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LAW 440: Property Law

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THE NATURE OF PROPERTY

THE PROPERTIES OF PROPERTY

- Property is a social construct that is not static; it responds to social, economic, and technological changes.
    - Notions of property held by European settlers differed radically from those held by Aboriginal peoples.
    - Property regimes reflect changes in the purposes which society or the dominant classes in society expect the institution of property to serve; they thus reflect the distribution of power and wealth in society.
- We need a definition of property because when expectations change, disputes arise regarding what property is or ought to be, and when people have different expectations, they are apt to see facts differently.

What is Property?

- In everyday use, "property" is mistakenly used to describe tangible objects.
    - This misconception arose when absolute rights to land (rather than more limited rights) became more freely marketable during the spread of the capitalist market economy, and it looked as though things themselves, not just rights in them, were being exchanged.
- Property is best seen as an enforceable claim (a right) to some use or benefit of something good against the world (a right *in rem*).
    - This claim is enforced by an institutional structure (i.e., society/the state, custom/convention, law), without which property could not exist.
        - e.g., it may be possible to speak of property rights to particular rooms in homes, where it is understood that a person has a normative claim to it that will be enforced by the common consent of those who participate in their particular social unit.
        - For the most part, in our system, property rights are created and defined by the law.
    - Property can thus be characterized only by invoking certain rights that persons have with respect to it.
    - Property includes the rights of persons with respect to tangible and intangible resources.
    - Property is not the same as possession, as property rights trump possessory rights.
        - One can maintain ownership of something without having possession of it (e.g., if I pick up a book at the store, I possess the book but do not own it).
    - Property may be held by a natural person or by an artificial person, such as a corporation or an unincorporated grouping recognized by the state as having the right to use and benefit of something and the right to exclude non-members from it.
    - Legislatures, courts, regulatory and planning agencies, markets, and customs allocate property rights.
    - In the case of a lease, exclusive rights exist for a limited period and under certain conditions.
    - Property is thus a network of sociolegal relationships between people in respect of things, which they can alter however they want (e.g., selling a car, leasing an apartment, etc.).
- More specifically, property is a bundle of rights that can be disaggregated and exchanged individually.
    - One could lease their land to someone else (giving up their rights to exclusion and enjoyment of the property), sell part of their property, sell subsurface mineral rights, grant a right-of-way across their property to their neighbour, or mortgage their property to a lender.
    - A.M. Honoré identified the following elements of property:
        1. The right to possess, use (or non-use), manage, and control the resource.
        2. The right to income and capital accruing from the resource.
        3. The right to be protected under the law.
        4. The right to transfer *inter vivos* (between living persons) and on death.

5. Liability to seizure by the state.
6. The duty to avoid harmful use.
   - Thus, ownership entails both rights and duties.
     - e.g., a firearm owner is duty-bound to take certain precautions.
- Another element is the right to exclude, regarding which there are various schools of thought:
  - *Single-variable essentialism*: the right to exclude is the irreducible core attribute of property.
    - i.e., the right to exclude is a necessary and sufficient condition of property.
    - This represents the view of TW Merrill.
  - *Multiple-variable essentialism*: the essence of property lies not just in the right to exclude, but in a larger set of attributes (e.g., free use, enjoyment, and disposal).
    - i.e., the right to exclude is a necessary but not sufficient condition of property.
  - *Nominalism* views property as a purely conventional concept with no fixed meaning.
    - i.e., the right to exclude is neither a necessary nor sufficient condition; a legal system can label as property anything it wants.

Property Law Distinguished from Other Areas of Law

- In contrast to property law, which creates rights *in rem*, contract law and tort law create rights *in personam* (i.e., against individuals).
  - e.g., if J agrees to sell his car to B, but delivers it to I instead, B can only sue J in contract law but can sue I in property law, even though I has possession of the car.
  - In this sense, property rights are stronger than rights *in personam*.
- However, the range of property rights is limited relative to contractual rights, as property rights must be created out of a closed menu; the *numerus clausus* principle limits the number of rights that courts will acknowledge as property.
  - On the other hand, parties to a contract can structure that contract however they want.

Forms of Property

1. **Private property**: exists where only the owner can access and enjoy the resource and has the right to exclude others.
2. **Open access (non-property)**: exists where anyone can access and enjoy a resource and no one has the right to exclude others (e.g., an idea, air, etc.).
3. **Common property**: exists where a community owns and manages a resource and gives each member of that community an equal right to enjoy and not be excluded from it (e.g., the common area of a condominium).
   - It appears to people outside the community to be private property.
   - Society or the state may declare some things (e.g., parks, streets, highways, etc.) to be for common use.
     - Society or the state may limit the kinds of things people can do with/on common property.
     - In this case, the state *creates* the rights, the individuals *have* the rights.

4. **Public property**: exists where government entities own and manage a resource and reserve the right to exclude; however, the state remains bound by certain obligations to the people, since they hold property in trust for the benefit of the people (e.g., the Alberta legislature, Edmonton International Airport, etc.).

THE CASE FOR PRIVATE PROPERTY

- For Bentham, property is the creature of law; law is a legal construct; take away laws and property ceases.
  - Property only exists as the expectation of deriving certain advantages from something; the law, based on a social consensus permitting private ownership, is what upholds this expectation.

- However, according to CB MacPherson, we need to justify property because property is a right in the sense of an enforceable claim, and the enforceability of that claim depends on a society's belief in it as a moral right.

