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Private Law: Property

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Table of Contents

The Nature of Property

Property and Culture

- Ideas of property and ownership can vary widely between cultures.
- For instance, the Nishga have concepts of property that share many points with the English common law: delineation, the right to destroy property, exclusive possession (exclusive to a group), and inheritance (through the matrilineal line). Alienation, however, had limited scope, as it was subject to the approval of the tribe, and would not convey lands outside of tribal ownership. (*Calder*)
  - The *Calder* suit for declaration of aboriginal title was dismissed. Of 7 judges presiding:
    - 1 declined a ruling on the title issue (sovereign immunity pre-empted the suit)
    - 3 thought that the Nishga used to have title, but it had been extinguished.
    - 3 thought that the Nishga used to have title, and it had not been extinguished.
- The *Suddenly A Gate* piece by Michael Posluns (Shuswap) demonstrates the despair felt by some Shuswap at the assertion of title over their lands. Clearly the Shuswap had at least as strong a sense of personhood in land as the English did.

Definitions of Property

- **Nominalism**: Walter Hamilton, in the *Encyclopedia of the Social Sciences*, calls property a "euphonious collection of letters" (meaning that property is whatever we say it is.
  - An Australian court endorses this view, adopting a "bundle of rights" approach. Asserting that something is "property" doesn't imply any particular right in that bundle. (*Yanner*)
    - In this case, the right conferred is "imperium, not dominium"; the right to legislate and control, and no more (contrast with the furniture in the state house).
- **Essentialism**: Property has some basic essence(s) into which it may be broken down.
  - Felix Cohen's *Dialogue on Private Property* attempts to find a core principle underlying the idea of property. Rejects a number of interpretations:
    - Absolute dominion (as property comes with obligations)
    - Materialism (property can be more than merely material things; e.g. IP)
    - Economic value (some valueless things are property; some valuable things are not)
    - Ownership (one may have a property right in something without owning it outright)
    - Cohen's definition of property: Conceptually "attaching" this label to something:
      To the world:
      Keep off of X unless you have my permission, which I may grant or withhold.
      Signed: *Private Citizen*
      Endorsed: *The State*
  - Cohen settles on **exclusion** being the essential component of property. The distinction between property and contractual rights is that a property right is good against the world.
    - The dissent in *Yanner* takes this view. (*Yanner*)

The major approaches

- **Functionalism**: Property defined in accordance with social sense ("I know it when I see it"); policy considerations may be involved (e.g. *INS* – "quasi-property" to protect *INS*' efforts).
- **Attributivism**: Property is defined by the attributes assigned to it in other contexts (e.g. *Victoria Park* – hasn't been property elsewhere; *Calder* – not quite like normal property).

Justifications for Private Property

- Canadian law recognizes "the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law." (*Harrison*)
- Why? Ziff advocates a *pluralistic* justification, which blends several of the following single-variable justifications:
- **Economic Prosperity**: Private property maximizes wealth.
  - Consider the tragedy of the commons
  - Some critiques exist, particularly arguments about inequality of wealth distribution.
- **Utilitarianism**: Property exists to maximize "happiness" (pleasure vs. pain).
- **Freedom**: Decentralized private power, with which the state interferes less.
- **Personhood**: Control of resources is required to achieve "proper self-development".
- **Entitlement to Labour**: Individuals are entitled to their labour
  - Consider *INS*, where a property right (they call it "quasi-property", but Cohen points out that it is a property right) is recognized in the news, due to effort in obtaining. (*INS*)
  - Consider the dissent in *Edwards*, which (vociferously) attempts to protect the fruits of the spelunker's labours over the technical title of the other party. (*Edwards*)
  - Artists have an economic interest in their labour, but other can use it as part of their work as long as they don't **interfere** with that interest (e.g. by copying work) (*Theberge*)
    - Similarly for designers of genetically modified plants (*Monsanto*)
  - Adverse possession is an excellent example of this view given legal effect – a party that has expended his labour may refute the title of the non-labouring paper title holder. (*Asher*)
- **First Occupancy**: First in time is first in right.
  - Invoked by both majority and dissent in *Edwards*; π occupied land, Δ the caves. (*Edwards*)

