures* - abolishes all the tenures (feudalism)
    - expect free and common socage (no wardship, marriage, relief, etc.)
- reception:
  - ceded/conquered colonies - existing legal system applies until Crown decided otherwise
  - settled colonies - British common law applies immediately
    - applied to "unoccupied territories" - but apparently not territories occupied by indigenous people
  - *The Law and Equity Act*, s. 2 - "The Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limit..."

### Types of Property

- real (realty): real actions (land laws); can bring action against others wrongfully in possession and reclaim
  - corporeal (tangible) - right in property that entitles you to exclusive physical possession (i.e. house)
  - incorporeal (intangible) - right in property that entitles you to something without actual physical possession (i.e. easement - right of way over neighbour's land after proper legal process; right passes down with title but is abstract)
- personal (personalty): compensation for loss property
  - chattels personal - stuff that isn't land



- "choses in possession" - physical thing that can be possessed and taken back (i.e. cow)
- "choses in action" - something you can only enforce through court action (i.e. bank account; shares; patent)
- chattels real - lease (bizarre historical reality...)
- sui generis: aboriginal title (unique interest)
- distinctions have broken down to some extent over time... i.e. some personal property may be recoverable
- legal vs. equitable rights:
  - legal rights (common law courts) - solid, tangible, enforceable rights
  - equitable rights (Courts of Chancery) - if you promise to do something you should do it; rights are less durable/secure
    - agreement to make a lease is made - discretionary; good against everyone but a person who, in good faith, also pays for lease of same land
    - trust - putting property in the name of another person to manage for the benefit of a third person; trustee holds legal title; beneficiary holds equitable title

## Property, Class & Poverty

### Waldron, "Homeless and the Issue of Freedom"

- classical liberalism - based upon principles of minimal government, maximize the freedom of individuals; negative rights - freedom from undue interference/external restrictions (Locke, etc.)
  - negative freedom - if you have no private property and aren't allowed on public property you can't "be" anywhere
- positive liberties - the power and resources to act to fulfill one's own potential; ability of people to participate in society/government
  - positive freedom - society is obligated to provide basics for people to reach their full potential

## Protections for Property

### Expropriation

- at common law a Crown grant of land is irrevocable (unless the grant contains an express power of revocation); expropriation = Crown "taking back" land
- common law presumption is that real or personal property cannot be taken by the government without compensation; otherwise clear legislation is required
- US & Australia - enshrined property right in their constitutions
  - US - permits government takings only for a public purpose and with just compensations
  - Canada - doesn't guarantee compensation but in practice it's almost certain
- governments will regulate land to the point that it amounts to a de facto taking as it compromises the rights of the owners to use the land beneficially/productively/reduces its market value

- US - these "regulatory takings" can be considered expropriations
- Canada - not so
- US - courts can inquire if a taking is really for a public purpose or unconstitutional (not so in Canada); courts tend to defer to the legislature
- US - Penn Central Test - look at case specific factors including: potential economic impact of state action; whether the state action interferes with investment backed expectations; character of governmental action

### Constitutional Cases

#### ***Pennsylvania Coal Co. v. Mahon*** (1922, US)

- coal company sold surface land with a deed protecting future mining rights under the land; mining would cause collapse of house; *Kohler Act* comes into force - forbids coal mining in a way that harms structures (i.e. the house); coal company gives Mahon notice; Mahon fights notice saying it is prevented by the *Kohler Act*
- decision: *Kohler Act* can't prevent mining as it would amount to a regulatory taking of mining company's property; Mahon bought property knowing the deed was there
- legacy: Fifth Amendment interpreted as preventing private owners from bearing public burdens; thus some regulatory takings can qualify for compensation due to effect on use/market value
  - "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases... go... In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbour's shoulders." (pp. 125-26)

#### ***Lucas v. South Carolina Coastal Council*** (1992, US)

- P. purchases beachfront lots; government passes *Beachfront Management Act*; Act prevents P.'s land from being able to be developed
- decision: legislation constitutes a "taking"
- legacy: taking occurs when regulation "denies all economically beneficial or productive use of the land"

### Non-Constitutional Cases

#### ***Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*** (1999, NSCA)

- Nova Scotia enacts *Beaches Act* which prohibits development on beaches without authorization; landowner wants to develop his beach - applies for a permit and is denied; claims his land was de facto expropriated
- decision: not expropriation
  - scope of de facto expropriations is narrow in Canada with two governing principles:
    - valid legislation that very significantly restricts owner's enjoyment of private land
    - Crown may order compensation for such restriction only where authorized by legislation

- this means the only questions courts can consider are whether the regulatory action was lawful and whether the *Expropriation Act* entitles the owner to compensation for the resulting restrictions
- loss of economic value from regulation is not sufficient to be expropriation; two requirements:
  - extinguishment of virtually all the incidents
  - acquisition of beneficial interest by the expropriating authority
- legislation itself did not restrict freedoms; denial of the permit did
- loss of economic value is not the same as loss of an interest in land as per the *Act*
- freezing of land development did not confer any interest onto the province

### ***Canadian Pacific Railway Company v. City of Vancouver* (2006, SCC)**

- CPR was granted Crown land for a railway corridor through Vancouver; railway stopped and CPR offered to sell to developers or the City; City passed a bylaw preventing the land from being developed but also did not buy the land; CPR wants the bylaw struck down or compensation
- decision: not expropriation
  - test for de facto taking is very similar to *Mariner*:
    - acquisition of beneficial interest in property or flowing from it
    - removal of all reasonable uses of the property
  - not proven that the City gained any interests from the law
  - not all reasonable uses were banned - i.e. can still be a viable railway, etc.
  - statute in Vancouver Charter expressly says bylaw don't equal takings

### Successful Claims re: De Facto Expropriation

- *The Queen in Right of British Columbia v. Tener et al.* (1985, SCC)
- *Casamiro Resource Corp. v. British Columbia* (1991, BCCA)
- *Manitoba Fisheries v. The Queen*
  - all three went beyond reducing the value of the property to making it impossible to do business (i.e. completely tripping access to mineral rights in *Tener*) - p. 136

### NAFTA

- Article 1110 on Expropriation and Compensation:
  1. No party shall directly or indirectly nationalize or expropriate an investment or an investor or another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except:
    - a) For a public purpose;
    - b) On a non-discriminatory basis;
    - c) In accordance with due process of law and the general principles of treatment provided in Article 1105; and
    - d) Upon payment of compensation in accordance with paragraphs 2 to 6.
  2. Compensation equivalent to fair market value immediately before expropriation took place (see p. 148)
  3. Compensation shall be paid without delay and be fully realizable
- together this suggests the American doctrine is most applicable

***Metalclad Corp. v. United Mexican States*** (2000, NAFTA arbitration)

- American firm trying to build hazardous waste treatment facility in Mexico; government refuses permit; company starts anyway; stop work order is issued and then a decree saying the area is an ecological reserve
- decision: no valid basis for denial of construction permit
  - Article 1110 applies not just to expropriation but also to covert/incidental interference with use of property that deprives an owner of reasonable expected economic benefit - even if it doesn't necessarily benefit the state
- legacy: the only case to win re: breach of Article 1110

## Boundaries

### Land: Airspace & Subsurface Rights

#### Airspace

- "*cujus set solum ejus set usque ad coelum et ad infernos*" - owner of a piece of land owns everything above and below it to an indefinite extent
- owner of surface holds rights to airspace to a certain height above the ground
- *Land Title Act*, s. 141(1) - "An owner in fee simple whose title is registered under this Act may, by the deposit of an air space plan, create one or more air space parcels separated by surfaces and obtain indefeasible titles for them..."
  - s. 141(3) - "...an airspace parcel may be subdivided in accordance with the *Strata Property Act*."

#### ***Didow v. Alberta Power Ltd.*** (1988, ABCA)

- government utility company installed power poles that encroached on airspace of people's property; P seeking declaration remedy (power poles would have to go) rather than a trespass action which would basically allow the government to pay to encroach
- decision: government is trespassing (so they enacted a statute to override the decision)
  - trespass is strict liability - just have to prove it happened; nuisance - must show interference
    - AB argued trespass isn't actionable because it doesn't interfere with landowner's use and enjoyment - i.e. airplanes
    - court responded that airplanes are transient while power poles are not; poles are at a height that could potentially be utilized
  - Haddad: "I view this test as saying a landowner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land." (p. 164)
    - infringement on potential enjoyment is enough

## Below the Surface

- should it be limited to what can be reached by the owner?
- what about new technologies - i.e. carbon capture?
- *coase theorem* - ownership should be neutral - based on what each party can buy/sell to maximize utility

### **Edwards v. Sims** (1929, US)

- Edwards owns entrance to cave; Lee (probably) owns the land above part of the cave; Sims (Judge) seeking to make Edwards let a surveyor onto his land to see if the cave encroaches
- decision: Lee owns the part of the cave below his land (latin maxim applied); just like in mining the surveyor must be able to enter the property and see
- majority (Stanley): "we can see no difference in principle between the invasion of a mine on adjoining property to ascertain whether or not the minerals are being extracted from under the applicant's property and an inspection on this respondent's property through his cave to ascertain whether or not her is trespassing under this applicant's property" (p. 166)
- dissent (Logan): the person who owns the entrance owns the cave - "he owns everyone beneath the surface that he can subject to his profit or pleasure, but he owns nothing more." (p. 168)

## Mining Law

- at common law the person who owns the land owns all minerals in the soil except gold and silver; realistically this is rarely true due to legislation and the Crown's rule:
  1. prerogative rights of the Crown - Crown entitled to gold and silver in land
  2. terms and reservations on initial Crown Grant - grant has provisions for what the Crown and owner are entitled to
  3. statute – *Land Title Act*, s. 50 reads into all Crown Grants and gives many more exceptions

## **Lateral Boundaries**

### Land Bounded by Land

- surveys of land used to be described by natural boundaries; now described in title as per city plans
- landowner has the right to enjoy their own land in its natural state - as it was when acquired - unaffected by excavation on neighbouring land (buildings complicate this)
- if excavation on lot A leads to subsidence (caving/sinking in) on lot B, then A is strictly liable no matter how much care was taken
- if there is a building on landowners property they can get an "easement of support" from the owner of the adjacent lot by paying them to guarantee that they'll keep lateral support; this goes on the land title
- up to 30 years ago "prescriptive easement" was possible – if a building has been on the land for >20 years there is effectively an easement of support

- *Land Title Act*, s. 24 abolished all prescriptive easements in 1974
- *Property Law Act*, s. 36(2) – if building or fence encroaches on neighbouring land compensation must be paid or fence must be moved

### ***Blewman v. Wilkison*** (1979, NZ)

- landowner excavated and then subdivided; land (on a hill) is developed and sold
- issue: is the original owner responsible to the new owner for erosion?
- decision: no - not under a strict liability to the new owner; work done under sound advisement (no negligence); new owner acquired risk of erosion
  - if proof of negligence were available then law of negligence still would have applied

### Land Bounded by Water

- ad medium filum aquae - if you own the property on one side of a stream (river) you own the stream bed up to the halfway point
- doesn't apply to tidal waters - Crown owns the bed and the foreshore between the low & high watermark
- creates a problem in BC/NA (versus the UK) - we have navigable rivers that are non-tidal waters
  - BC - the Crown owns all navigable rivers
  - 1961 - Crown owns all beds unless expressly provided in the Crown Grant

### ***R. v. Nikal*** (1996, SCC)

- Wet'suwet'en man caught gaffing salmon without a license; argued the owner of the river (the Band) owns the fishing rights; BC *Land Act* doesn't apply to federal reserves
- decision: acquitted due to aboriginal status & licensing though fishery considered separate from ownership of the bed
  - navigability of the river matters for who owns the river bed - there were rapids where he was fishing but navigable above and below; determined it counts as navigable
  - several cases quoted establishing that rapids/falls along an otherwise navigable river to not make it unnavigable above that point; some short portages are acceptable

### Riparian Rights

- at common law riparian owners can use unlimited water for domestic purposes even if it diminished the flow for those downstream
- if the water is being used for extraordinary purposes it may be used but the flow may not be diminished
- NA rights differ from UK rights due to different circumstances:
  - gold rush environmental damage; everyone has an interest in streams
  - interior is dry but developed agriculturally - major irrigation needs
  - slowly statutes came to supersede the common law in BC
- *Water Act*, s. 2(1) - "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 purpose 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..."