Economic Theories

Efficiency and Productivity

- Economic theories posit that a private property system leads to a more efficient use of resources than a command economy and that it maximizes productivity by incentivizing labour and investment.
    - Transfers occur if and only if the value of something to the buyer is greater than its value to the seller.
    - This is evidenced by the wealth and abundance in the West contrasted with the deprivation found in former Soviet states (though property systems have not been tested in laboratory conditions).
    - For this to happen, Posner argues that property rights must be *exclusive* (protects incentives), *transferable* (to facilitate efficient allocation), and *universal* (since the more players the better).
    - Hernando de Soto argues that capitalism succeeded in the West while failing elsewhere because developing nations are characterized by informal, ill-defined, and poorly enforced property rights. When people lack stable property holdings, they are less able to raise capital (which is necessary for economic development) by using land as security for loans.
        - Thus, the failure of developing nations rests largely in their inability to release the capital potential in existing assets; well-developed markets and private property go hand-in-hand.
- Counterarguments:
    - Too much private property can lead to a "tragedy of the *anticommons*," which occurs when property rights are too fragmented and no one has effective control, thwarting efficient use.
    - Maximizing material wealth must sometimes take a back seat to other values (e.g., few would suggest that ability to pay is the best way to allocate judicial appointments).
    - The most efficient allocations of property are often very unequal.
    - Private property in industry may sacrifice the interests of society to commercial profit.
    - There are inherent sources of waste in a system of private property, as the success of the fittest comes only with the failure of the less fit, resulting in loss to the community.
    - For many economists, crashes like the Great Recession of 2008 are evidence of the need for regulation.

Externalities

- According to Hardin, private property can be used to internalize *negative externalities* (a cost caused by a producer that is not financially incurred or received by that producer).
    - In a system of common property, costs and benefits are misaligned, as one gets all the benefits of using a resource while the negative externalities of it are shared amongst everyone; thus, the effects of a person's activities on his neighbours and on subsequent generations will not be taken into full account.
        - This makes it rational for people to use common property unsustainably; hence, individual rationality can lead to group irrationality.
- There are various ways (with varying costs) to mitigate the effects of externalities:
    - A social contract (custom) that triggers social penalties.
        - If the common resource is accessible by many people, this might not be feasible.
    - A hierarchical organization (or *firm*) that controls the resource.
        - The costs for administering a firm could be high.
    - Nationalizing the resource and avoiding externalities through government coercion.

        - The costs of state ownership could be high.
    - Privatization, which internalizes externalities.
        - Reduces information costs, as it is clear who to negotiate with to facilitate transfer of a resource.
        - Incentivizes owners to be good stewards of privately held resources (e.g., it may prompt a farmer to increase the fertility of his land, which he would not have if the land were common property).
        - While one still has no direct incentive to consider the effects of one's use of land on the land of others in a system of private property, the externalities that accompany private ownership (usually) do not affect all owners, and it will generally be necessary for only a few neighbours in a private property system to reach an agreement that takes them into account.
        - Demsetz argues that private property rights develop in response to change, provided that the gains from internalization exceed the costs.
            - Before the fur trade began, anyone could hunt freely in the forest; as a result, the hunter would receive the entirely of the benefits provided by the animal killed while the cost of depleting the animal's stock was shared among everyone.
                - But, the advent of the fur trade, which increased the value of furs and the scale of hunting, increased the risk of depleting animal populations to the extent the gains of internalization began to outweigh the costs.
                    - While people could negotiate and agree to use land more sustainably, the costs of this are high.
                    - As such, a private system of hunting territory arose among Indigenous peoples of the Labrador Peninsula to internalize externalities.
                - In contrast, a private system of bison grazing territory was not adopted simultaneously because the costs of internalization were relatively high; bison are free roaming creatures and adopting a private system of grazing territory would mandate the costly erection of fences.

- Counterarguments:
    - Externalities associated with activities that generate external effects impinging upon many people (e.g., GHG emissions) cannot be internalized at low cost.
    - Communal property can act as a social safety net, with the cost of disasters being spread evenly.
    - Privatization of the commons could result in its destruction without regard for future generations in the absence of a coordinated approach.
    - There is evidence that communal property does not always result in overconsumption.

Desert Theories

- The *theory of occupancy* posits that the discoverer of property has the right to take control and dispose of it.
    - But this does not account for acquisition by transfer or by inheritance.
- Locke's *labour theory of property* holds that everyone is entitled to the produce of their labour.
    - According to Locke, every person has a property in their person and their labour; by mixing that labour with something from nature, one makes that thing their property, to which no one else is entitled.
        - Taking things out of nature does not depend on the express consent of all commoners; if one needed such consent, everyone would starve notwithstanding an abundance of resources.
        - This ensures that nature remains, until appropriated, in no one's private possession.
        - Whoever works more and harder thus deserves more property.
        - Since the world is a world of plenty, Locke held that whatever one does not need for his advantage belongs to others.

        - Locke had direct effects on colonization, as he argued that since Native Americans are lazy and do not have the right to land without labour, taking the land from them was not a crime.
    - Locke's theory challenged earlier Christian theories of property, which reasoned that since God gave Adam dominion over the Earth, Adam's descendants should also share the Earth in common.
    - Strengths of Locke's theory:
        - It is joined to a widely accepted theory of liberty and democracy.
        - It is flexible and widely applicable; it appeals to very different political sensibilities.
            - People on the left use it to argue that that which they produce hands is rightly theirs.
            - People on the right use it to argue that the entrepreneurship of capitalists entitles them to that produced by their employees.
    - Problems with Locke's theory:
        - Locke's assumption of abundant resources no longer holds.
        - Few things are produced by the labour of one person alone.
        - The theory does not consider the needs of others.
        - The theory does not account for inheritance and transfer.
        - Who is to say that one who adds value without the consent of others deserves that value?
        - The meaning of "mixing labour" is uncertain (e.g., If I paint one's house, does that mean I own it?)
        - The theory does not capture the full breadth of work.
            - Arendt differentiates "work" (acts that create new objects or knowledge) and "labour" (acts necessary to sustain life), the latter of which does not alter property rights in Locke's theory.
        - Marx argued that since workers put life into the objects they create, the more a worker works on an object the less they possess (i.e., they become alienated).

Utilitarian Theories

- Hobbes argues that in a state of nature, where every man is against every other man, there is no place for industry (because the fruits thereof are uncertain), agriculture, trade, arts, or society; plus, there is continual fear of death.
    - To avoid this, the state/society can monopolize the use of force and establish, protect, and enforce private property, ensuring that life is not "solitary, poor, nasty, brutish, and short."
- People have needs that they need to satisfy to achieve happiness, and those needs can best be achieved in a system that provides security for private property holdings.
    - While material wealth is no guarantee of happiness, rich nations tend to be happier than poor nations.
    - While redistribution might improve happiness for the poor more than it would reduce it for the rich, widespread confiscation of property would deaden industry.
- Counterarguments:
    - Does not consider the distribution of happiness.
    - Takes desires as given and assumes that the fulfillment of them has a positive value that is quantifiable.