Functions of Modern Property Law

- **Resolving Novel Claims**: New entitlements are presented frequently, and the courts must decide what should/shouldn't have property rights associated.
- Some novel claims that have been considered:
  - An entertainment "spectacle" is *not* property (*Victoria Park*)
  - Cells extracted from a human spleen are *not* property (*Moore*)
  - Genetically modified plant cells and genes *are* property (*Monsanto*)
  - "Higher life forms" (e.g. mice) are *not* property (*Harvard Mouse* [ref. in *Moore*])
- ***Numerus Clausus***: Courts should be cautious in introducing new forms of property. (*Keppell*)
- In resolving novel claims involving **patents**, courts may consider:
  - Policy considerations (e.g. patients' rights vs. limiting researcher liability), whether the issue is better solved by the Legislature, or whether it is necessary to protect individual rights (such as patients' rights). (*Moore*)
  - A purposive and contextual analysis of the patent (in determining validity of the patent and its applicability to various situations), as well as relevant case law. (*Monsanto*)
  - **Note**: In manufacturing case law, an unpatented device whose operation *depends upon* a patented component infringes the patent, even if the device is not used and merely kept in reserve (because its presence holds value; potential use) (*Monsanto*)

Property in Perspective

Sources of Canadian Property Law

The Norman Conquest (1066)

- William the (Bastard|Conqueror) conquers England, brings a tenurial system with him.
- Crown has ultimate ("*radical*") title to all land in his domain.
- Crown could grant land under tenure to his **tenants in chief**.
  - This imposed reciprocal obligations upon the Crown and his tenant; the tenant would take an oath of service (pledging security [military/financial], spiritual, splendour [personal services], or sustenance [agrarian] service), and the lord would promise secure tenure.
  - Although these oaths expired at death (along with the tenurial grant), inheritance quickly became legally binding (12th c.). The expiring tenant could not select his heir.
- Tenants could **subinfeudate** (i.e. repeat this process, taking tenants for themselves). Their tenants are called **tenants in demesne**, and the subinfeudating tenant becomes a **mesne lord**.
- Tenants could, *with the permission of their lord*, **substitute** another party, who would take their place (oaths and all). This is usually part of a sale of land, and is how it's done today.
- Contrast **tenurial** grants to **allodial** ownership (i.e. outright ownership of land) – only the Crown is an allodial owner in Canada. A fee simple absolute is the next best thing.

Significant English Statutes

- **Quia Emptores (1290)**: Guarantees the right to **alienation** (i.e. substitution no longer requires the consent of the lord).
- **Statute of Wills (1540)**: Permitted bequest by will (i.e. select one's heir(s)). "**Devise**".
- **Tenures Abolition Act (1660)**: Abolished all forms of tenure except for **free and common socage**, and abolished all incidents of tenure except for **escheat** (reverting to lord upon lack of heir or end of tenure) and **forfeiture** (loss of tenure upon criminal offence).

English Law and Aboriginal Property Rights

- The method by which the Crown obtains land determines the legal system in place there:
  - **Conquest (Cession)**: Local laws stay in force (e.g. Quebec)
  - **Settlement**: English law is imported wholesale (doctrine of *terra nullius*)
- BC received its laws by settlement. Its reception statute is the **Law and Equity Act**, s. 2 of which puts English law as of Nov. 19, 1858 in force in BC.
  - **Exception**: Section 2 states that English laws that are "from local circumstances inapplicable", or conflict with subsequent BC laws, do not apply.
    - (e.g. the *ad medium filum aquae* rule). (*Nikal*)
  - **Note**: Laws passed by the Imperial Parliament post-reception apply *ex proprio vigore* ("of their own force") if they specifically mention BC.
- Although the Crown has the underlying ("*radical*") title, it is burdened by pre-existing Aboriginal title. Aboriginal title is *sui generis* (see below).
- For the purposes of showing the existence of Aboriginal title, the relevant date for the assertion of sovereignty is in 1846 (the date of the Oregon Treaty, where the US recognized BC as British land). It must be shown that title existed at that time (plus other conditions).

Basic Divisions of Property Law

- **Realty**: Rights in relation to the land. Permits the owner to take a *real action*, which entitles the plaintiff to have the property returned (instead of receiving compensation).
  - **Corporeal**: Physical realty, *e.g.* freehold estates, houses, *etc*.
  - **Incorporeal**: Non-possessory rights, *e.g.* easements, profits-à-prendre, rentcharges, *etc*.
- **Personalty**: Rights in relation to non-realty. Plaintiff entitled to monetary damages.
  - **Chattels Personal**: Most personal property.
    - **Chose(s) in Action**: Intangible personal property right, *e.g.* a patent or copyright.
    - **Chose(s) in Possession**: Tangible personal property right, *e.g.* a cow or a shirt.
  - **Chattels Real**: Leases, mostly.
    - Ziff discusses how the emergence of chattels real blurs the line between realty and personalty. It also allows the less affluent to obtain realty (sort of).
- ***Sui Generis***: Unique interests (Aboriginal title; others?).