- analogous to *Yanner* - purpose is to regulate rather than to own outright
- attempts to allow Aboriginals to maintain water rights - especially in Southern Interior - but courts tended to rule in favour of private owners and did not give legal standing to Aboriginal title until it was too late
- *Land Act*, ss. 55-56 - lay out how the Crown owns all beds of bodies of water and shorelines unless it's been explicitly granted by the Crown

### ***District of North Saanich v. Murray* (1975, BCCA)**

- riparian owner has right to access the water
- Crown (provincial) owns the foreshore
- owner built a big wharf on pilings on the foreshore; argue that in order to effectively access they need the wharf
- ability to access the water is okay but the owner is not allowed to hamper the public

### ***Steadman v. Erickson Gold Mining Corp.* (1989, BCCA)**

- owner gets spring water from a well; silt from a new road built by the D contaminates the water supply; cause of action - nuisance; D. argues the P. didn't have the license required to use the water; Crown couldn't determine if the well came from ground water or spring water - ground water percolates through soil in an undefined course and does not require a licence
- decision: under the common law no one owns water (like animals) until someone appropriates it
  - dig a well and the ground water is yours; you can use it even if your neighbour is effected but you can't contaminate it
  - if it's stream water you must prove it's only being used for domestic purposes if you don't have a license
    - Steadman's use was small enough to count as domestic - wins either way

### Accretion

- changes must be gradual and imperceptible - if land is eroded by boundary water the land is lost
  - standard set out by Lord Wilberforce - *Sorter Centre of Theosophy Inc. v. Sate of South Australia*; followed by *Nastajus v. North Alberta (Land Registration District)*
- if the Crown owns the shoreline they get accreted land there
- newly formed island goes to the Crown - "Water Law in Canada" (La Forest)

## Fixtures: When Personality Becomes Realty

### The Metaphysics of Annexation

- annexation - to attach; especially to a larger or more significant thing
- historically - land goes to one's heir and chattels go to the church courts
- what about chattel fixed to the land?
- four principles of chattel v. fixture (*Stack v. Eaton* [1902]):
  - "The articles are not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such that they were intended to be part of the land."
  - "The articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue as chattels."
  - "That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent for all to see. If it's meant to better the land it's a fixture."
  - "The intention of the person affixing the article is material only so far as it can be presumed from the degree and object of annexation."

### ***LaSalle Recreations Ltd. v. Canadian Camdex Investments Ltd.*** (1969, BCCA)

- carpet leased by hotel owner - put in building with a mortgage; goes bankrupt; carpet company didn't notify the bank the carpet wasn't paid for - is the carpet a chattel or a fixture?
- decision: carpet improves the building so it's a fixture; carpet is considered "slightly affixed)
- note re: security interests: when an item is sold with a security interest and it becomes a fixture on land that has a mortgage or charge, priority rules apply to determine which creditor will prevail; common law holds that affixed chattel goes to land security - the chattel owner has to go after the purchaser
  - in some jurisdiction one can register a right to enter and seize a fixture

### Tenant's Fixtures

- Williams and Rhodes, "Canadian Law of Landlord and Tenant" (6th Ed. Volume 2):
  - "Not all fixtures attached by tenants may be removed from the property when the lease expires. The fixtures must be removable without injuring the freehold. To be removed the article must be either:
    - For the purposes of carrying on a trade; or
    - Ornamental in nature or for the purpose of domestic convenience."
- the implied right of detachment may be removed through contract (*335426 Alberta Ltd. v. Werstmount Village Equities*)
- removal must be timely



***Diamond Neon (Manufacturing) Ltd. v. Toronto-Dominion Realty Co.*** (1976, BCCA)

- company (WCP) leased land to Uptown Motors; UM made a contract with P. to lease them a sign; lease expired (for land or sign?) - new tenant (Dueck) - took over/sign stayed; WCP sells land to D.; D. sells the signs
- issue: did D. concert the P.'s property when the signs were sold?
  - contract said signs were not fixtures; D. not a party to the contract
- majority: D. acquired the right to the signs when they bought the property; thus did not convert them when they were sold
  - whether a chattel becomes a fixture can't be exclusively determined by contract; whether it's a fixture must be "patent for all to see"
- dissent: when property was sold the owner of the signs should have been examined; signs speak for themselves as they say the name of the business/owner
  - when the lease for the land to Dueck had expired and he didn't remove the chattels the sign owner lost their rights

**Tangible & Intangible Resources**

***Thereby v. Galerie d'Art du Petit Champlain Inc.*** (2002, SCC)

- D. bought posters; transferred ink onto canvas and resold them; the artist seized the pictures (pre-judgement - this only applies legally when alleging a violation of economic rather than moral rights)
- decision: the posters were not an illegal reproduction - the physical ink was moved

***Monsanto Canada Inc. v. Schmeiser*** (2004, SCC)

- P. patented pesticide resistant gene; D's crops had 98% GM plants but he didn't have a license; D. argued the GM seed blew over from other farmers' fields and grew (he used RoundUp which killed the non-resistant plants)
- issue: what does it mean to "use" the patented seeds?
- decision: can't patent a plant just a gene - can't patent a higher life form (see Harvard Mouse); gene was "used" in a legal sense so patent was infringed; ownership doesn't negate the patent
  - moral concerns - defers to Parliament
- Harvard Mouse: Harvard developed a process where they injected cancer into a mouse and then checked its offspring; mouse was then bred for cancer research
  - they wanted to patent both the gene and the mouse - 5:4 decision by the SCC said no - you cannot patent a mouse
  - expectation was that Monsanto would lose because it was about plants (a higher life form)

Accession

- accession - an amount added to an existing quantity of something; what happens when items are combined to the point of being inseparable (i.e. multiple parts are used to make a functional boat)?

- *McKeown v. Cavalier Yachts* - \$1,700 boat hull turns into \$24,000 boat - challenging to determine damages
- four tests have been advanced (*Thomas v. Robinson* [1977, NZ] & *Paziuk v. Frank Dunn Trailer Sales Ltd* [1994, Sask]):
  - injurious removal test: can items be removed without serious physical injury to principal chattel?
  - separate existence test: has the separate identity of the acceded chattel been lost (i.e. when a plank is added to a ship)?
  - destruction of utility test: would removal of the combined items destroy the utility of the principal chattel (i.e. tires off a truck)?
  - the fixtures test: looking at the degree and purpose of annexation - has an accession occurred?

## The Concept of Possession

### Definitions of Possession

Canadian law “does not recognize the existence of a single concept of possession applicable for all purposes.”

– Cullity J. (*Lifestyles Kitchens & Bath v. Danbury Sales Inc.* [1999 Ont. SC])

- core notion: intention to possess + measure of physical control = possession
  - starting point only
  - cases depend on the facts
  - second element tends to vary with the context
- possession requires some element of control and intention
- possession - or the right to possession - determines the ability of an owner to sue in tort in response to wrongful interference with chattels
- generally there are two components of possession: (*Pierson*)
  - *animus possidendi*: an intention to possess
  - *factum*: physical control (also referred to as “*corpus*”)
- example - a hunter in hot pursuit of a fox does not actually possess it until it is physically possessed (i.e. after it has been shot); until then a “saucy intruder” may kill the fox and claim it as their own (*Pierson*)
- if the animal is mortally wounded and the hunter stays on the trail (or if the animal is trapped) possession may be found there (constructive control) (*Pierson*)
- possession may be constructive - i.e. at common law a landowner possesses animals nesting on his land until they leave; also for animals that keep returning
  - *Wildlife Act*, s. 2 excludes obtaining property rights in wildlife except with a permit
- conversion - the “wrongful exercise of dominion over the personal property of another”; must be actual interference with the plaintiff’s dominion (Popov)
  - acts that significantly but incompletely seek to achieve possession may result in a pre-possessory interest - must be unlawfully interrupted
  - this is a right to possession; this interest has equal legal footing with subsequent possessory rights
- *jus tertii* - right of third parties don't matter

## Carol Rose - "Possession as the Origin of Property"

- points out two driving factors in the law of possession: clear communication of possession (for administrative purposes) and rewarding useful behaviour
- factors converge - clear communication has an economic incentive to society - facilitates trade and minimizes resource-wasting conflict
  - clear communication is itself a useful act that should be rewarded
- possession is "yelling loudly enough to all those who are interested" and continuing to yell; requires a "clear statement to the rest of the community"
- act of possession is a "text" that others may read; subtexts to the text of the first possession include:
  - will the text be "read" by the right audience at the right time? (*Pierson*)
  - are "secondary symbols" necessary to represent the text - i.e. registering patents?
  - what constitutes a "clear act"? does this disadvantage groups that are not familiar with the symbolic systems within which these acts take place?
    - example - *Johnson v. McIntosh* (US) - it was argued that Aboriginal peoples didn't have possession of land as they hadn't *asserted* their property rights
  - what attitude does the doctrine have to the relationship between man and nature?
  - some Aboriginal groups have expressed confusion of the concept of ownership of land...

### ***Popov v. Hayashi* (2002, US)**

- Popov attempting to catch a ball at a baseball game (record for home runs being made); loses it when he's swarmed; ball ends up with Hayashi; both contend they had intention and control at some points; when ball is hit beyond the fence by Bonds it is "abandoned"; first person to get to it can claim it (like a wild animal)
- decision: judge can't decide - equitable division (developed academically); forced to sell ball and split the proceeds; almost all profit spent on legal fees
  - two equally valid claims of possession
  - factual problem - not enough facts to determine which claim is superior
  - Popov had "pre-possessory interest" in the ball
  - "cloud on its title" - an award to one would be unfair to the other

### ***Pierson v. Post* (1805, US)**

- Post pursuing a fox; Pierson intervened, killed fox & took possession of it
- issue: what counts as sufficient possession so as to give rise to a right in property in wild animals?
- decision: title to wild animals vests by taking possession; mere pursuit is not enough but once mortally wounded/maimed it can no longer be intercepted
  - capture may also be sufficient or if an animal is trained to return to its owner (i.e. falcon) - to establish a property right

## Acquisition of Title of Land by Possession

### Possessory Right by Prescription

- doctrine of prescription - once you have enjoyed a particular right for certain amount of time (i.e. 20 years) that fact becomes a right
  - "right of support" - i.e. right of way or if a neighbour's land has held up your building for 20 years then they can't compromise the building
  - prescription has been virtually abolished in BC. (*Land Title Act*, s. 24)
- incorporeal right - property right but not of possession (just right of way, support, etc)
- prescription - non possessory rights that develop over time
- common law possessory right by prescription - called adverse possession
  - can come to own real estate by squatting (see below); has been virtually abolished in BC (but not in Ontario):
    - *Land Act*, s. 8(1) – “A person may not acquire by prescription, occupation not lawfully authorized... an interest in Crown land, or in any land as against the government's interest in it.”
    - *Land Title Act*, s. 24 – “All existing methods of acquiring a right in or over land by prescription are abolished and, without limiting the abolition, the common law doctrine of prescription and the doctrine of the lost modern grant are abolished...”