Personhood Theories

Self-actualization theories

- Property allows the human will to develop and thrive, bestowing on people the capacity to demonstrate individuality and full self-expression.

    - Our natural disposition for such things as sustenance, self-defence, and self-worth supports a primordial need for the institution of private property.
    - Hegel argues that property is necessary for self-actualization because humans require the possession of material objects onto which they can project their free wills.
    - Radin argues that people possess objects they feel are part of themselves, and that these objects are bound up with personhood because they are part of the way we constitute ourselves.
- Private property promotes societal flourishing, as property owners are invested in the success of their communities.
    - Since property owners are less dependent on the state and are free to dissent, facilitating democracy.
- Counterarguments:
    - Our craving for material goods is socially induced, as attitudes toward property vary between cultures.
    - Property ownership may foster greed, selfishness, or quests for power.
    - Private property may also skew democratic institutions in favour of the wealthy.

Freedom-based theories

- Some argue that the right to property is deduced from the individual's right to act as a free person.
    - Property enhances negative freedom by providing extensive protection from unwanted intrusions.
    - Property enhances positive freedom by promoting stability, discipline, and responsibility and enabling one to not be reliant on the state (or anyone else) except to the extent needed to protect property.
- Counterarguments:
    - Freedom does not justify private property in resources required for the public.
    - If the liberty of everyone is equally sacred and relies on property, then everyone is entitled to property.
    - By decentralizing power, private property can promote the emergence of an economic oligarchy with the power to influence, govern, and exploit.
    - The positive freedom of some might overrule the negative freedom of others.

Pluralist Theories

- Munzer argues for a pluralist justification of property rights based (1) utility and efficiency, (2) justice and equality, and (3) labour and desert.
    - He believes that material inequality is to be tolerated only if everyone possesses a minimum amount of property and if the scale of inequality does not prevent full human development; at the same time, differences in merit demand rules that calibrate entitlements based on desert flowing from labour.
    - This results in a justification of some private property limited by "sensible government regulation."

NOVEL (UNPRECEDENTED) CLAIMS

- When assessing novel property claims, two distinct styles of judicial analysis seem to exist:
    1. **Attributes approach**: hinges on whether the right being asserted looks like property, which requires a firm conception of the necessary traits of property.
    2. **Functional approach**: hinges on how property, as a tool of social life, should be used by taking into account the policy considerations at play.

International News Service v Associated Press, 248 US 215 (1918) (labour theory and incentives)

Facts:

- Both parties compete by gathering news and distributing it to their members for publication in their newspapers. The value of their services depends largely on information being transmitted to members before similar information can be transmitted to competing newspapers. INS was accused of pirating AP's news by (1) bribing AP employees, (2) inducing AP employees to violate company rules by giving them news, and (3) copying news from AP's bulletin boards and early editions of its newspapers.

Issues and holding:

1. Is there a general property right in news? **NO**
2. Does INS's conduct constitute unfair competition in trade? **YES**

Rationale: (Pitney J)

1. News—the information contained in a news report—is not the creation of the writer but is a report of matters that ordinarily are *publici juris*; hence, news is not protected against the public by copyright law.
2. A company can have a limited property interest in news against a competitor because it has economic value to the parties and is the result the expenditure of money, skill, and effort to obtain it; hence, news is "quasi-property."
    - Due to AP's limited property interest in news, INS's behaviour constituted misappropriation (INS had endeavoured to reap where it had not sown), and hence unfair trade competition.
    - Permitting indiscriminate publication by anybody for profit would render publication pointless.
    - The court must characterize the pirating of news by INS, an act contrary to good conscience, as unfair trade competition without waiting for the legislature to intervene.
- *Remedy*: temporary injunction against INS to prevent them from publishing AP's news for a few hours after publication by AP, at which point it no longer has economic value to AP.
    - *Note*: balances labour theory with economic incentives to produce news.
    - *Note*: temporariness suggests Pitney J wants to prevent AP from becoming a monopolist in news.

Dissent:

1. Holmes J…
    - Property depends upon the right to exclude from interference codified by law, and one can not be excluded by law from conveying thoughts, no matter how much it took to produce them (hence, news is not property).
        - *Note*: accords with Bentham's view on property.
    - INS publishing AP's news before them leads to the impression that AP obtained its information from INS, resulting in misrepresentation and hence unfair competition; however, this can be corrected by INS giving credit to AP when publishing its stories, until those stories have been out there for a few hours.
2. Brandeis J…
    - The fact that an idea has cost its producer money and labour and has economic value is not sufficient to ensure to it the legal attribute of property; ideas, after being communicated, become open access.
    - Courts should defer to Congress as to whether news outlets can have a limited property interest in news.

Notes:

- Three factors go into the decision making of the three judges: (1) labour theory, (2) economic efficiency, and (3) institutional design (which body is most competent to recognize new property rights).
- One possible critique of Pitney J's judgment is that society is made better off when ideas are spread widely.

Victoria Park Racing and Recreation Grounds Ltd v Taylor (1937), 58 CLR 479 (HCA) (*numerus clausus*)

Facts:

- The plaintiff operated a horse racing course surrounded by a high fence. The defendant Taylor owned land next to the course and would stand on an elevated platform to watch the races and read information from the notice boards. The defendant Angles would stand on the platform, describe the races over the phone, and announce the names of the

winning horses, which were then broadcast over the radio. Attendance at the horse racing course decreased as a result. The plaintiff filed for an injunction on the broadcast on the grounds of nuisance and breach of copyright.