Property and the Constitution (Expropriation)

- Property is *not* protected in the Constitution, generally.
  - It does protect Aboriginal land rights (s. 35).
  - It *is* protected in the Bill of Rights, but this only applies federally (and it is the provinces that have primary control over property law – recall s. 92(13)!).
  - Other countries, such Australia, do constitutionally protect property (recall *The Castle*).
- In the United States (where the right to property is constitutionally enshrined), "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"; negating someone's economic interests constitutes "going too far". (*Mahon*)
  - There, removing all economic interests is akin to "permanent physical occupation", which *always* outweighs public interest ("no matter how weighty"). (*Lucas*)
- NAFTA includes a *much* broader view of expropriation; an act or omission that is "tantamount to expropriation" is sufficient. (*Metalclad*)
- There are very few cases in the Canadian jurisprudence that recognize the possibility for a "*de facto*" taking (i.e. expropriation without seizure of title via the *Expropriation Act*).
- The test for a *de facto* taking of property is very strict; there must be: (*CPR*)
  1. An "acquisition of a beneficial interest in the property or flowing from it", **and** (*CPR*)
     - This doesn't require forced transfer of property. (*CPR*)
     - Regulating future development of land does not amount to a beneficial interest (i.e. if the land isn't being forcibly re-developed, the Crown hasn't gained a "benefit") (*CPR*)
     - *Mariner*, an earlier case, doesn't include "flowing from it"; an increase in the value of Crown land is insufficient, since it must be a benefit in the *plaintiff's* land. (*Mariner*)
  2. The "removal of all reasonable uses of the property" (from the plaintiff). (*CPR*)
     - Even if these uses are regulated, they aren't "removed" until a permit is denied.(*Mariner*)
     - The loss of all *economic* interest is also insufficient; there are non-economic interests in the bundle of property rights, and they must be removed, too! (*Mariner*)
- Common law requires that "unless the words of a statute so demand, a statute is not to be construed so as to take away the property of a subject without compensation" – Lord Atkinson in *AG v. De Keyser's Royal Hotel* (UK, HL 1920), aff'd in *Manitoba Fisheries Ltd. v. The Queen* (SCC 1979)

The Physical Dimensions of Ownership

Cujus est Solum ejus est Usque ad Coelum et ad Inferos

- "Whoever owns the soil also owns up to the heavens and down to the flames."
  - Although Blackstone did assert this, it was probably never the law.

Coelum

- The rights of an owner of land are restricted to such a height as is necessary for ordinary enjoyment, buildings, *etc*. Above that, the owner has no more right than anyone else. (*Skyviews*)
- Buildings or land-based objects (*e.g.* cranes) that pass above someone's land are trespassing in their airspace. (*Anchor Brewhouse v. Berkeley House*, UK 1987)
- **Note**: The *Land Title Act* s. 141 allows a fee simple owner to sell parcels of airspace (i.e. strata) as if they were land.

Inferos

- At common law, the owner of property *does* own the ground underneath his property. (*Edwards*)
  - The dissent in *Edwards* is vociferous, arguing that the owner of adjacent property (which has an entrance into a cave partially beneath the plaintiff's property) has acquired ownership through "discovery, exploration, development, advertising, exhibition and conquest". Claims that the owner of the surface can only claim ownership as far down as he can actually assert his dominion and obtain profit or pleasure. (*Edwards*)
    - Ziff cautions us that it is not necessarily the better (or even more popular) view.
- Ownership rights below the surface are subject to:
  - The Crown prerogative (residual powers; Crown retains rights to precious metals, *etc*.)
  - Any terms or reservations in the Crown grant of the surface land.
  - Statutory restrictions (in practice, the most important).
    - **Note**: The *Land Act* s. 50 reserves rights to basically anything valuable below-ground.