### Rules of Adverse Possession

- how one could acquire title through adverse possession:
  - occupation is open & notorious
  - occupation is adverse - exclusive
  - occupier must not have permission - that's just the owner asserting title
  - occupation must be peaceful
  - occupier must be present for the occupation
  - occupation must be contained
- essentially one would need intention to possess and must use the property as an owner might
- possession is itself a good title against anyone who cannot show a prior - and therefore better - right to possession; this right is devisable - even by non-paper-title-holder (*Asher*)
- this leaves the claimant with a possessory right superior to that of anyone else - amounts to de facto title (re: *CPR*)
- adverse possession typically required 20 years of possession (differed in some jurisdictions); 60 years for Crown land
  - paper title owner doesn't technically lose title - just loses the right to assert their rights to the land
- BC - adverse possession has been more-or-less abolished:
  - *Limitation Act*, s. 12 - abolishes adverse possession
    - s. 14(5) - clause grandfathering rights prior to July 1, 1975
    - s. 3(4) - no limitation period if land was dispossessed in circumstances amounting to trespass

- *Property Law Act*, s. 36 - contains rules of encroachment of property
- *Land Title Act*, s. 8(1) - prohibits anything that "smells" like adverse possession on Crown land
- *Land Title Act*, s. 171 - allows a first registration of land to be based on adverse possession only under certain circumstances (including a declaration under another Act)
- *Land Title Act*, s. 23(3) - makes indefeasible titles immune against adverse possession; s. 23(4) - except for adverse claims against the first issue of indefeasible title
- any subsequently registered title is immune - a claim under *The Land Title Act*, s. 171 must be made before the land is old (i.e. while the first indefeasible title is still the only one around)
- note: Prof. Foster holds the view that adverse possession may still be possible, even if it begins or matures after July 1, 1975; he acknowledges that this is a minority view.

### ***Asher v. Whitlock* (1865, UK)**

- 1842 - Williamson encloses wasteland on the manor (no title to the property)
- 1850 - encloses adjacent land; builds a cottage
- 1860 - dies; will leaves the land to his wife (for life or until remarriage); leaves the rest to his daughter
- 1861 - defendant marries the widow; moves in
- 1863 - Feb. - daughter dies
- 1863 - Sept. - widow dies
- 1865 - heir (at law - no will) of the daughter sues the defendant
- issue: does D. have title by adverse possession
  - no paper title but only 15 years - no adverse possession
- who owns the land?
  - the Lord - not part of litigation; apparently not objecting
- who has a right to the land?
  - the P. - the heir in law (to the daughter); the husband has no claim

### Relativity of Title in English Law – Who had the better claim in *Asher*?

- either the D's possession was adverse or it was not; if it was not adverse to the heir at law's title it may be treated as a continuation after wife died (though when wife died land became daughter's)
- asserting it's a valid will - asserting daughter (and her heir) had the rights
  - it's not adverse; had permission authorized by the will
- reasoning:
  - original occupier had rights to possession; he made a will in which he granted a determinable life estate to the wife (X to A for life until A remarries)
  - once the wife remarried the daughter captures the remainder (the whole estate in fee simple)
  - when the daughter dies all of her property goes to her heir-at-law
  - defendant would have had to argue that he had been in sole possession; once the daughter died, possession would have expired

- if possession gives rights - and possession ends - should not the next possessor acquire rights?
  - per Cockburn CJ - the plaintiff maintains her right to the land, because the possession is passed in succession to her; based on the testator's possession, the law grants the testator a right in the land that he can transfer to others; once rights in possession are crystallized, they can be transmitted, even if the person to whom the rights are transferred is not in 'actual' possession
  - per Mellor J - possession is evidence of prima facie title; however it is not equivalent to title; defendant would have to show that the person with earlier possession has a bad title or that he has a superior one; defendant did not do so in this case
- rationale: a person can derive rights from possession and then that person can pass the rights on to others; once the rights are transmissible, the right is transmissible by a will

## Finders, Keepers

### Possession Establishing Relative Property Rights

- someone who takes possession of lost property (a "finder") acquires a title good against the world, except against those with a prior and continuing claim to possession (i.e. the actual owner)
  - finders must make some attempt to contact the actual owner (*Parker*)
  - finder has possessory rights unless someone with a previous right contests
- jus tertii - the existence of a third party with a superior claim does not preclude a finder from asserting his claim to found property over someone with a lesser claim. (*Bird; Hannah*)
- abandonment - if an item has been voluntarily abandoned, even the former owner does not have a superior right; relinquishment of possession is not enough; it must be shown that the owner intended to grant title to the first person to take possession of it (*Charrier*)
  - burial goods are not abandoned as this intention is lacking (*Charrier*)
- attached chattels - an occupier of the land has a superior title to chattels in or attached to the land over that of finders, even if the occupier is unaware of its presence (*Parker*)
- unattached chattels - an occupier of land has a superior title to unattached chattels only if the occupier has displayed an intention to exercise control over the land sufficient to include the chattel in question (this depends heavily on the circumstances) (*Parker*)
  - the occupier must show a "manifest intention" to control chattels on its land (*Parker*)
  - consider Carol Rose's concept of possession as communication; doesn't this fit nicely?
- trespassing finders - if found while trespassing, the occupier's claim will be superior (*Parker*)
- found in the course of employment - items found in the course of employment confer finders' rights to the employer (whose claim is superior to the employee's) (*Hannah*)

## Rights & Obligations of Finders/Occupiers

- re: **Parker v. British Airways Board** (1982, Que. CA)
  - the finder of a chattel acquires no rights over it unless a) it has been abandoned and b) they take it into their care and control
  - the finder of a chattel acquires very limited rights over it if they take it into their care and control with dishonest intent or while trespassing
  - subject to forgoing and next point - finder doesn't acquire absolute property or ownership but does get right to keep it against all but the true owner or one who can assert a prior right to keep the chattel which was subsisting at the time when the finder took the chattel into their care and control
  - unless otherwise agreed any servant or agent who finds a chattel in the course of their employment or agency and not wholly incidentally or collaterally thereto and who takes it into their care and control does so on behalf of their employer or principal who acquires a finder's rights to the exclusion of those of the actual finder
  - person with finder's rights has an obligation to take such measures as are reasonable in the circumstances to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it meanwhile
  - rights and liabilities of an occupier:
    - occupier of land has rights similar to finder over chattels in or attached to that land and an occupier of a building has similar rights in respect of chattels attached to that building, whether in either case the occupier is aware of the presence of the chattel
    - an occupier of a building has rights superior to those of a finder over chattels upon or in, but not attached to, that building if, but only if, before the chattel is found, they have manifested an intention to exercise control over the building and the things which may be upon or in it
    - occupier who manifests control over a building so as to acquire superior rights must take measures to ensure lost chattels are found and attempts are made to return them to their owners (i.e. innkeeper or carrier's liability – manifestly accepts to care for and be liable for chattels lost on premises)
    - occupier of a chattel (i.e. car) is to be treated as occupier of building for purposes of rules
  - in *British Airways* it was shown the airline hadn't manifested intention of control - worker got the bracelet

### **Bird v. Fort Frances** (1949, Ont.)

- 12 year old boy finds money while trespassing; no claim was made for money by the owner
- money ultimately went to the boy as he had a better claim to it than the city despite his own wrongdoing (*ex terpi causa on orator actio* - "from a dishonorable cause an action does not arise")

### **Charrier v. Bell** (1986, US)

- amateur archaeologist finds burial plots; exacts two tons of artifacts; land is ultimately purchased by the state who claims ownership; P. claims ownership arguing he had permission to be on the land and he excavated the artifacts
- determined the objects buried with the dead are not abandoned (distinguished from other cases); all artifacts stayed with the state
- note: Canada - many *Heritage Acts* re: artifacts; exact definition of abandonment is not confirmed - may include passage of time, owner's intentions/conduct, possession by finder, and intent to abandon

### **Transfer of Title through Delivery: Gifts**

- there is a distinction between bargains and gifts:
  - gifts - donative transfer; one-way; benevolent
  - bargains/contractual exchanges - self-interested; bi-directional; promises are only enforced if written down & "sealed" (symbol of the seriousness of the promise); consideration - something must be promised in return
- primary legal goal with gifts is to determine intent to donate beyond question
  - are gifts exchanges (like other economic bargains) or selfless?
- types of gifts:
  - testamentary - wills (regulated by the *Wills Act*)
  - *inter vivos* - between the living
- perfectly constituted gift includes:
  - intention to give - desire to divest oneself of the gift entirely
  - acceptance by the donee - understanding of the transaction and a desire to assume title
  - delivery - solid evidence that you meant it; confirmation of the intention to give (context based)
    - a declaration by the donor that the property will henceforth be held on trust for the donee is binding
    - constructive delivery - critical elements - the donor has retained means of control and all that can be done has been done to divest title in favour of the donee (*Kooner v. Kooner* [1979, BCSC])
- *donatio mortis causa* - a gift made in contemplation of death
  - hybrid consisting of elements of both an *inter vivos* donation and a testamentary bequest but without abiding by the *Wills Act*
  - delivery is required
  - does not become absolute until death of the donor
  - can be revoked
- symbolic delivery is sometimes appropriate (i.e. on deathbed gives only key to safety deposit box)
- courts will not perfect an imperfect gift - i.e. ignore delivery requirement (*Milroy v Lord* [1862])



### **Schoppel v. Beaumont Estate** (1970, BCSC)

- Captain Beaumont owns half an island and is angry at his trust company; makes a note “selling” the island for \$1 on date of his death
- issue: was the island given away before he died or is it part of his estate?
  - depends on when it was gifted/sold
  - was \$1 just to make it seem enforceable? - nominal consideration; gift covering as a contract
- decision: courts will not complete an incomplete gift
  - not enforceable - document doesn't comply with the *Wills Act*
  - no delivery - no deed; land can generally only be granted by deed

### **Thomas v. Times Book Company** (1966, UK)

- Dylan Thomas (writer) leaves a manuscript behind in a pub; tells a man (Cleverdon) that if he can find it it's his; Cleverdon makes copies of the manuscript and gives them to Thomas at the train station where the promise was made; Thomas' wife claims the manuscript from Times Book Company; Cleverdon says it's his
- decision: court finds there was intention to make a gift and satisfactory delivery - valid gift; possession with consent is sufficient for delivery

### **MacLeod v. Montgomery's Estate** (1979, ABCA)

- failure to complete a gift due to land deed - grandmother had promised to send her the duplicate title and never did; must be registered to be the legal owner
  - “In my view, the decision in this case is sound. To complete a gift effectively, the donor is obliged to do what can be done. In Alberta, in order for a transfer to be registered, that transfer has to be accompanied by a Duplicate Certificate of Title, unless the Title is already lodged at the Land Titles Office; or, alternatively, unless there is proof that the Duplicate Certificate of Title has been lost or destroyed. In my opinion, the delivery of the transfer, as well as the duplicate Certificate of Title, was required to complete the gift in this case. The Duplicate Certificate of Title was not delivered. It lay in the would-be donor's power, by instructions to her solicitors, to complete the gift. There is no evidence that she gave such instructions. Equity will not force a volunteer to complete that which is incomplete. Had the Duplicate Certificate of Title been lodged at the Land Titles Office, as in the case of mortgaged lands, the delivery of the transfer would have completed the gift, as the donor would have done everything that could be done to perfect the gift. This is not so in the case at Bar. The gift was not completed.” [para. 31]
  - also see para. 9 & 14...
- *Land Title Act*, s. 20 specifies that estates cannot pass at law or in equity unless the instrument is registered in compliance with the *Act*
- *Land Title Act*, s. 189(1) – “The holder of a duplicate indefeasible title to land for which the holder has given a transfer must deliver up the holder's duplicate indefeasible title to the registrar for cancellation.”

# Common Law Estates & Aboriginal Title

"The **doctrine of estates** is really the foundation of the common law of real property, and the essence of it is admirably stated in the excerpt from *Walsingham's Case* ("time in the land or the land for a time" - see Sources of Canadian Property Law above).