Issue and holding:

- Does the plaintiff have a property right that was infringed? **NO**

Rationale:

1. Latham CJ…
    - Anyone is entitled to look over the plaintiff's fence because a spectacle cannot be owned (i.e., the eyes cannot be guilty of trespass) and copyright cannot be claimed in information posted on the notice boards because the law does not operate to give any person an exclusive right to state or describe facts.
        - If this is to be prevented, the plaintiff should build a higher fence or move their notice boards.
2. Dixon J…
    - The conduct of the defendants does not constitute a nuisance (non-natural use of land curtailing a neighbour's legitimate enjoyment of their property) as there is a difference between enjoyment of land and profit (which is at issue here); the deprivation of profit is not actionable.
    - Unless a deprivation of profit is coupled with interference of a protected right, there is no remedy available to the plaintiff; that said, the right to exclude the defendants from broadcasting a description of the occurrences they can see on the plaintiff's land is not a protected right.

Dissent: (Rich J)

- The advent of television may force the courts to recognize that protection against the complete exposure of the doings of an individual may be a right indispensable to the enjoyment of life.
- The conduct of the defendants constitutes a nuisance in that it was an improper or non-natural use of land which curtails a neighbour's legitimate enjoyment of his property.

Notes:

- Demanding precedent shows great restraint in recognizing novel claims (*numerus clausus*).

Moore v Regents of the University of California, 793 P (2d) 479 (Cal Sup Ct 1990)

Plaintiff's facts:

- Moore underwent treatment for hairy cell leukemia at UCLA Medical Center by Golde. In 1976, Golde obtained Moore's consent to remove his spleen to slow down the progression of the disease. Golde and his colleague Quan then used portions of his spleen for research without Moore's knowledge. On later visits, which according to Moore were said by Golde to be necessary to his health, Golde withdrew blood, blood serum, skin, bone marrow, and sperm. Golde and Quan continued to conduct research on Moore's cells, which Moore claims was also without his knowledge. In 1984, a patent was granted on a cell line established from Moore's T-lymphocytes. The patent named Golde and Quan as the inventors and listed the Regents of UCLA as having the property right to the patent).
- Moore characterized this situation as a conversion (a tort that protects against interference with possessory and ownership interests in personal property) and a breach of fiduciary duty and/or lack of informed consent.
- The defendants, on demurrer, claimed that even if the plaintiff's facts were true, they have no legal implications.

Issues and holding:

1. Assuming the facts are true, would Moore have a cause of action for breach of fiduciary duty and/or lack of informed consent? **YES**
2. Assuming the facts were true, would Moore have an ownership interest in his cells? **NO**
3. If no, should conversion liability be extended to provide a cause of action in this case? **NO**

Analysis:

- Where a plaintiff neither has title nor possession to the property alleged to have been converted, he cannot maintain an action for conversion; since Moore did not retain possession of his excised cells, he must establish ownership.

Rationale: (Panelli J)

1. (*Reasons for finding a cause of action for breach of fiduciary duty and/or lack of informed consent not discussed*)
2.
    a. No reported judicial decisions support Moore's claim, either directly or by close analogy.
        - While Moore relied on decisions addressing privacy rights, lymphokines, unlike a name or face, have the same molecular structure in every human being.
    b. California statutory law, which mandates the destruction of anatomical parts following scientific use, clearly intends to limit a patient's control over excised cells.
    c. Regent's patent cannot be Moore's property because the cell line is the product of invention and is thus factually and legally distinct from Moore's body.
3.
    d. Extending conversion liability would threaten those engaged in socially useful activities with disabling liability.
        - *Note*: Panelli J is concerned with the effects of recognizing property rights on economic incentives.
    e. Legislatures should decide whether scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials.
    f. Enforcement of obligations on physicians to disclose research and economic interests will protect patients against what Moore experienced.

Dissent: (Mosk J)

a. While no reported judicial decisions support Moore's claim, neither does any decision deny such a claim.
    - Common law has the capacity to grow and change in response to new social needs.
b. While certain statutory limitations or prohibitions on the use of property diminish the bundle of rights that would otherwise attach to it, what remains is still deemed to be a protectable property interest.
    - Even if regulations limit the use of excised tissue, Moore nevertheless retained valuable rights in that tissue.
c. Moore is not claiming that the patent is his property, he is claiming that he is entitled to compensation for unauthorized use of his tissues *before* the patent was formed.
    - Since the patent did not operate retroactively to immunize the defendants from accountability and given that Moore contributed in a substantial way to the development of the Mo cell line through providing his genetic material, Moore should benefit from the rewards that the Mo cell line brings as a "joint inventor."
        - i.e., the policy reasons that inform joint inventor patents should also apply to cell donors.
d. The degree to which the exchange of scientific materials is free and efficient has already been compromised by making biological products of genetic engineering patentable.
    - Plus, disabling liability is not inevitable if protecting bodily tissues is coupled with a proper system of record keeping, allowing researchers to ensure that the source of the tissues they are using has consented to his/her proposed use of it.
e. While the legislature may intervene, this does not relieve the courts of their duty to fashion a remedy.
    - Failing to compensate the providers of tissue for medical research is inequitable and immoral and fails to respect the dignity and sanctity of the human body.
f. The nondisclosure cause of action falls short on three grounds: (1) it is unlikely to be successful in most cases, (2) it fails to protect patients' rights to share in the proceeds of the commercial exploitation of their tissue, and (3) it may allow exploiters to escape liability.

Notes:

- The case never went to trial for breach of fiduciary duty and/or lack of informed consent because it was settled.
- The majority appears to be concerned with how recognizing property rights in body parts could lead to their commodification, but you can have property rights in body parts and just prohibit people from selling them.

- In *Newman v Sathyavaglswaran*, parents brought an action against the LA County Coroner's office for removing their deceased daughter's corneas without their consent. The court agreed that the parents' property was taken and held that affording property rights in dead bodies to next of kin protects the dignity of the human body.

