PROPERTY LAW
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Nature of Property

The "Properties" of Property

Meanings of Property

- depends on the purpose 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 have 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 not 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 '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 (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 is 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 it's 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 could'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 that 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 subinfeudinate; can't sell
    - 1290 - Statute of *Quia Emoters* - 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 - *Statures 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 law 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 this is 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 back 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 an 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 feee 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 does'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 title 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 rile 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
- <u>decision</u>: under the common law water 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

<u>Accretion</u>

- 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 Personalty 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 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 rule 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 is 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 loose 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 there acts take place?
    - example - *Johnson v. McIntosh* (US) - it was argued that Aboriginal peoples didn't have possession of land as they hand'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 it 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 takes it into their care and control
  - the finder of a chattel acquires very limited rights over it if they takes 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; exactas 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 only enforces 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
- decsion: 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 states in the excerpt from *Walsingham's Case* (see Sources of Canadian Property Law). Aboriginal title may be viewed from both an aboriginal and a common law perspective... SCC has insisted that is it 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 defined duration; freehold is forever
- fee simple land - inheritable; alienable; devised by will; presumptive transfer is of 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
- 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 without phrase "and his heirs"
  - *Wills Act,* s. 24 – fee simple is assumed unless a contrary intention appears by the will

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 15th century - able to bar fee tail (turn it into fee simple)
- 17th century - strict settlement; current tenant of land incapable of alienating; each generation must renegotiate life estate so it's ongoing
- by 19th century legislation allowed disentailing; *The Property Law Act*, s. 10 effectively abolishes fee tail

The Life Estate & the Estate *Pur Autre Vie*

- conventional life estates may operate:
  - for the life of the person (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

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
- 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 – enhance value of land; usually not actionable due to benefit, but may be if property taxes skyrocket or changes the 'personhood' of the land
    - permissive – damage from failure to preserve or repair property; generally must be written into the property agreement to be actionable
    - voluntary – conduct that diminishes the value of land; generally actionable; some exceptions include clearing land for cultivation or felling trees for certain repairs
    - equitable – severe and malicious destruction; actionable
        - *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
    - 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

General Principles (*Delgamuukw*)

- inalienable: may not be sold, except to the Crown
    - it is possible to alienate the land to the Crown, who may then grant it to back to the Aboriginal group in a common law fee simple estate
- sources of title:
    - Common Law Test: physical occupation
    - Aboriginal Systems of Land Holding: concepts of title existing prior to sovereignty
- communal: Prof. Foster: "inaccurate"l personal ownership does exist, in some fashion

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
- 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

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

Proof of Aboriginal Title (*Delgamuukw*)

- must show the following:
  - Ownership 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*)

Infringement by the Crown (*Delgamuukw*)

- Crown may make infringements on Aboriginal title with "inescapable economic components" if they show:
  1. compelling and substantial legislative objective
  2. infringement is consistent with the Crown's special fiduciary duty to Aboriginal groups
- 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"

Extinguishment

- province has no power to extinguish Aboriginal title
- note: 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)

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; got rid of biggest obstacles; 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
  - first acknowledgement of full aboriginal property rights
  - clarified basic rules for Aboriginal title in Canada
  - Crown argued Aboriginal rights but no title; maybe only for acts relating directly to Aboriginal rights

- boils down to first occupancy; must be shown that land was 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
- 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
  - communally held by members of an Aboriginal nation
- 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 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