**Aboriginal title** may be viewed from both an aboriginal and a common law perspective... SCC has insisted that it is essential to consider both perspectives in assessing whether aboriginal title exists."

- Prof. Foster, syllabus

## The Estate in Fee Simple

- doctrine of estates - fourth dimension of boundaries is time
  - leasehold is for definite (defined) duration; freehold is forever (indefinite time)
- fee simple land - inheritable ("fee"); alienable; devised by will; presumptive transfer is of the whole property
  - stage 1 - Lord gets service for land; tenancies are for life only
  - stage 2 – land goes to heir
  - stage 3 – can sell or inherit land
    - inheritance - any heir qualifies; if there is no heir the land escheats back to the Crown (Lord) absolutely (no conditions)
- importance of phrase in wills "to A and his heirs"
  - stage 1 – really just means A
  - stage 2 - becomes a guarantee to A and family
  - stage 3 – phrase sort of becomes fraud – A is able to sell
    - "A" becomes words of purchase; "heirs" becomes limitation (fee simple)
    - became a "magic incantation" – especially when the common law used to default to life estate
- now reversed in BC legislation – default is fee simple unless it says "in life only"
  - *Land Title Act*, s. 186(2) – presumption of fee simple
  - *Property Law Act*, s. 19 – fee simple does not require the phrase "and his heirs"
  - *Wills Act*, s. 24 – fee simple is assumed unless a contrary intention appears by the will (reverses the common law)

## **Thomas v. Murphy** (1990, NBCA)

- not a torrens jurisdiction (torrens = a system of land title where a register of land holdings maintained by the state guarantees an indefeasible title to those included in the register)
- lawyer is supposed to report on title of land; checks and assures the owner it's a fee simple; but... the magic words - "and his heirs" was missing
- in NB at the time only the words "in fee simple" were needed - they were missing too
- still taken as fee simple on the basis of intention

## The Fee Tail

- aka "entail" - the fee tail was once the standard method by which the English aristocracy and gentry kept land in the family; estate in fee tail can only be passed to lineal descendants; generally goes to children or grandchildren; can further specify to be male, female, etc.
- late 15<sup>th</sup> century - able to bar fee tail (turn it into fee simple)
- 17<sup>th</sup> century - strict settlement; current tenant of land incapable of alienating; each generation must renegotiate life estate so it's ongoing
- by 19<sup>th</sup> century legislation allowed disentailing; *The Property Law Act*, s. 10 effectively abolishes fee tail (was never really present in Canada)

## The Life Estate & the Estate *Pur Autre Vie*

- conventional life estates may operate:
  - for the life of the recipient (*pur sa vie*); or
  - for the life of another person (*pur autre vie*) - may arise from initial intention or by selling the remainder of one's own life estate
- no special terminology is needed at common law to confer a life estate
- a failed attempt to confer a fee simple estate can produce a life estate instead
- repugnancy problems - when the wording of the will is conflicting; unclear whether the intention is for a fee simple or a life estate:
  - *Wills Act*, s. 24 - presumption of fee simple
  - testator's intention is taken from a consideration of the whole of the will, any other admissible evidence, and the meaning of the whole or part of the will (*Christensen*)
  - when the testator is a lay person the technical meaning of the words aren't given as much weight as they would had they been drafted by a person with legal training (*Christensen*)
  - three possible options:
    - first gift is absolute; the repugnant portion is discarded (*Walker*)
    - determine if gift is a life estate with the power of encroachment (*Taylor*)
    - gift is a life estate with no possibility of encroachment (*Christensen*)
  - cases are highly fact specific; generally determined by the trial judge's impressions of the details beyond the actual will

### ***Re Walker*** (1924, OLRCA)

- testator gave wife "all of my real and personal property" but "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, the remainder shall be divided as follows..."
- issue: if she gets the entire estate, what about provisions in her own will?
  - options - she gets the estate as a gift and the second provision doesn't count or she gets a life estate and gift over prevails
  - there is a repugnancy (contradiction) in will's wording
- decision: concluded it was a full gift; remainder had no effect
  - doesn't explain how the decision was reached (though wills cases tend to be very fact based)

### **Re Taylor** (1982, Sask.)

- testator's widow given all real and personal property to "have and use during her lifetime" and also provided that "any estate of which she may be possessed at the time of her death is to be divided equally between my daughters"
- issue: is this absolute interest or only a life interest?
- decision: court ruled that she gets life estate *with* the power to encroach (spend money of estate) which is effectively fee simple for all but changing the title
  - seems the only way to balance both sides
  - Judge also interprets the meaning as clear it should be a life estate

### **Christensen v. Martini Estate** (1999, ABCA)

- man has close friends (sisters) and a second wife (Martini); awards property to his wife and then to the sisters
- options for the Judge:
  - absolute gift to Martini and *hope* (not direct) that she will give what remains of property to sisters
  - determinable fee (fee simple that can end prematurely) to Martini with gift to sisters when Martini no longer needs property
  - conditional fee (conditional on Martini needing property) with gift to sisters when Martini no longer needs it
  - life estate to Martini (with or without power to encroach) then gift to sisters
  - occupation license to Martini with gift to sisters
- trial: wording is too vague to give anything to the second wife; sisters get everything
- Court of Appeal: overturns decision; life estate for wife then sisters get it (option 4)
  - based on his most likely intention (issue caused by him drafting the will himself)

## **Life Estates Arising by Operation of Law**

### Law of Waste

- limits the extent to which a life tenant may alter the physical complexion of real property
- first three types may be allowed through a contract between the life tenant and the remainder person; the fourth may not
- life tenancies can be complicated for who pays insurance, etc.
- purpose is to prevent a life tenant from exploiting the property so as to reduce its value for later tenants
- some land agreements involve un-impeachment - liability for all waste is contracted out
- four categories of waste:
  - ameliorating – enhances value of land
    - usually not actionable due to benefit
    - may be actionable if property taxes skyrocket or the alterations significantly alter the nature of the property (especially if there is an express provision to the contrary)

- permissive – damage from failure to preserve or repair property
  - generally must be written into the property agreement to be actionable ("duty to repair" stipulation)
- voluntary – a positive act that diminishes the value of land
  - generally actionable; remedy - injunction or damages
  - some exceptions include clearing land for cultivation or felling trees for certain repairs
  - cutting timber without improving the land would be voluntary waste
- equitable – severe, malicious, willful destruction
  - actionable; remedy - injunction
    - *Vone v. Lord Barnard* [1716] – Barnard angry with his son; had everything of value taken from; in grant – no impeachment for waste but law of equity still awards damages as it's wanton destruction
    - *Law and Equity Act* s. 11 – “An estate for life without impeachment of waste does not confer and is deemed not to have conferred on the tenant for life a legal right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate...”

### Other Life Estates

- dower: designed to provide shelter for widows
  - gave surviving spouse life interest in freehold lands of deceased husbands; even overcame testamentary transfer; not abridged by widow's remarriage
- curtesy: widower's interest in lands of deceased wife (if an heir had been born)
  - may have been designed to stop a Lord from reaping benefits of land when heir was still a child
- homestead: dower abolished in BC in 1925; drew new law from US; homestead laws typically exempt family from seizure from creditors; enable non-owning spouse to prevent dispositions of the home; confer life estate in home of that spouse
  - *Estate Administration Act*, s. 96(2) - "...in an intestacy, (a) except where it would otherwise go under this Part to a surviving spouse, the spousal home devolves to and becomes vested in those persons by law beneficially entitled to it and, subject to the liability of the land... those persons must hold the spousal home in trust for an estate for the life of the surviving spouse, or so long as the surviving spouse wishes to retain the estate for life, and (b) the household furnishings go to the surviving spouse."
  - *Land (Spouse) Protection Act*, s. 4(1) - "If an entry has been made on the title under s. 2, s. 77(1) of the *Estate Administration Act* applies to the devolution of the homestead."
    - *ESA*, s. 77(1) - "Despite a testamentary disposition, if real estate is vested in a person without a right in any other person to take by survivorship, on the person's death it devolves to and becomes vested in the person's personal representatives as if it were a chattel real vesting in them..."

## Aboriginal Property Rights

Aboriginal title is sui generis - it is similar to, but not quite like, common law title

### ***Delgamuukw v. British Columbia*** (1997, SCC - Lamer)

- tried to sort out Aboriginal title in 1920's; then Great Depression, World Wars, etc.
- late 1940's - first major series of conferences; land claims movement revived
- only six negotiations allowed at a time - one from BC (Nisga'a first)
  - Gitsaan people; trial - 1987-1991; CA - 1993; SCC - 1997
  - Crown argued Aboriginal rights but no title; maybe only for acts relating directly to Aboriginal rights
  - first acknowledgement of full aboriginal property rights; clarified basic rules for Aboriginal title in Canada
    - lands in BC weren't conquered; pre-existing property rights were not extinguished with British Sovereignty over BC
    - federal government could unilaterally extinguish Aboriginal title prior to the protections afforded by CA, 1982, s. 35
    - *Calder* - established that legislation could unilaterally extinguish Aboriginal title before 1982 through clearly expressed legislative intent (never done)
    - province has no power to extinguish Aboriginal title
    - provincial title is subject to Aboriginal title - s. 109
    - provincial laws of general application may apply to Aboriginals and their lands under s. 88 of the *Indian Act* (but may not affect Aboriginal rights)
- boils down to first occupancy; must be shown that land was physically occupied at time of assertion of British Sovereignty or continuity between present and pre-sovereignty must be shown
  - doesn't have to be unbroken chain; only proof of connection to the land
  - occupation must be exclusive
- sources of title:
  - common law test - **physical occupation** (based on notions of possession)
  - Aboriginal systems of land holding - concepts of title existing prior to sovereignty
- unique features of Aboriginal title:
  - **inalienable** (unable to be taken or given away) except to the Crown
    - cannot be sold, mortgaged, leased, or surrendered to any other party
    - it is possible to alienate the land to the Crown, who may then grant it back to the Aboriginal group in a common law fee simple estate
  - **communally held** by members of an Aboriginal nation (collective right)
    - Prof. Foster: "inaccurate" - personal ownership does exist, in some fashion
- land under Aboriginal title cannot be used in a manner irreconcilable with the nature of the attachments to the land underscoring that claim
  - Lamer seems to have made this fairly narrow (i.e. strip mining a hunting ground or paving ceremonial site)
- won on the issue of oral history being admissible; crucial as elders were dying
- judgment: new trial ordered; why? - Crown argued changes in claims prejudiced the court (basically just re-phrasings); SCC agreed

### Rights to the Land (*Delgamuukw*)

- exclusive use and occupation for purposes that go beyond that of exercising particular established Aboriginal rights (e.g. hunting in the land) – it is a right to the land itself
  - Aboriginal title is a property right, not solely a right to exercise traditional rights
- limitation: can't "sever the traditional bond between land and people" (e.g. no building strip mines in sacred places)
  - must preserve land for future generations; analogy made to equitable waste
  - if the land is wanted for other purposes it can be sold to the Crown and bought back in fee simple (normally includes mineral rights)

### Spectrum of Rights (*Delgamuukw*)

- only Aboriginal title confers a property right
- for comparison, the three forms of Aboriginal rights are:
  - Aboriginal Rights: unrelated to land; rights to customs, songs, crests, etc.
  - Site-Specific Aboriginal Rights: right to hunt in certain lands, etc.
  - Aboriginal Title: a right to the land itself