The *Numerus Clausus* Principle

- The recognition of novel claims is quite rare; courts have adopted the cautious view that the categories of property rights should be carefully controlled (the *numerus clausus* principle).
    - In the 1834 English case *Keppell v. Bailey*, the court held that courts should not permit the creation of various sorts of fancy interests in land; as such, a party wishing to demonstrate that a right is proprietary must show that the interest fits into the appropriate legal box.
    - Strikes a balance between the proliferation of property forms and excessive rigidity.
    - Has slowed judicial reform of property law, channelling legal change in property rights to the legislature.
- The macro-rule of *numerus clausus* contains micro-rules: existing entitlements must be reasonably well-defined.
    - After all, it would be pointless to allow certain easements without defining what can be designated as one, since new rights could be smuggled in by configuring them as easements.
- Explanations of the *numerus clausus* principle include:
    - It reduces information costs; it is easier to determine what interests encumber a parcel if the range of property rights is restricted.
        - Reducing informational costs is also achieved by channelling legal change in property rights to legislatures, which can communicate such changes more effectively than courts.
    - It helps limit anticommons problems, which occur when too many kinds of rights fracture property holdings so significantly that efficient exchanges are prevented by holdouts.
    - Allowing for a concept of property to be too open-ended renders the concept of property obsolete.
    - One must be careful about introducing new property rights because it is difficult to reverse that process.

PROPERTY IN PERSPECTIVE

SOURCES OF CANADIAN PROPERTY LAW

English Common Law

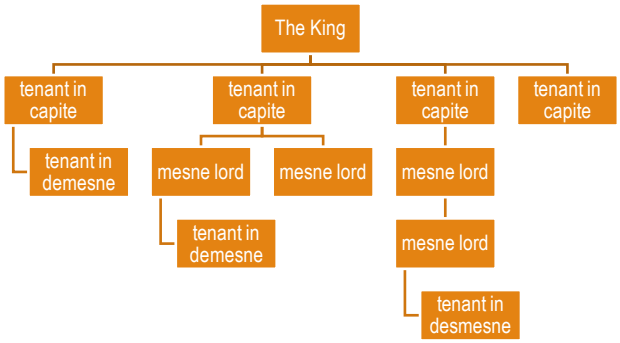
The Growth of Feudalism

- In the 5th to 10th centuries, for a sense of security, people transferred ownership of their land and placed themselves under the protection of a more powerful neighbour, the "lord," with the weaker party becoming their "vassal" (*commendation*); the vassal and lord had mutual duties of support and protection.
    - Feudalism thrived in the presence of, personal, non-market-based relationships, trust, norms stressing the importance of families rather than individuals, and lots of available land and little available manpower.
- By 1086, the feudal system of land tenure was universally adopted throughout England, based on the premise that William the Conqueror, who conquered England in 1066, was the paramount lord in all of England.
    - A grant from the King became the basis of landholding; no land was *allodial* (i.e., without a lord).
    - The King would appoint mesne lord to occupy land (i.e., *tenure*) in return for tenurial services like oaths of fealty (i.e., pledges of allegiance), military service, taxes/gifts, personal services, etc.

        - Thus, in England, tenure was the chief means of securing the performance of public duties; there was no restrictions on the types of services that could be imposed on a grant of land.
    - Tenants could pass their land to someone else by the alienation of the tenant's full interest in the land to a purchaser, who would then assume the position occupied by the original tenant (i.e., *substitution*).
    - Tenants could create a further layer of tenure (i.e., *subinfeudation*) by subdividing their estate and becoming a feudal lord over his tenants, who would similarly promise fealty, taxes, personal service, etc.
    - Peasants/serfs/villeins were not included in the feudal system; there was a separate body of law, manorial law, to regulate peasants' work and landholding rights.

Forms and Incidents of Tenure

- The forms of tenure were classified as:
    - **Knight service**: required the tenant to provide a fixed number of armed horsemen for 40 days in each year; most common for persons holding property directly of the crown.
        - Once this was recognized as an inefficient method of raising a standing army, the obligation was commonly commuted into a money payment (i.e., *scutage*).
    - **Serjeanty**: required services of a personal nature to the King (e.g., caring for royal falcons or dogs).
    - **Frankalmoin**: required services of a religious nature (e.g., praying for the grantor).
    - **Socage**: comprised any tenure that did not fall within the other three categories.
        - Mostly required services of an agricultural nature; designed to provide sustenance.
- Tenure gave rise to rights and obligations called "incidents of tenure," cementing a bond between lord and tenant:
    - **Homage**: ceremony in which a feudal tenant pledged reverence and submission to his feudal lord.
    - **Fealty**: the oath by which the tenant swore to provide feudal obligations to his lord.
    - **Suit of court**: the tenant's obligation to attend the lord's court and assist in its deliberations.
    - **Aids**: the tenant's duty to give the lord financial support in time of need.
    - **Relief**: the lord's right to a sum of money, usually one year's value of the land, when the tenant's heir succeeded to the land.
    - **Primer seisin**: the right to take possession of land until homage and relief were rendered.
    - **Wardship and marriage**: the right to take wardship of a male heir under 21 or female heir under 14 (married) or 16 (unmarried) and to control their marriage.
        - Based on the interest in seeing tenants properly educated and suitably married.
    - **Escheat**: if the tenancy came to an end (when the tenant died without leaving an heir or was convicted of a felony), the land "escheated" (i.e., reverted) to the immediate lord of whom it was held.
    - **Forfeiture**: if the tenant committed high treason, the land would revert to the lord.



The Manorial System

- At the base of the pyramid were vassal-labourers who initially held unfree or villeinage tenures (i.e., their obligations were not certain; they could be varied at the whim of the lord).
    - These holdings were typically within manors, internal fiefdoms that pervaded post-Conquest England.

        - Within it, there was a lord, others holding under free tenures, land held by labourers, and common pastures and wastelands.
    - The responsibilities of villeins were onerous and made the comfortable existence inside the manor possible; in stages, some constraints on the arbitrary powers of the lords developed.
    - When consent to quit one's land was sought and granted, a transferee was "admitted" as the lord's new tenant and the transaction was recorded in the court rolls; this was called "copyhold tenure."