Lateral Boundaries

Land Bounded by Land

- There are several ways to describe the land set out in a grant. If they conflict, there is a hierarchy set out by the courts. An objective evidentiary test is used. (*Ziff*, pp. 93-94)

Land Bounded by Water (*ad medium filum aquae*)

- ***Ad medium filum aquae***: At common law, the boundary of land adjacent to a river extends out to the middle of the river. (*Nikal*)
  - **England**: This applies only to *non-tidal* rivers. (*Nikal*)
  - **Canada**: This applies only to *non-navigable* rivers. (*Nikal*)
    - Waters that are *generally* navigable are considered navigable throughout. (*Nikal*)
    - This may not be the rule in some of the Atlantic provinces (*Ziff*, p. 96[73])
    - This is an excellent example of an English law that was held not to have been received due to incompatibility with local conditions (See "*English Law*...", above)
- The *Land Act* ss. 55 and 56 restrict rights to seabeds, lakebeds, *etc*. (i.e. all non-groundwater)

Riparian Rights Generally

- Owners of land abutting water (**riparian owners**) have special rights over that water.
- At common law, you may use as much water coming on to your property as you like, so long as you do not contaminate it for use by others. (*Steadman*)
  - **Note**: This water is not your property, but you do obtain a riparian right to use it. (*Steadman*)
- The BC *Water Act* now governs stream water rights, but ground water is mostly unregulated.
  - *Water Act* s. 2 vests ownership of all stream water in the Crown, although s. 42 allows diversion of unrecorded stream water for domestic purposes.
- The Crown owns the foreshore (the land between the low and high water marks). However, riparian owners do have some rights, such as the **right of access** (ability to dock boats, load, unload, *etc*.) (*Murray*)
  - Riparian owners' rights may not interfere with the Crown's right of ownership. Thus, putting down permanent concrete pilings for a dock without permission is trespass! (*Murray*)

Accretion

- A "gradual and imperceptible" addition to a riparian owner's shoreline becomes part of their land. (*Monashee*)
  - **Note**: This only benefits a *riparian* owner. Thus, if A's land is separated from the shoreline by a strip of Crown land, A cannot claim accretion (as the Crown is the riparian owner, not A). (*Monashee*)

Implications of Ownership

- Land owners have an incidental right to lateral and vertical support for their **soil**. (*Rytter*)
  - This right is lost if a building is erected on that soil. (*Rytter*)
  - At common law, if a building had been standing for 20 years (without any substantial increase in weight), you could get an easement for support on the adjoining property, under the law of prescription. (*Rytter*)
    - **Note**: The *Land Title Act* s. 24 abolishes this prescriptive process.

Fixtures

- Chattels (personalty) may become affixed to realty, thereby become fixtures (realty).
- The test for determining whether something is a chattel or a fixture is as follows: (*La Salle*)
  1. **Presumption**: Not attached to the land? Chattel, unless contrary circumstances.
  2. **Presumption**: Attached to the land? Fixture, unless contrary circumstances.
  3. "Circumstances" include assessing the degree and object of the affixation.
     - **Degree**: A "permanent" affixing, even a slight one, implies fixture.
     - **Object**: Affixed for the better use of the goods as goods? It's a chattel.
       Affixed for the better use of the land? It's a fixture.
  4. "Circumstances" may only include the *objectively* determined intent of the affixer.
     - This test is objective because it is designed to allow uninformed third parties to view the item and assess whether it might reasonably be a chattel or fixture (that is, whether it would be included in a sale of property).
- Applying this test to hotel carpeting yields the result that they are fixtures. (*La Salle*)

The Concept of Possession

- *See also* Aboriginal Title*, below, for possession in the recognition of title.*