### Test to Establish Aboriginal Title (*Delgamuukw*)

- must show the following:
  - Occupancy at Sovereignty: BC - 1846 (not the dates of contact or reception!)
    - must show a degree of occupation equivalent to common law title, otherwise only site-specific rights might be granted; this is an issue for nomadic groups (*Bernard*)
  - Continuity of Occupation: continuous from time of sovereignty to present
    - must show that they have "maintained a substantial connection" with the land that has descended down from pre-sovereignty use (*Bernard*)
  - Exclusive Possession: this may be possession *shared* within a group; merely need to be able to exclude those outside of the group
    - need to demonstrate effective control of the land - i.e. that they *could* have excluded others, not that they *did* (*Bernard*)
  - note: in admitting evidence the court must take a "sensitive and generous" approach; oral history that is useful and reliable should be included (*Bernard*)

### Test to Justify Infringement by the Crown (*Delgamuukw*)

- section 35 not subject to s. 1; Court "read in" limitation and established test:
  1. compelling and substantial legislative objective (i.e. economic/regional fairness; conservation; historical reliance on fisheries by other groups)
  2. infringement must be consistent with the Crown's special fiduciary duty to Aboriginal peoples
- duty to consult: Crown has a duty to consult with Aboriginal groups that may potentially have title to lands in which the Crown intends to exploit resources (*Haida*)
  - duty is proportionate to the strength of the claim and the seriousness of effects
  - Crown has duty of good faith; scope ranges from notification to "deep consultation"
  - may also require compensation and potentially even consent

### Post-Delgamuukw

- no Aboriginal title has been recognized in BC
- **test was narrowed in *Marshall***
  - the court must examine the nature and extent of the pre-sovereignty Aboriginal right and then seek a corresponding common law right
  - re: Aboriginal title - there must be **regular use of defined tracks of land**
  - claims that fail to meet the requirements of Aboriginal title because of less intensive use of land may still meet the criteria for other types of rights
- **oral history** may be acceptable if reliable (comes from a credible source) and useful (no other valid Aboriginal perspectives are available) (*Marshall*)
- knowledge - real or constructive - that an activity of the Crown affects an Aboriginal group that has a credible but unproven claim has a duty to consult and accommodate
  - duty arises from the "honour of the Crown" and therefore is applicable before the land claim is settled (*Haida*)
  - also involves a duty to negotiate in good faith
    - the Crown must balance competing interests
    - Aboriginal people do not have a veto power (*Haida*) - if unhappy with the government's use of disputed lands they can enter into a process of judicial review
- although Aboriginal title cannot be extinguished, it can be regulated and infringed upon by government action (*Bernard*)

### Indian Act

- possession of land on a reserve must be allotted by the band council with the approval of the Minister (s. 20(1))
- the Minister may issue either a Certificate of Possession (s. 20(2)) or a Certificate of Occupation (s. 20(5))
  - a Certificate of Occupation may be issued for two years (s. 20(5)) and may be extended, transformed, or revoked (s. 20(6))
  - Indians with a Certificate of Possession may transfer land to other band members with approval by the Minister (s. 24)
- if an Indian is no longer entitled to live on reserve they must transfer the Certificate of Possession to the band/band member or the right of possession reverts
- a person who is not a band member may only occupy a reserve with the approval of band council (s. 28)
- a person who is not entitled to reside on a reserve is unable to acquire possession or occupation rights by descent (s. 50(1))
- a band may absolutely surrender all rights of band members to the Crown (s. 38)
- since 1951 the Minister is rarely involved in the administration of the *Indian Act* on reserves but retains veto power
- the view of family on reserves remains similar to pre-19th century inheritance law - a distinction is made between land and personal property (reinforces ideas of collective ownership of land)
- some scholars - i.e. Tom Flanagan - who advocate for private land ownership on reserves; federal government has allowed steps in this direction (i.e. Nisga'a)



## Estates in Personality

- historically the common law did not recognize life estates in chattels (*Crago*)
  - personality was owned absolutely
  - qualified by the exception of bailments
  - generally the simplest way to transfer ownership of personality is through a trust

## Origins & Nature of Equitable Interests

### Uses, Trusts & "Equity's Darling"

#### Equity

- tied to notions of **fairness** (based on facts; not to be derailed by rules that lead to unjust results); ownership (i.e. mortgages); moral/legal concept of corrective justice (Aristotle)
  - "Equity is, as it were, a complete code, unwritten and based on right reason alone, which interprets and amends the law."
- based on **good conscious**; since equity is discretionary (no right to equitable remedies) one must "come to equity with clean hands"
- equity follows the law (with better results); practically speaking it may appear to overrule the common law but theoretically it only compliments the common law
- equity regards what ought to have been done - i.e. once an agreement is made to sell land the equitable interest passes to the buyer until the transfer of the legal title is complete
- equity will not aid a volunteer
- **trusts** are at the heart of the equitable system
  - two owners with rights in the property: legal owner & equitable/beneficial owner
- confined to the civil side of the law - primarily property & contracts

#### "Equity's Darling" (M. Conway)

- **myth that equity protected women's property interests**; in reality this was often not the case
  - sometimes used to protect the property interests of wealthy married women; often employed against women
  - often employed to divert property from legal heiresses to males:
    - the equitable principle of strict settlement employed a system of fee tails to keep property in tact and generally in the male line
    - the trust system was also employed to keep the beneficial title in the male line
    - equity was employed to make the common law dower less effective
- equity did provide some protection for married women as it recognized the separate identity of wives from their husbands
- generally gains in property rights for women were made through political reform rather than the use of equitable principles

## The Use

- **feoffor to uses** (original owner/testator) grants land to the **feoffee to uses** ("trustees") for the use of the **CQU** ("*cestui que use*" - beneficiary)
  - not recognized by the common law
  - Court of Chancery recognized the duties of the feoffee to the CQU
  - the feoffee was bound by conscience to carry out the intentions of the feoffor
  - held for certain purposes including after the original feoffor dies
  - effectively acts like a will
  - feoffee - owners at common law; CQU - no rights at common law
- feoffor trusts the title to the feoffee to hold the land for the benefit of the CQU - it's a management role
  - they would generally receive some kind of benefit (i.e. compensation for service)
  - ideal feoffee became a partnership of lawyers
- originally when dealing with matters of conscience arising from the arrangement (i.e. the feoffee has no conditions to go by or the CQU thinks they're being cheated) they would go to the church, but the rule was that issues relating to land were for the common law
- petition the King; common law couldn't address these issues; went to the Court of Chancery - courts of conscience
  - to not carry out the required instructions/terms of the agreement would be a violation of good conscience
  - Chancellor is not interfering with property rights (no change in legal title or common law right in the land), only obliging the fulfillment of the agreement (very contractual)
  - Chancellor is acting "in personam" (imposing a personal liability)
- functional outcome - creates something close to a second kind of property; the interests of the CQU begin to resemble property rights (fee simple owner is common law & beneficial owner in equity)
- **bona fide (good faith) purchaser for value of the legal (fee simple) estate without notice** is the only person who can defeat the interest of an equitable owner
  - two innocent parties - the BFP and the CQU
  - commerce trumps the equitable interests of the CQU

## Origins of The Use

- desire of landowners to **avoid taxation/feudal burdens** (decaying feudal system)
  - services becoming less important
  - tenurial incidents; death duties - burdens owed to the Lord
  - tenants wanted to avoid paying - only owed if they died while seised of the land
  - incentive to not be seised of the land while not losing the benefits of the land
- human desire to make **secret deals** (minor influence)
  - traditional way to transfer land was through a livery of seisin (ceremony)
  - the use created the added benefit of concealing the true owner
- allowed the land to effectively be disposed of by a will (main reason)
  - Statute of Wills (1540) - personalty only

- **land couldn't be willed**; wills and land were seen as incompatible - land goes to the heir apparent ("primogeniture" succession by eldest son) unless diverted elsewhere during your lifetime
- allowed owners to make provisions for those other than the heir apparent
- only other option was to give it away/sell it and lose control of it
- other possible motive: to get around the significant number of female heirs (given the high mortality rate of men in the middle ages)

### Statute of Uses (1535)

- 1200's - statutes were enacted where the King made the distinction between actions that might avoid taxation and those that deliberately did so
- Henry VII needed money; wanted to put an end to uses and revive the feudal system
  - proposed a measure to Parliament; was turned down but succeeded in changing the common law through a test case
  - test case - upon the death of a prominent Lord and the discovery that all his land was held to use Henry VII declared the uses illegal
  - result - uses are invalid and "wills" are void; Henry VII goes back to Parliament with a new proposal
- effect of the statute - to remove the title of the feoffee and move it to the CQU ("execute the use")
  - converts the equitable interest of the CQU to a common law interest so they would die seised and then owe taxes (short term gold mine for Henry VIII)
  - repealed in Britain in 1925; never formally abolished in BC so may still apply
- exceptions - only caught passive uses that were clearly about evading taxes
  - leasehold grants - "to A for 99 years for the use of C"
  - grants to corporations - "to B Ltd. for the use of C"
  - active uses - real obligations imposed on the feoffee (like the kind of trust we use today)
    - trusts - the paradigm example of how equity and the common law interact; where there is a conflict equity prevails
    - feoffor - settlor; feoffee - trustee; CQU - beneficiary
  - "use upon a use" (exhausted the statute) - "to B for the use of C for the use of D"
    - C has the legal interest and D has the beneficial interest
    - originally the second use was seen as repugnant but within a generation of the statute "trusts" were born (thanks to clever lawyers who essentially revived the useful system)

### Note on Mortgages

- type of express trust (mortgagor - borrower; mortgagee - lender)
- "An Historical Introduction to the Land Law", W.S. Holdsworth:
  - since lending money with interest was illegal at Church law the device of the mortgage was developed
  - lender (mortgagee) got paper title (in fee simple) to the land and money from the benefits of the land

- when the principal of the loan was paid by a fixed date the land would then be re-conveyed to the mortgagor
- at common law if the principal was not paid back by the strict deadline the mortgagee would get to keep the property (this is where equity stepped in...)
- "Land Law, citizenship, and the invention of 'Englishness': The strange world of the equity of redemption", D. Sugarman & R. Warrington
  - equity developed a remedy whereby the mortgagor had an equitable right to redeem after the deadline if the loan was repaid within a reasonable period
  - equity then developed the remedy of **foreclosure** - if the borrower continually does not repay the loan within a reasonable period of time the mortgage may be foreclosed
    - mortgagee keeps equitable and legal interest in the property
    - mortgagor loses their right to redeem
  - mortgage remedies developed from the attitude that landowners - who made embarrassing mortgage deeds - should be protected from their bad bargains

## Trusts

- Intentional Trusts
  - Express
  - Resulting
    - incomplete or ineffective transfer
    - gratuitous transfer
    - note: since *Kerr* - the common intention resulting trust is no longer an important category
- Constructive
  - Remedial - motivated by the unjust enrichment of the defendant
  - Institutional - based on the wrongful conduct of the defendant

## Resulting Trust

- a resulting trust occurs when the legal title is transferred while the beneficial title remains with the original owner (*Pecore*)
- may be created when a trust document has not fully dispose all the beneficial rights (Ziff)
  - ex: A to Acme Co. in fee simple to hold in trust for B for life --> the remainder fee simple equitable interest would result back to the settlor

## Gratuitous Transfer

- the equitable maxim - equity prefers bargains over gifts - generally applies
- however this is only a presumption and it may be rebutted (*Pecore*)
- there is also a presumption of advancement between spouses (*Pecore*)
  - ***Pecore*** - elderly father transferred funds into joint bank account with his daughter
    - presumption was rebutted:
      - father was concerned for the financial security of his daughter and assisted her family financially

- father's letters stating that the money was not gifted likely stemmed from fears of capital tax gains