The Decline of the Feudal System in England

- The system of services proved unsatisfactory; by the 13th century, many obligations were no longer enforced.
    - Knight-service, and other feudal services, depend on the personal capacity of the tenant.
        - Military technology changes also made knights on horseback less important.
        - Thus, knight-service changed to shield-money/scutage (a form of taxes).
    - Serjeanty was better performed by paid labourers, so this service was changed to money as well.
    - In socage tenure, there was an increase in nominal or no services rendered, which cannot later be changed.
- The feudal system became messy and unclear, and it had become difficult to determine the state of existing obligations; there were many partial owners stacked on top of one another, making it hard for prospective buyers of land to determine who to negotiate with.
    - In response, the *Statute Quia Emptores* of 1290 prohibited future subinfeudation; escheats and forfeitures then truncated the pyramid until the Crown assumed the position of immediate lord to all tenants.
- Possibility of escheat was diminished by the *Statute of Wills* in 1540, which permitted land to be given away by will.
- In 1660, the *Tenures Abolition Act* significantly reduced the number of available tenurial forms.
    - It converted all tenures by knight service and serjeanty into socage without any feudal obligations and removed some incidents of tenure; it decreed that all future grants were to be in free and common socage.
- Henceforth, the feudal system was a spent force as a means of economic organization, its revenue-raising functions having been taken over by other taxation instruments.
    - Labour and land were commodified; common fields were enclosed and large landholders began to rely on hired labour rather than tenurial obligations.
    - In the inflationary conditions of the 16th and 17th centuries, rents became of little value, and there was thus little incentive to preserve claims to the lordship of land held by socage tenure.
- The vestigial doctrine of feudalism remained after its demise: all land was held ultimately "of the Crown."

The Reception of English Law

- For settled colonies, the general rule was that the laws of England would form part of the laws of the colony insofar as these are applicable to conditions in the colony.
    - In Canada, most English property laws were seen as suitable to circumstances in Canada, probably because:
        - Prudence points to the reception when failure to do so creates uncertainty (i.e., it is convenient).
        - To reject a statute might mean that the unreformed common law would govern.
        - The common law was malleable enough to adapt to new environments.
        - There was a resolute confidence in the superiority of English political institutions; the common law was seen as the repository of centuries of collected wisdom.
- Today, Canadian landholding in common law jurisdictions is not allodial but tenurial, with all private land held of the Crown in the form of an estate; the tenure under which land is held is free and common socage.
    - The services and incidents of socage are of little or no importance, except for the incident of escheat, which exists typically in some modified statutory form.

Aboriginal and Indigenous Property Law

The Doctrine of Discovery

- The *doctrine of discovery* was a principle of international law under which European nations could claim sovereignty over unclaimed territory (*terra nullius*) by discovering it prior to other European nations, notwithstanding the presence of self-governing Indigenous groups.
    - Gave European nations the right to govern the territory but not to dispossess Indigenous groups, which retained Aboriginal title because of their prior occupation of land.
        - Aboriginal title was recognized by colonial legislation and practice (e.g., *Royal Proclamation*).
        - Thus, the British negotiated treaties with Aboriginals for ceding occupied territories to the Crown.
            - Parts of Canada (notably BC) were never ceded to the Crown, giving rise to ongoing disputes over Aboriginal title and other rights.

Aboriginal vs. Indigenous Law

- Aboriginal law is the law of the Canadian state as it relates to Indigenous people; it includes Aboriginal rights and title, treaty rights, and other rights protected under s. 35 of the *Charter*.
    - Indigenous perspectives influence the development of Aboriginal law.
- Indigenous law consists of the internal laws of Indigenous groups, which persist despite attempts to displace them.
    - It consists of the traditional laws and customs and modern legislation enacted by Indigenous communities.

Royal Proclamation, 1763

- Leading up to the *Proclamation*, the British Crown needed allegiance with Indigenous peoples in North America.
- The *Proclamation* governs territory ceded through the 1763 Treaty of Paris, and formally recognized Aboriginal property interests; it forms part of the Constitution of Canada.

- Declares Indigenous ownership of land west of rivers flowing into the Atlantic that have not been purchased.
- Forbids colonial governments and individuals from negotiating land agreements individually with Indigenous peoples to (1) prevent irregularities in the future and (2) stave off claims of injustice and discontent.
    - Only the Crown can negotiate treaties with Indigenous peoples.
- Mandates that settlers on unceded Indigenous land must vacate it.
- Sets the stage for the signing of treaties as being the means towards the goal of Western settlement.

Treaty No. 6 (1876)

- Holds that the First Nations people inhabiting the defined land cede to the government of Canada all their rights titles, and privileges to that land.
- States that the Crown agrees to lay aside reserve lands after consulting with the “Indians.”
- Commits the Crown to giving each First Nations person $12 for extinguishing their land claims and $5 each year thereafter, maintaining schools on reserves, spending $1500 per year on ammunition and twine for nets, giving First Nations agricultural equipment, seeds, and livestock as a one-time gift, granting First Nations assistance in famine, providing medicine on reserves, and purchasing provisions for bands.
- Prohibits liquor from being sold on reserves.

- Gives First Nations people the right to hunt and fish throughout the tract surrendered, excepting tracts taken up for settlement, mining, lumbering, or other purposes.
- Mandates that First Nations will obey the law, maintain peace and good order, and not interfere with private property or obstruct the administration of justice.

Treaty Relationships from an Indigenous Perspective (EagleWoman)

- From Indigenous perspectives, the promises made by the Crown were promises of *ongoing* kinship and alliance; through treaties, First Nations welcomed European neighbours to live together and abide by promises of peace, friendship, and resource sharing.
- In cross-cultural interactions like treaty-making it is necessary, according the SCC in *Badger*, to understand the context for each side entering the treaty.
    - The treaties, as written documents, recorded an agreement that had been reached orally and did not always record the full extent of the oral agreement; thus, expert witnesses, oral histories, songs, drawings and other evidence of Indigenous intent are crucial to proper interpretation of treaty terms.
- Treaties and statutes relating to Indigenous people must be liberally construed and any uncertainties should be resolved in favour of the Indigenous people; plus, any interpretations that have an impact on treaty or Aboriginal rights must be approached in a way that maintains the honour of the Crown; it is always assumed that the Crown intends to fulfill its promises.