Definitions of Possession

- Canadian law "does not recognize the existence of a single concept of possession applicable for all purpose" – Cullity J. (*Lifestyles Kitchens & Bath v. Danbury Sales Inc.*, Ont. SCJ 1999)
- Generally, there are two components of possession: (*Pierson*)
  1. ***Animus Possidendi***: An intention to possess.
  2. ***Factum***: Physical control, also referred to as "*corpus*".
  - Thus, a hunter in hot pursuit after 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*)
    - Alternatively, it 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. For instance, at common law a landowner possesses animals nesting on his land until they leave.
  - **Note**: *Wildlife Act* s. 2 excludes obtaining property rights in wildlife except with a permit.
- Acts that significantly but incompletely seek to achieve possession may result in a **pre-possessory** interest, if they are unlawfully interrupted. This is a right to possession. (*Popov*)
  - This interest has an equal legal footing with subsequent possessory rights. (*Popov*)
- **Carol Rose** points out two driving factors in the law of possession: clear communication of possession (for administrative purposes), and rewarding useful behaviour.
  - These factors converge; clear communication has an economic incentive to society, that of facilitating trade and minimize resource-wasting conflict. Thus, clear communication is itself a useful act that should be rewarded.
  - "[P]ossession is yelling loudly enough to all those who are interested, and continuing to yell." Require a "clear statement to the rest of the community."
  - Acts of possession are a "text" that others may read. Some subtexts to the text of first possession that are noted:
    - Will the text be "read" by the right audience at the right time? (e.g. *Pierson*)
      - Are "secondary symbols" necessary represent the text? (e.g. registering patents)
    - What constitutes a "clear act"? Does this disadvantage groups that are not familiar with the symbolic system within which these acts take place?
      - Consider the US *Johnson v. McIntosh* case, where it was argued that Aboriginals 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 expressed confusion at the concept of ownership of land.

Possession in the Acquisition of Title (Adverse Possession)

- At common law, if someone other than the title holder holds open and notorious, adverse (i.e. without the title holder's permission), exclusive, peaceful, actual and continuous possession of land, they may acquire title through adverse possession. (*Re CPR*)
- 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 a non-paper-title-holder. (*Asher*)
- This doctrine does not transfer title! It merely extinguishes the title of the previous owner. However, this leaves the claimant with a possessory right superior to that of anyone else, which amounts to *de facto* title. (*Re CPR*)
- Although adverse possession typically requires 20 years possession (though it differed in some jurisdictions), in the case of Crown land it requires 60 years. (*Re CPR*)
- **Note**: In BC, adverse possession has been (more-or-less) abolished by the *Limitation Act* s. 12, but note s. 14(5) for a clause grandfathering rights prior to July 1, 1975.
  - The *Property Law Act*, s. 36 contains rules on encroachment of property.
  - The *Land Act* s. 8(1) prohibits anything that smells of adverse possession on Crown land.
  - The *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).
  - The *Land Title Act* s. 23(3) makes indefeasible titles immune against adverse possession, except for adverse claims against the first issue of indefeasible title (s. 23(4)).
    - **Note**: Any subsequently registered title is immune; a *LTA* s. 171 claim must be made *before* the land is sold (i.e. while the first indef. title is still the only one around)!
  - **Note**: Prof. Foster holds the view that adverse possession might still be possible, even if it begins or matures after July 1, 1975. He acknowledges that this is a minority view.

Possession Establishing Relative Property Rights (Finders)

- 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 (e.g. the actual owner). Finders must make some attempt to contact the actual owner. (*Parker*)
- ***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*)

Possession in the Transfer of Title (Gifts)

Overview

- The courts will not perfect an imperfect gift. (*Schoppel*)

Gifts *Inter Vivos*

- Gifts "between the living".
- Showing an *inter vivos* gift requires three elements: (*e.g. Stein*, *Thomas*?)
  1. ***Animus Donandi***: Intention to give a gift.
     - Evidence of intent is viewed "with suspicion"; the onus is on the donee to show intent to make a gift. (*Thomas*)
  2. **Acceptance**: Generally very easy to show (who wouldn't accept a gift?)
  3. **Delivery**
     - Obtaining possession with the permission of the owner counts as possession, even if there is no physical delivery from one party to the other. (*Thomas*)
     - The donor must do "everything that can be done" to complete the gift. (*MacLeod*)
       - E.g. if transfer of duplicate title is required to make a transfer of land, and the donor possesses such duplicate title, then it *must* be transferred to make the gift complete. (See *Land Title Act* ss. 20 & 189(1) for equivalent provisions) (*MacLeod*)
- A "mere promise" or unfulfilled intention to make a gift is incomplete and imperfect. (*Schoppel*)
- **Exceptions**:
  - **Seal**: A promise under seal is enforceable, regardless of the above test's results.
  - **Trusts**: No delivery is required; a beneficial interest is transferred to the donee.
  - **Estoppel**: A may be "completed" if you relied on the donor's promise to your detriment.
  - ***Strong v. Bird***: A purported gift, left unfulfilled, will be enforced in equity if the donee is is named (and becomes) an executor under the will of the donor, and the intention to make the gift continued under the donor's death. (*Strong*)
- *See Ziff p. 145 for a variety of factual concessions that relax the delivery requirement*.