### Remedial Constructive Trust

- background - after *Murdoch* (farmwife was denied any interest in the family ranch despite her monetary/labour contributions) there was a strong movement for family property reform
  - only applied to married couples
  - the remedial constructive trust developed as a remedy for common law partners who did not qualify under family property acts (i.e. ***Peter v. Beblow***)
- test - plaintiff must show (*Peter*):
  - **unjust enrichment** on the part of the defendant
    - a tangible, economic benefit was received and retained by the defendant
    - there was a corresponding deprivation to the plaintiff
    - absence of a juristic reason for the benefit (i.e. a contract or gift)
      - it is the duty of the plaintiff to show that there is no juristic reason that fits into an established category
        - this prima facie case is rebuttable - de facto burden of proof is placed on the defendant to show the reason why the enrichment should be retained (*Garland*)
        - in regards to the rebuttal the courts should have regard to the reasonable expectations of the parties and/or public policy arguments (*Garland*)
  - the default remedy (once the unjust enrichment is established) is monetary compensation
    - to gain a proprietary remedy of a remedial constructive trust the plaintiff must establish:
      - that money is not sufficient in the circumstances (i.e. defendant won't pay)
      - the plaintiff's contribution was specifically linked to the property
  - calculation of compensation:
    - quantum meruit approach - value received/fee for services
    - value survived approach - plaintiff contributed to the family enterprise and should share in the benefits of it (used in *Peter*)
      - use of the value survived approach with a monetary award is possible (*Kerr*)

### Institutional Constructive Trust

- may exist without unjust enrichment (*Soulos*)
- institutional and remedial trusts are connected by an appeal to good conscious - **based on wrongful conduct** (i.e. the scoundrel real estate agent - ***Soulos v. Korkontzilas***)
- four criteria must be satisfied for remedy to be available (*Soulos*):
  - defendant acquired the assets in relation to an equitable obligation they held
  - the assets came into the hands of the defendant through a breach of this equitable relationship

- the plaintiff must have a legal reason for seeking a proprietary remedy - either personal or as a deterrence to other people in the position of the defendant
- an absence of factors that would render the imposition of a constructive trust unjust (i.e. protection of a BFP)
- equity is a flexible concept - a constructive trust may be applied to relationships/ interests for which there have not traditionally been protection under the common law (***Bulan Bulan***)
  - no protection for communal copyright in the *Copyright Act*
  - however... an artist that uses the communal knowledge and artwork on the consent of an indigenous community may be under a fiduciary duty to preserve the integrity of their culture
  - court (Australia) suggested that in an extreme case of a breach of the fiduciary duty by the artist a constructive trust may be applied as a remedy
  - here the artists met their duty by moving immediately to protect the interests of the community
  - no fiduciary duty between the breacher of the copyright and the community as a whole

## Acquired and Transferred Interests in Land

There are basically four ways to acquire and transfer interests in land:

- crown grant:
  - describes land granted for the first time by the Crown since the assertion of sovereignty (*Land Act*, s. 50)
  - title is irrevocable - unless there is a specific revocation clause in the grant
  - the actual sovereign may reacquire the land through an act of the legislature (must be in line is the expropriation statutes)
- will or intestacy:
  - a will must be in writing (*Wills Act*, s. 3)
  - must be signed by the testator with two witnesses present who must also sign (s. 4)
  - members of the armed forces and mariners at sea only require one witness
  - *Wills Act* is strictly interpreted and applied
  - *Estate Administration Act*, Part 10 - sets out the inheritance rules applicable upon the death of someone who dies intestacy
    - real estate that is not held in joint ownership is treated for these purposes like personal property - the legal title vests in the names of the executors/ administrative representatives (s. 77(1))
    - the executors must hold the real estate in trust for the beneficiaries (s. 78(1))
    - the personal representatives may convey the legal title to the person beneficially entitled to it (s. 79(1))

- proprietary estoppel:
  - in rare cases equity may be used as a cause of action to acquire interests in land - i.e. when A, to the knowledge of B, acts to his detriment in relation to his own land in the expectation, encouraged by B, of acquiring a right over B's land...
    - such expectation arising from what B has said or done, the court will order B to grant A that right on such terms as may be just
- inter vivos transfers by gift or contract:
  - a contract in respect to land is not enforceable unless (*Law and Equity Act*, s. 59(3)):
    - (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
    - (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicated that a contract or disposition not inconsistent with that alleged has been made, or
      - i.e. there has been partial performance by the party being sued including payment (e.g. acceptance of payment of a deposit or partial payment)
    - (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

	Before Contract	Contract	Conveyance
Law	Fee Simple in Vendor	Fee Simple in Vendor	Fee Simple in Purchaser
Equity	Fee Simple in Vendor	Fee Simple in Purchaser*	Fee Simple in Purchaser

\*Equity regards what ought to have been done as being done

- **contract of sale** - equitable title qualified by being a right good against everyone except a BFP
  - logic issue with this conceptual map - it only applies if specific performance is a possible remedy (the land must be unique)
  - legal title must be registered in the Land Title Office - it is good against the world except against the person making it (*Land Title Act*, s. 20)

# Qualified Transfers and Future Interests

## Basic Concepts

Reversion: X grants Blackacre to A for life, X retains

- the grantor (or their estate) retains a fee simple in reversion if less than the whole fee simple is transferred
- it is a present, vested right to future enjoyment (*Stuartburn*)

Remainder: A grants Blackacre to A for life, then to B in fee simple

- B has a remainder interest in the property - it is a present, vested right to future enjoyment (*Stuartburn*)
  - a remainder interest in property qualified the politician in ***Stuartburn*** as an "owner"
- both remainders and reversions may be disposed of through contract or gift (*Property Law Act*, s. 8)

Defeasible Interests: X grants Blackacre to A in fee simple, but if at some point A doesn't do Y, Blackacre reverts to X

- A retains a right of re-entry - exercisable if the condition subsequent is broken (*Caroline*)
- words such as "on the condition that; but if; provided that; if it happens that..." suggest a condition subsequent
- a right of re-entry is still a property right
  - ***Caroline***: "shall revert if" suggested a defeasible interest which would have offended the rule against perpetuities; drafted by laypersons; judge decided to rectify the deed

Determinable Interests: A grants Blackacre to A in fee simple, until Y occurs

- X retains a possibility of reversion (reverter) - when Y occurs the fee simple determines *automatically* to A
- Y operates as an internal limitation
- words such as "while; during; so long as; until..." suggest a determinable interest; words that have a temporal sound (Ziff)

## Defeasible and Determinable Interests & Statute

- *Law and Equity Act* - may be disposed of (s. 8) or registered in the Land Title Office like a charge (s. 10(4))
- *Perpetuity Act* - a determinable interest is treated in the same way as a defeasible interest for the purpose of the rule against perpetuities (s. 23)
  - the distinction remains relevant if the limitation/condition is broken
- *Land Title Act* - registered as charges (s. 172); land held in trust will be registered "in trust" but particulars of the trust are not entered in the Land Titles Office (s. 180)
- *Wills Act* - may be passed and created through wills (s. 2)



- re: Aboriginal title - due to sui generis nature the common law distinction between defeasible and determinable interests do not apply
  - **St. Mary's Band** - grant condition re: "if cease to be used for public purpose" did not qualify as a less than fee simple grant for the purpose of the Kamloops amendments

### Contingent Interests

- rules of construction:
  - presumption against intestacy (*McKeen*)
  - presumption in favour of early vesting (*McKeen*)
  - an interest that follows a life estate is presumed to be vested (*Brown v. Moody*)
- A grants Blackacre to A for life and then to C in fee simple, but only if Y happens
  - C has an unvested contingent remainder in fee simple because her fee simple is subject to a condition precedent
  - X retains a possibility of reversion
  - if it is unclear who out of a small group of people will acquire the fee simple then they all have unvested interests
- **McKeen** - carefully drafted will but did not consider the possibility of his wife dying after his sisters; determined the intention of the testator was to make the sisters interest vested; wife's death was not meant to be a condition precedent

### **State Limitations on Private Power**

- proprietary freedom is not absolute - not all conditional dispositions will be enforced
- limitations are informed by the property-based values (i.e. efficiency) and external factors (i.e. respect for human dignity, equality, etc.)

### Effects of Invalidity/Uncertainty

- invalid condition subsequent - severed from the grant; destroys the grantor's right of re-entry; makes the gift absolute
  - courts require more certainty with conditions subsequent because it is important that someone whose interest is liable to be divested should know what events will divest their interest
  - a donor for which it is a higher priority that the gift be given instead of the condition being met should use a condition subsequent so that if the condition is struck out the property will remain with the intended beneficiary
    - when it was more important to the testator that the donee receive a benefit than whether the condition is met, it is likely to be a condition subsequent (*HJ Hayes*)
    - a testator's intention is presumed to not be intestacy; court's will prefer the reading of the will that does not result in intestacy (*HJ Hayes*)
      - condition that the some would receive land if he worked the land was determined to be a condition subsequent and therefore void for uncertainty
      - testator's intention was to benefit all his son's; evidenced by the \$1,000 to be paid to James by Harold if James chose not to work the land

- invalid determinable limitation - entire grant fails; both the determinable interest and the grantor's possibility/right of reverter are destroyed
  - a donor for whom the qualification is of a higher priority than the wish for the property to remain with the intended donee should chose this type of gift
- invalid condition precedent - condition will be voided; grant may also be void
  - conditions precedent involving realty are treated more leniently if there is an uncertainty issue because invalidity voids the whole gift
  - if it is clear that the donee has met the condition it is alright if the condition is vague to the rest of the world

### Public Policy Limitations

- three basic categories (Ziff):
  - state action
  - private action in the public domain
  - private conduct treated as being outside the public domain
- tension between principles of free alienation and autonomy and other values (i.e. equality)
- *cy-pres* doctrine allows the courts - in certain defined circumstances - to revise the terms of the trust so as to carry out the settlor's intentions as nearly as possible (*Leonard Trust Foundation*, p. 519)
  - in the case of a charitable trust the court only needs to find that the trust advances a valid charitable purpose
- ***Leonard Trust Foundation*** - quasi-public nature of the trust meant the courts could determine if it was in line with public policy
  - majority - determined the operational words could not be separated from the (offensive) recitals; limited their decision to the particularly offensive language in the recitals
  - suggestion that discriminatory trusts without blatantly offensive language are acceptable (i.e. *Ramsden* - scholarship only available to protestants; distinguished from *Leonard* because *Leonard* was based on "blatant religious supremacy and racism")
  - Tarnopolsky J.A. (concurring judgment) laid out possible framework for evaluating other trusts:
    - distinction should be made between family trusts and non-family trusts
      - justification - charities have special protections from taxation; privileged status; private/public divide
    - charitable trusts should be upheld against *Charter* values, human rights legislation, and international instruments
    - the trust should be evaluated considering the social and historical context of the target group
      - unclear if a special requirement within a trust can only be based on the historical disadvantage of a targeted group (i.e. women)
      - *Fox* - a member of an Appeal Court applied Tarnopolsky's considerations to a family trust situation

## Restraints on Alienation

- restraints on alienation are invalid if they are repugnant to the inherent attributes of ownership (*Trinity College*, p. 532)
  - an invalid restraint may be expressed or implicit
  - at the heart of the rule against restraints is economic efficiency
- three most obvious types of restraint:
  - mode
  - class
  - time
- right of first refusal - an element of restraint but not as restrictive as an option because the seller does not have to sell
  - **Trinity College** - despite the low price, this restraint on the Bennetts was not sufficiently restrictive to make it void
- option to buy - an option is a right to purchase; it is more coercive because the discretion in regards to its application is held by the potential buyer
  - **Trinity College** - the right of an option - accompanied by the very insufficient purchase price (triggered by the deaths of the Bennetts) - was coercive to the degree that it became an unlawful restraint on private property

## Leases, Licenses, and Bailments

### Leases

- contractual, exclusive possession but title does not pass (*Fatac*)
- four basic types:
  - periodic (i.e. month to month)
  - fixed term
  - tenancy at will - either party can terminate at any time
  - tenancy at sufferance - lease has expired but tenant stays on without permission (not really a true lease)
- privity of estate - obligations between tenant and landlord that "touch and concern the land" continue even if privity of contract is discontinued
  - if T(1) assigns lease to T(2) the privity of estate obligations are assigned onto the new tenant
  - in a sublet, privity of contract nor privity of estate obligations are assigned onto the second tenant; the first tenant remains responsible to the landlord