Lindberg, "Historical Lawsuit Affirms Indigenous Laws on Par with Canada's," (2019)

- In *Restoule v Canada*, the ONCJ held that provincial and federal governments are obligated to increase the annuities outlined in the original Robinson-Huron Treaty signed in 1850, which have sat at $4 per year for the past 144 years despite a clause that agrees to increase the annuity should government revenues increase.
    - The ruling relied upon Anishinaabe principles of respect, responsibility, reciprocity, and renewal to understand the intention of the signatories at the time of the signing; the perspective of renewal holds that the maintenance of the treaty relationship is an ongoing obligation for all parties.
        - The court relied on expert testimony from elders and community leaders and the historical record and supplements this knowledge with other expert witnesses.
    - Such a decision is an incremental turn in the correction within Canadian jurisprudence by recognizing Indigenous legal systems and traditions; it recognizes Canada's multi-juridical composition.

BASIC DIVISIONS IN THE LAW OF PROPERTY

- Many of the categories into which property rights are divided are now obsolete.

Land/Goods or Moveables/Immovables

- Goods/movable property is tangible, transitory (not permanent), and can move from one place to another.
- Land/immovable property is permanent and stationary.

Legal/Equitable

- Rights which could be enforced in common law courts were legal rights; rights that were enforced in the Court of Chancery were equitable rights.
    - The rules of equity were created to fill gaps in the common law and correct perceived injustices.
    - However, the *Judicature Act* of 1873 merged these courts into a single High Court of Justice; thus, this distinction is based on legal conditions that have ceased to exist.
- There are two important differences between legal and equitable property rights:
    - Most equitable property rights can be created with less formality than comparable legal property rights.
    - Equitable property rights tend to be less durable than legal property rights.

Tangible/Intangible

- The distinction depends on whether the property right entitled the holder to possession of the thing involved.
- In a way, all property rights are intangible in that they are rights enforceable against other persons, regardless of the nature of the thing to which those rights relate.

Real/Personal

- Commonly associated with the categories of land and goods, as all real property rights are rights to land and most personal property rights are not.
    - But this association is misleading, as there are rights to land which are not real property (e.g., a lease, since there was no real action which would allow a dispossessed tenant to recover the leased land).
- This distinction arose in English law out of the writ system.

The Writ System

- When one man was wronged by another, he had to consider what form of action he would bring; when the facts of a case did not fit into any existing form of action, there was no legally recognized wrong.
    - There were a fixed number of writs (forms of action) different in content and structure, and choice of writ was irrevocable, determined procedure, and dictated whether one ended up successful.
        - Choice of writ dictates which court would hear the case, how to summon the opposing party, what they can do if that party refuses to comply, how to plead a case, the general legal issue of the dispute, the mode of the trial (if there is one), the remedy available, the speed of the proceedings, and how to enforce the judgment.
    - The substantive law in each form of action generally developed independently of that in other forms.
- The basis for the real/personal distinction was based on whether a plaintiff was entitled to recover possession.
    - Any form of action by which the plaintiff was entitled to recover possession became known as *real actions*; it became settled that only land could be recovered in real action.
    - Any form of action for which the plaintiff could only recover damages (but not acquire possession) became known as *personal actions*.
        - Personal property (e.g., crops) could be claimed by a writ of detinue, but the defendant could satisfy the claim by paying compensation, so there was no guarantee that the good would be returned.
    - Nowadays, things are different, as the right to recover a thing is not limited to real property, removing the original basis for the distinction between personal and real property.
- In the 19th century, the writ system was abolished; the law does not know of a specified, finite number of actions, nor does it recognize that every action corresponds neatly to a specified form of action.

Types of Real and Personal Property

- Real property is divided into:
    - **Corporeal interests**: interests based in possession (i.e., life estate, fee simple, and fee tail).
    - **Incorporeal interests**: non-possessory interests (e.g., easements).

- Personal property is divided into:
    - **Chattels personal** is divided further into:
        - **Choses in possession**: rights to tangible personal property that is capable of being in possession.
        - **Choses in action**: rights to collect a sum of money that is due under a contract, to recover damages for tort, or any other right that can only be enforced by court action; they are *not* rights to things that can be held in your hand (e.g., shares in a corporation, intellectual property).
    - **Chattels real**: another name for the leasehold interest.
        - The right to occupy someone's land under a lease was originally considered to be a purely contractual matter that entitled the leasee to a personal action for damages against the leasor; but now, the lease has been transformed from a contractual right to a propriety right *in rem*.

PROTECTION OF PROPERTY RIGHTS

Property Rights in Alberta

- Private land in Alberta is held under a common grant from the Crown (except land held under Aboriginal title).
    - Albertans have broad rights to own, use, and enjoy property, but these rights are not absolute.
- The Crown may take the property of its subjects in the public interest; the courts cannot question the wisdom of the government and they cannot make the government pay compensation.
    - Early on, property was part of the "Royal Prerogative" (i.e., the Crown could control private property), but now, *any government interference with private property must be authorized by a duly enacted statute*.
        - To be "duly enacted," a statute must fall within an appropriate head of power.
        - e.g., the *Municipal Government Act*, s. 640(1), holds that land use bylaws may prohibit or control the use and development of land and buildings in a municipality.
        - e.g., the *Hydro and Electric Energy Act*, s. 37(1), holds that when an operator requires an estate or interest in land for a power plant or transmission, it may be acquired by expropriation.
    - Compensation claims for the expropriation of property are based in statute, and the courts will assume that compensation is to be paid if legislation is silent on compensation.

Property Right Protections in Canada

- Canada's constitution is bereft of a provision defending property; for this, Canada stands out among nations with written bills of rights.
    - Many argue that this is how it should be, as property owners are not an oppressed minority group, they already enjoy substantial statutory protection, and constitutionalizing property rights may create an irresolvable conflict between private and public interests.
- Private property is not without protection in Canada:
    - The power of government to pass laws governing property is limited by the division of powers.