Testamentary Gifts

- Wills, governed by the *Wills Act.* Highly formalized.
- See *Schoppel* for a case where a (perhaps) testamentary gift is non-conformant. (*Schoppel*)

Donationes mortis causa

- "Deathbed gifts"
- Like a testamentary gift, only becomes absolute upon the death of the donor.
- Uses the same test as *inter vivos* gifts, although the delivery requirement may be relaxed to take account of the peril under which it was granted.
  - "I can see no reason for drawing an arbitrary distinction between what is necessary in one case the other" – Middleton J. (*Kingsmill*)
  - The delivery requirement is satisfied if evidence of title has been handed over, provided that it is enough to prove ownership and gain control. (*Kuyat*)
- Must be made in contemplation (but not necessarily the expectation) of impending death.(*Kuyat*)
  - The donee need not be *in extremis* (*i.e.* under a sudden peril) (*Saulnier*)
    - Although this is the majority view, there are cases arguing for *in extremis*. (*Thompson*)
- The offer expires once the peril passes.
- In Canada, one may not make a DMC of land. (*Dyck*)

The Doctrine of Estates

Overview

- "**[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, or the land for time without end, and he who has land in tail has a time in the land or the land for time as long as he has issue of his body, and…" – *Walsingham's Case* (1573), 75 ER 805 at 816
- **An estate is not the same as tenure**. In Canada most estates (which are *a right to the land*) are held in a fee simple. All estates are granted via *a tenurial relationship* with the Crown (which is always free and common socage).

Fee Simple

- "[A] time in the land without end" – *Walsingham's Case*.
  - A.K.A. "The largest estate known to law" – Ziff.
- "Fee" means that the estate is inheritable, "simple" allowed inheritance to any heir.
  - Sometimes "fee simple absolute"; "absolute" means that no conditions encumber it.
- Magic words: "To [A] and his heirs".
  - "To [A]" are **words of purchase**; they grant A a right to the property.
  - "and his heirs" are **words of limitation**; they don't actually grant A's heirs a right to the property, but instead merely indicate the duration of the estate (i.e. as long as A has heirs)
- At common law, failure to use the magic words would result in a life estate being granted instead. (*Millard v. Gregoire*, (NS CA 1913))
  - In recent times (in areas where statutes haven't changed this), courts have relaxed the standard so that it is merely necessary for the grantor's intent to be clear. (*Murphy*)
- Today, the *Property Law Act* ss. 19(1) and 19(2) make fee simple the default estate; a fee simple (or the greatest interest the transferor possesses) is conferred, unless a contrary limitation is expressly included

Fee Tail

- Devolved only to lineal descendants; only function was to perpetuate family dynasties.
- Prohibited alienation (although a number of clever tricks existed to "bar" the property, turning it into a fee simple estate, which could then be sold).
- Abolished by the *Property Law Act* s. 10.
- The history of the fee tail is that of the dynasts battling the free marketers.
  - The dynasts wanted to be able to guarantee that certain lands would stay in their family in perpetuity.
  - The free marketers wanted to be able to buy and sell land – mostly sell, as the descendants of the dynasts were heavily in debt.
- Consider the Bennets in Jane Austen's *Pride and Prejudice*, where the father only has a life estate in his entailed property (as he has five daughters, but no male heirs). On his death, the property will go to his (male) cousin, and not his children.

Aboriginal Title

- 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". 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**: Only Aboriginal title confers a property right. For comparison, the three forms of Aboriginal rights are: (*Delgamuukw*)
  - **Aboriginal Rights**: Unrelated to land; rights to customs, songs, crests, *etc*.
  - **Site-Specific Aboriginal Rights**: The right to hunt in certain lands, *etc*.
  - **Aboriginal Title**: A right *to the land itself*.
- **Proof of Aboriginal Title**: Must show the following: (*Delgamuukw*)
  1. **Ownership at Sovereignty**: In BC, this is 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*)
  2. **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*)
  3. **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**: The Crown may make infringements on Aboriginal title with "inescapable economic components" if they show: (*Delgamuukw*)
  1. Compelling and substantial legislative objective.
  2. Infringement is consistent with the Crown's special fiduciary duty to Aboriginal groups.
  - **Duty to Consult**: The 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*)
    - This 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**: The 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).

Index of Cases

Z is the Ziff textbook **C** is the course package