### Licenses

- permission to do what otherwise would be trespass (Ziff)
- can be either express or implicit
- it is not an interest in the land so it is not binding on subsequent purchasers (*Fatac*)
- gratuitous - theoretically revocable (subject to human rights legislation)
- contractual - a contractual license contains an implied term that it will not be arbitrarily revoked without notice (subject to conditions of good behaviour) (*Davidson*)

## Lease or License?

- key difference is the **test of exclusive possession** (*Fatac*)
  - lease - occupier's right to exclude the reversioner except to an allowance for inspection or repairs
  - license - situation is reversed; the licensee can only enter and use the land only to the extent of the permission granted
  - determined through examining the substantive rights conferred and not just the language of the agreement
    - rent is not a precondition for tenancy but suggests a legal intention
    - limitations on purposes does not negate a tenancy
    - when the right to occupy can be terminated through legal matters extraneous to the landlord-tenant relationship (i.e. holding public office) it is not a tenancy
      - **Fatac** - determined it was a license
        - owner has a general right of access so long as they didn't disrupt the other party's activities
        - the area that Atlas could actually mine was dwindling; there was no clearly defined area for which Atlas had exclusive use

## Bailments

- involves the transfer of possession of chattel from a bailor to a bailee with the intention/expectation that the property will be returned (p. 633)
- can exist independent of a contract (*Letourneau*)
- **obligation to return the property** in the original - or in some cases altered - state is the essence of bailment
  - generally the ability to substitute the goods for other (even identical) items is inconsistent with a bailment (sale vs. bailment, p. 639)
    - **Crawford** - since Murray had the ability to return different cows to Crawford the title of the cows had passed and it was not a bailment
  - if the chattels remain the property of the bailor - even if there is co-mingling of the chattel while it is with the bailee - the transfer may still be characterized as a bailment
    - **Mercer** - grain case; bailor would get back different grain but it's still considered a bailment
      - impossible to tell one grain from another (which means the case could have gone either way)
      - the farmers retained control of the grain (unlike in *Crawford*)
      - Craven was only a point of transfer; there was a clause in the contract that the grain remained the property of Mercer
- in order to establish a bailment **possession must be transferred**
  - **Latourneau** - plaintiff followed the directions of the defendant's employee; qualified as the delivery of possession (parking of the trailer as instructed)
    - corroborated by the evidence of the other couple who received the same instructions
    - that the trailer was not placed on the defendant's property was not an issue
    - that the plaintiff kept a copy of the key might have been an issue (not here)

- once the plaintiff has established that there was a bailment the onus shifts to the defendant to prove that they were not negligent in their role as bailee (*Latourneau*)
  - traditionally the **standard of care** required of a bailee differs depending on the type of bailment:
    - benefit to the bailer (usually gratuitous) - lower standard
    - benefit to the bailee (usually gratuitous) - higher standard
    - mutual exchange (generally contractual) - in between
  - now the likely standard of care will generally be the negligence standard but these distinctions will still be relevant

## Shared Ownership

### Conventional Forms of Concurrent Ownership

#### Co-Parsinary

- arose when property was left to heirs who were all daughters who would then share ownership as co-tenants
- abolished by the *Estate Administration Act*, ss. 83-94

#### Tenancy by the Entireties

- applied to husbands and wives and could only be severed by death or divorce
- depended upon the "unity of the marriage persons"
- abolished by the *Property Law Act*, s. 12

#### Joint Tenancy

- the four unities combined with an intention to create a joint tenancy are required (*Ontario Law Reform Commission*)
  - **unity of possession** - each owner has an undivided interest in the whole
  - **unity of interest** - the interest in the land must be the same in extent, nature, and duration
  - **unity in title** - each tenant's title must be derived from the same document/ occurrence
  - **unity in time** - all tenant's titles must vest at the same time
- creates a right of survivorship
  - there must be an intention for a right of survivorship
  - a right of survivorship speaks before the will

#### Tenants in Common

- only unity of possession is required (*Ontario Law Reform Commission*)

## Joint Tenancy or Tenants in Common?

- words of severance that suggest some type of division indicate an intention to create a tenancy in common (*Bancroft*)
  - i.e. "equally; share and share alike..."
- personalty - common law presumption of joint tenancy remains (*Bancroft*)
- equity sometimes prefers tenancies in common
  - in partnerships the legal title is shared in a joint tenancy but the equitable interest must be held in trust as tenants in common for the heirs
- relevant statutes:
  - *Property Law Act*, s. 11(2) - presumption is reversed to require a presumption of tenants in common for land (except for trustees)
  - *Property Law Act*, s. 11(3) - if not stated, the shares are presumed to be equal
  - *Property Law Act*, s. 18 - a person may sever joint tenancy and transfer land to themselves
  - *Land Title Act*, s. 177 - joint tenants must be recorded and identified on the title
  - *Land Title Act*, s. 173 - the registrar may effect registration at the instant a shared ownership of a fee simple arises

## **Severance of Joint Tenancies**

- joint tenancy can be severed by a unilateral act, a mutual agreement, or an express or implied course of dealings (*Sorensen*)
- a unilateral act of one tenant that destroys one of the four unities
  - **Sorensen** - wife conveyed interest to son without knowledge of husband; valid even though it wasn't registered until after her death
    - *Land Title Act*, s. 20(1) - "except against person making it"
  - things that will sever:
    - conveyance of title to a third party (*Stonehouse*)
    - conveyance of title to yourself (*Property Law Act*, s. 18)
    - executed but unregistered transfer (*Land Title Act*, s. 20(1) - effective against the person who made it)
    - trust - severs legal and equitable ownership (*Sorensen*)
    - lease - unclear (likely it will not)
    - unilateral declaration of a trust
  - things that will NOT sever:
    - charges against title do not effect unity of title (*Sorensen*)
    - unilateral will (*Sorensen*)
    - incomplete partition action (*Sorensen*)
    - unilateral declaration (*Sorensen*)
    - life estate
- mutual agreement
  - **Sorensen** - although they had a divorce settlement they were operating as if they still had joint tenancy
- course of dealings
  - can be either expressed or implied - i.e. in the course of marriage breakdown (*Ziff*)

## Resolving Concurrent Ownership Disputes

- co-tenants are allowed to possess the whole
- general rule in common law - there is no way to account for benefits of occupation
- the common law did not require co-tenants to share costs and benefits but equity held that co-tenants should not suffer or profit out of proportion to their interest
- ouster - when one tenant makes it impossible (constructive or actual) for another to occupy the property
  - equitable remedy of occupation rent may be available
- accounting for expenses:
  - equitable accounting for allowances - only applies after partition and sale of co-tenancy (*Ontario Law Reform Commission*)
  - *Property Law Act*, s. 13 - a co-tenant that has had to pay expenses over their share may apply to the court for an order to recover extra costs
  - *Property Law Act*, s. 14 - as a remedy to s. 13 the court may a) place a lien on the interest in the land of the defaulting owner; b) order sale of the interest; c) make any other order to allow applicant to recover
  - all equitable remedies
- termination of co-ownership:
  - *Partition of Property Act*, s. 2 - all parties with interest in land may be compelled to partition or sell land
    - creates a prima facie case for partition but this presumption may be rebutted in situation where granting it would result in hardship and justice requires that the order not be made (*Harmeling*)
  - *Partition of Property Act*, s. 3 - parties can claim a sale and distribution of proceeds as well as claiming partition under this act
    - courts have discretionary power to not enforce partition if it would be inequitable
    - **Harmeling** - elderly man left by wife; court would not require sale of their retirement home; house was purchased primarily with his money (under-valuing of wife's contributions?); partition would not allow the husband to obtain similar accommodations
  - this Act does not apply on reserves

## Co-Ownership Through Marital Property Law

### Family Relations Act

- established system of deferred legal sharing of property
- Part 5 (division of property) currently only applies to married couples and not common law unless they 'opt-in' (**Walsh**)
  - majority: marriage is a choice; deference to legislature
    - other remedy: constructive remedial trust
  - dissent: the "choice" not to marry may only be an illusion
- rules of separate property continue to apply until some triggering event - i.e. separation, divorce (s. 56(1))

- most assets are considered family assets and the presumption is that each spouse owns a half interest in the property as tenants in common (s. 56(2))
- a family asset is one owned by one or both spouse and is ordinarily used by a spouse or a minor child of either spouse for a family purpose (s. 58(2))
- although there is a presumption of equal sharing there is judicial discretion to re-apportion based on the circumstances (s. 65)
  - exception: business assets are not considered family assets unless there was a direct/indirect contribution by the other spouse (s. 59)
    - note: an indirect contribution can include effective management of the household and taking care of the children (s. 59(2))
    - onus is on the spouse claiming it is not a family asset to show that it was used for business purposes and not family purposes (s. 60)
- irrespective of the triggering event a court can determine possession, ownership, or division of property (s. 66)
- if there is a conflict between any Acts regarding division of matrimonial property the *Family Relations Act* prevails (s. 69)

#### Land (Spouse) Protection Act

- a spouse may make an entry on the registrar against the homestead and the homestead cannot then be transferred without that spouse's consent during his or her life (s. 3)
- despite any testamentary disposition or liability due to debts, a personal representative holds the homestead in trust for an estate for the life of the surviving spouse (s. 4(2))

#### Estate Administration Act

- if interest in the spousal home goes to someone other than the surviving spouse the beneficiary must hold the spousal home in trust for a life estate in the spousal home

#### Wills Variation Act

- if a testator does not make adequate provision for the proper maintenance and support of a spouse or children, the court has the discretion to order a variation to the will that makes provisions for the spouse and children that is just, equitable and adequate in the circumstances (s. 2)
  - guiding principle for variation of a will under this section is symmetry between the legal duties of the testator before death (see *Family Relations Act*) and those given to beneficiaries through the will (*Tataryn*)
  - when possible a will variation should meet all legal and moral obligations (*Tataryn*)
  - legal obligations will trump moral obligations (*Tataryn*)
  - **Tataryn** - testator made clear that he had disliked his son John from an early age
    - even though testator said that provisions for disabled son were adequate the Court varied the will
    - "adequate" is an objective test made with reference to community standards (*Clucas*)
    - lowly financial situation or disability of a child will increase moral obligation (*Clucas*)



## Property Law on Reserve

- Part 5: of the *Family Relations Act* does not apply on reserve (*Derrickson*)
  - S.91(24) gives exclusive jurisdiction over Indians and Lands reserved to Indians to the federal government
  - S. 88 (referential clause in *Indian Act*) may not apply to Indian lands
  - Ss. That deal with ownership in the *Family Relations Act* conflict with provisions in the *Indian Act*
  - The court may however award compensation in lieu of real property rights through the *Family Relations Act*
    - These decisions are devoid of the social context. Monetary compensation is not sufficient (*Mary-Ellen Turpel*)
- S. 77 of the *Family Relations Act*, as it relates to occupancy of the family home on reserves, is invalid as it conflicts with *Indians Act provisions* that deal with occupancy (*Paul*)

## Priorities and Registration

### Priorities

- Nemo dat*: you cannot sell what you don't have
- Bona fide purchaser for value without notice*
  - Must have paid value (equity will not assist a volunteer)
  - Must not have had notice (must come with clean hands)
    - Actual,
    - Constructive (ought to have inquired further)
    - Imputed (notice should have been conveyed by an agent)

Common Law rules:

- 1) A legal interest vs. a subsequent legal interest (Rogue sold Blackacre to innocent)
  - Nemo dat* applies
- 2) Legal interest followed by equitable interest
  - The conventional position is that *nemo dat* applies and the legal interest has priority. Situations of fraud or possibly gross negligence may be exceptions.
  - Example: 1st mortgage legal interest transfers, 2<sup>nd</sup> mortgage: equity of redemption
- 3) Equitable interest followed by legal interest
  - A holds land in trust for B, but sells to C
  - If C is BFP, then the subsequent legal title prevails over B's equitable interest
- 4) 2 equitable interest
  - First in time, first in right but since it involves equity there is discretion for the court to consider what is just based on the facts

### ***Chippewas of Sarnia***

- Surrender was not done properly. The band attempted to assert their aboriginal title was a legal interest that would take precedence of the BFPs over the last 150 years.
- The Court of Appeal determined that Aboriginal title is a fusion of equitable and legal concepts.
- Therefore as an equitable interest the BFPs subsequent have priority over this aboriginal interest.
  - Distinguishes *Guerin*:
    - The band had notice and acquiesced to the transfer
    - The Chippewas were attempting to invoke equitable remedies and therefore were liable to equitable defences
    - **Laches and Acquiescence** (concept of equity)- Former titleholders are estopped from claiming an interest in equity where they have acquiesced to the conduct transferring their interest away, and there has been reasonable reliance on that acquiescence

### **Registration Systems**

At common law: no registration system, proof of title was facilitated by an abstract (Youdan)

- Summary of documents tracing title prepared by vendor and looked over by purchaser
- General rule that chain of title had to extend sixty years, but this did not determine the quality of the title and parties could determine a different length by contract

### Deed Registration System (Youdan)

- Deed is deposited with registry office
- Do not guarantee title
- Generally treated as equivalent to actual notice
- Encourages registration of interests and process of title search became easier
  - Race System: First interest to register has priority
  - Notice system: The key aspect is notice, and registration just serves as equivalent to notice
  - Race-Notice system: To achieve priority a party must register first without notice of a prior interest

### Torrens System

- Indefeasibility: "The Curtain" s. 23(2)
- Risk Shifted from BFP to "true owner": The mirror, doctrine of notice is abolished
- Assurance: Fund to provide monetary compensation for instances where the system fails

## Benefits and Problems with Torrens

- Benefits
  - facilitates sale of land and reduces cost of transactions
  - Faster
  - Assurance fund protects people in case something goes wrong
  - Prevents fraud or misrepresentation of ownership/interests in land
  - Certainty
- Problems
  - people who would not have lost title under CL can under Torrens (instead of protecting legal estate owner at all costs, Torrens system sometimes favours BFP)
  - Assumes that there are not many rogues in the world

## Torrens in BC

- Interests, unless they are exempted under s.23(2), are only acknowledged through registration (s.20 of *Land Title Act*, s.54 of *Land Act*)
- Indefeasible fee simple title is held by the registered owner and registered title is good against the world (s.23(2) of *LTA*), subject to the list in s.23(2). The "Curtain Principle"
  - Once a certificate of title is registered it can be relied upon (*Creelman*).
    - This applies whether or not the circumstances were such that the certificate should not have been issued (*Creelman*)
    - However, the exception is that the Torrens System does not protect rogues
    - Also s. 23(3): A leasehold with actual occupation for less than 3 years does not need to be registered
    - Principle of immediate defeasibility for fee simple transfers (s. 23(2))
    - For all other charges there is a rebuttable presumption of immediate indefeasibility (s.26 of *LTA*)
      - Deferred indefeasibility: BFP must be one step removed from rogue, must actually have relied on registrar, leaves first BFP without a remedy
  - ***Gill????***
  - Certificate of indefeasible title does not bar rectifying the certificate if the only interests engaged are people who had notice that the title wasn't clear (*Pacific Savings*). S.23(1): Certificate as long as it remains in force and uncanceled
    - Notice of pending litigation over re-opening the mortgage was given *before* offer for purchase was accepted
    - A court can rectify a title as long as a BFP is not affected (***KAUP***)
- All other methods of acquiring rights in land are abolished (s. 23(3) of *LTA*)
- The register will register an application for title if the boundaries of the land are sufficiently certain and a good and marketable title in fee simple has been established (s.169(1))

- An application founded on adverse possession will not be accepted for registration, with some exceptions (s.171 of *LTA*)
  - The owner of subsurface or airspace rights who does not also own the surface can only register the interest as a charge (s. 179 of *LTA*)
- The register will register applications for a charge if the registrar is convinced that it is a good title and it is not an interest in land (s.197)
- A charge is any interest less than fee simple (s.1 of *LTA*)
  - The date of application is the relevant date for determining priority
  - The Mirror: “Except in the case of fraud in which he or she has participated in” a registered owner is not affected by notice of an unregistered prior claim (s. 29(2))

S.23(2): Indefeasibility of fee simple title is subject to a number of things listed in s.23(2) of *LTA*:

- A) Original conditions of the grant (i.e. Crown grant)
- b) Federal and municipal taxes (if you owe taxes, they can take your property)
- c) Municipal charge, rate or assessment at the date of the application for registration imposed on the land
- **d) Lease not exceeding three years when there is actual occupation**
- e) Public easements (ie: highway)
- f) Right of expropriation (you take your fee simple subject to the ability of the government to take your property if it's in the public's interests)
- g) Caveats, charges, judgments, pending court proceedings
- h) Someone else showing the boundaries are wrong
- **i) Right of someone to show fraud in the registration and that the registered owner participated in the fraud** (you take subject to the registered owner having participated in fraud)
- j) Restrictive condition, right of reverter, or obligation imposed on the land by the *Forest Act*, that is endorsed on the title.

## Fraud

- To qualify as fraud in the Torrens System more than mere notice is required (s. 29(2), *Holt Renfrew*). If knowledge of an unregistered interest is used for an unjust purpose it may qualify as fraud (*McCulloch ABQB*). The common law definition of fraud includes a false representation that was reasonably relied on by the party (*Holt Renfrew*). The BC Supreme Court in *Woodwest* applied a broader, equitable approach to fraud. Knowledge of an unregistered interest followed by an attempt to use s.29 of the *LTA* to defeat a prior claim may be considered fraud, subject to the discretion of the trial judge.
  - Common law definition of fraud (*Holt Renfrew ABCA*):
    - Representation made
    - Representation is false
    - The other party reasonably relied on this representation to their detriment
      - In *Holt Renfrew*:

- Majority reasoned that Dickson did not rely on the representations made by Pekarsky
  - Minority viewed the carefully worded offers as sharp practice in dealings with other lawyers, As well, this was extended by to include a duty to correct a representation when the party knows it has know become a false one
    - Tension with duty to client
- *Woodwest*:
  - Knowledge of the prior interest was gained before offer to purchase
  - Evidence that Woodwest had knowledge that the seller wanted the lease to be honoured
  - Attempted to use LTA to defeat the unregistered lease within ten days of acquiring the title
  - Unregistered commercial leases are common
- *McCulloch*
  - (By mistake caveat was removed from the certificate, defendant then transferred title to corporation owned by him and a few family members, tried to rely on LTA to defeat unregistered interest)
    - though he said it was for “tax purposes” the timing from when McCulloch found out about the mistake and the time he transferred title was too convenient

### Volunteers

- Torrens System does not generally protect volunteers (Ziff), the curtain will not fall for a volunteer

### Caveats (Ziff):

- An unregistered interest
- A notice of a claim that has not formed yet, only registerable for 2 months, may be renewed?
- Does not validate the interest claimed, serves only as notice

### Overriding Interests:

- Listed in s.23(2) of LTA
- Aboriginal Title: Attempts to register notice (caveat) of pending land claims in the Torrens registration system have generally been unsuccessful
  - Aboriginal title is “upstream” of the Torrens System, it therefore cannot be registered as a subsequent interest (*Skeetchestn BCCA*)

### Assurance Fund

- S. 294.2(1) of LTA:
- A person who is a) deprived of an interest in land because of a wrongful act and who would have been able to recover that interest in land under the common law
- B) is barred from bringing an action for possession or rectification of the register because of the Torrens system,
- May bring an action to recover damages against the rogue. The AG is joined as a nominal defendant and if the rogue is judgment proof the plaintiff can recover against the assurance fund

- Note: for deferred indefeasibility the bona fide purchaser who dealt directly with the rogue would not have title to the land nor would have access to the Assurance fund since they would not have kept title at common law
- For immediate indefeasibility: both parties have remedies

Title Insurance (Ziff):

- Protects against defects in title that lead to a loss
- The insurer will defend a title challenge on the insured's behalf
- Very prevalent in the US where Torrens is not well established
- Not yet significant in BC
- Appeals to the very risk adverse by appealing to the situations that Torrens doesn't cover: (boundary errors, risks taken by lenders???)
- Where title insurance is prevalent, lawyers play a much smaller role in real estate conveyances
- Title insurance claims are rare in Canada because title fraud is generally quite rare

## **Servitudes Over Property**

- Incorporeal interest: less than an estate in land, non-possessory right over land
- Tension between commodification of land and ease of transactions (Torrens) and a personhood view of property (covenants etc)

## Easements

4 Necessary but not sufficient conditions (*Ellenborough Park*):

- 1) A dominant and a servient tenement is required (s. 218 LTA modification: an easement “in gross,” without a dominant tenement is permitted if the easement is in favour of a listed government or public corporation) --> **statutory easement**
  - There must be proximity between the tenements but they are not required to be adjoining (*Ellenborough Park*)
  - Exception is a burial plot, at common law it is classified as an easement at gross
- 2) The easement must accommodate: it must clearly benefit the dominant tenement as land and not just as a personal benefit to the owner of that tenement
- 3) The dominant and servient tenements must not be owned by the same person (note s.19 of *PLA*: Common ownership of the tenements does not extinguish an easement)
- 4) The right must be capable of forming the subject matter of a grant:
  - it must be sufficiently precise and
  - must not result in substantial deprivation of possession rights of the owner of the servient tenement and
  - must be more than a right to recreation (although this has been broadly applied- easement to walk in a garden ⇒ *Ellenborough Park*)

### Positive easements

- Example: right of way
- Historically are favoured at common law since they do not restrict how an owner can use their land (*Phipps*)

### Negative easements

- The common law is chary of establishing new negative easements (*Phipps*)
  - No negative easement of protection from the weather
  - Established negative easements: right to a view, support

### Profits a pendre

- A permission to go onto the land of another and sever personalty from realty (*Tener*)
- Can be granted in gross, there is no need for a dominant tenement (*Tener*)

### Servitude-like rights

- Rights to public or quasi-public spaces
- Charter rights to freedom of expression apply to the use of public property (*Commonwealth*)
- Charter protections do not extend to public use of copyrighted materials (*Michelin*)
  - Registration system, though state-sanctioned, does not qualify copyright as quasi-public property

## **Covenants**

- A promise to do with land that may endure beyond the contracting parties
- At common law, benefits ran with the land but burdens did not

## Burdens

- In equity, some burdens may run with the land (*Tulk*). For a burden to run with the land subsequent purchasers must have had notice. For a covenant to run with the land it must be negative in substance (also: s.221(1)(a) of *LTA*)
- In *Tulk*: positive requirement to pay costs may not have been at issue, the thrust of the covenant was negative
- There must be the intention that the burden runs with the land
- Must touch and concern the land: it must be clear that the covenant is valid and applies
  - A registration of a covenant serves as notice but does not guarantee the legitimacy of the covenant (s.221 of *LTA*)
  - A restrictive covenant based on discriminatory principles such as race, sex, or religion is void (s.222 of *LTA*)
- Subsequent purchasers must have notice, part of the principle that equity must be otherwise prepared to enforce the covenant
- A declaration of a building scheme may be registered as a charge against the land. This will then run with the land (s.220 of *LTA*)

## Benefits

- Benefits may run with the land