- *Expropriation Acts* across the country set out the process that must be followed by any expropriating authority and prescribes how the owner must be compensated.
- Certain *Charter* sections weigh on private property; s. 2 protects demonstrators on public property, s. 8 protects against unreasonable search and seizure, s. 15 can be used to challenge discriminatory land use regulations, s. 26 affirms pre-*Charter* rights, and s. 35 recognizes Aboriginal land rights.
- The *Canadian Bill of Rights* protects a right to the enjoyment of property, and the right not to be deprived thereof except by due process of law (though this statute can be overridden by Parliament).
- The *Alberta Bill of Rights* enshrines the right to enjoy property and not be deprived thereof except through due process of law (though this statute can be overridden by the legislature).
- The *Alberta Personal Property Bill of Rights* holds that takings of personalty are of no force or effect unless there is a process in place for the payment of compensation.
    - It also holds that any provincial enactment shall be construed to not infringe on personal property rights unless it expressly declares it operates notwithstanding the Act.
- Canada's power over private property is limited by its international obligations.
    - Canada is a signatory to the 1949 UDHR, which recognizes a right to property and not to be deprived of it arbitrarily (but this has not been implemented by legislation and is not binding domestically).
    - Canada has entered into several Foreign Investment Protection Agreements with trade partners (e.g., NAFTA), which restrict the ability of the parties to take the property of foreign investors, unless doing so for a public purpose and in accordance with due process of law.
- The judiciary has used its influence to protect private property by requiring that the state take property only when specifically authorized by a duly enacted statute.

Jurisdiction Over Property Rights (*Constitution Act, 1867*)

Federal Powers	Provincial Powers
POGG	Property & Civil Rights in the Province 92(13)
Trade & Commerce 91(2)	Provincial public lands & Timber 92(5)
Banking, interest, etc. 91(14) -(16), (18) -(20)	Local Works & Undertakings 92(10)
Patents, trademarks & copyrights 91(22) -(23)	Matters of merely local/private nature in Province 92(16)
Land reserved for Indians 91(24)	Municipal institutions in the province 92(8)

Expropriation

- Under Canadian law, the taking of private land for public purposes without the consent of the owner (expropriation) triggers a right to compensation in accordance with legislation.
- Alberta's *Expropriation Act* sets out the process that must be followed strictly by any expropriating authority and prescribes how the owner must be compensated.
    - The starting point for calculating value is market price to make the owner "whole".
        - Special provisions address cases where a strict market value approach would result in insufficient compensation (e.g., where it would be insufficient for someone to establish themselves elsewhere).
        - Damages can be collected for disturbance, injurious affection (devaluation of the owner's remaining land), and the value of any special economic advantage the owner enjoyed in occupying the land.

    - The Act applies to the compulsory acquisition of not only the title, but also leases, rights of way, or other lesser estates or interests short of full ownership.
    - The Act specifies that the expropriating authority must notify every person with an interest in the land, who can file a notice of objection to question whether the decision is fair, sound, and reasonable.
    - If the parties cannot agree on compensation, the matter is referred to the Land Compensation Board, which can set compensation.
    - The Surface Rights Board can set compensation for access to the surface of land for mineral extraction and installation and maintenance of pipelines, telephone lines, and other prescribed activities.
- The arguments for expropriation are:
    - The Crown has radical title over land in Alberta anyway.
    - The needs of the many outweigh the needs of the one.
    - Expedience and the assembly/holdout problem.
        - If a private actor needs to buy the property of 20 landowners, each landowner has an incentive to hold out and demand an exorbitant sum to let the project proceed, handicapping the project; while private actors can get around this by negotiating in secrecy (covering up that landowners have veto power over a project), the government cannot, owing to the need for transparency and debate.
- The case for compensation based on market value is:
    - Equity; if the public shares in the benefits of the project, they should share in the costs.
    - Practicality; trying to gauge how each person subjectively values their property is not practical.
    - Economic efficiency
        - With compensation, the government is forced to weigh public interest against private interest; only when the former outweighs the latter will the government take the land.
        - Compensation provides insurance to property owners they that will have recourse if their property is confiscated, promoting investment.

Sisters of Charity of Rockingham v R (1922), 67 DLR 209 (PC)

Issue:

- Can one claim compensation on the ground that a portion of their property, which has not been taken for the construction of public works, has been "injuriously affected" by the construction of a railway shunting yard, which extends over land which have been taken from them under statutory powers?

Holding: (Lord Parmoor)

- No; the right to compensation does not exist at common law, it must be found in statute.
    - No owner of lands expropriated by statute for public purposes is entitled to compensation on the ground that his land is “injuriously affected,” unless he can establish a statutory right.

AG v De Keyser's Royal Hotel Ltd, [1920] AC 508 (HL)

Facts:

- The owner of De Keyser's Royal Hotel sought compensation for the compulsory occupation of certain parts of their hotel by the War Office acting on behalf of the Crown for purposes connected to WWI; the Crown holds that compulsory occupation was an exercise of the Royal Prerogative and gave no right to compensation.

Issue and holding:

- Is the hotel entitled to compensation? **YES**

Rationale: (Lord Atkinson)

- The legislature cannot fairly be supposed to intend, without clear words to the contrary, that one's property should be unfairly confiscated for the benefit of others without any compensation.
    - Therefore, *unless the words of the statute clearly so demand, a statute is not to be construed so as to take away property without compensation*.
        - Parliament is free to override this principle if it sees fit by expressly denying compensation in a statute (i.e., the initial presumption can be rebutted).

Manitoba Fisheries Ltd v R, [1979] 1 SCR 101

Facts:

- The *Freshwater Fish Marketing Act* granted the Freshwater Fish Marketing Corporation a commercial monopoly in the export of fish from Manitoba and other participating provinces. The Act put the appellant Manitoba Fisheries Ltd, who bought and sold fish to customers outside of Manitoba, out of business and rendered their physical assets worthless. The Act had provisions for providing compensation for assets made redundant by it. The appellant brought an action for loss of goodwill (i.e., established reputation) suffered because of the Act.

Issue and holding:

- Did the *Freshwater Fish Marketing Act* amount to a taking requiring compensation? **YES**
    - The appellant was entitled to compensation equal to the fair market value of its business as of May 1, 1969 minus the residual value of its remaining assets plus 5% interest per annum.

Analysis:

- To determine whether a taking occurred, two conditions must be met: (1) what the claimant lost must be "property" and (2) the property must have been acquired by the Crown.

Rationale: (Ritchie J)

- The legislation deprived the appellant of its connection to its customers (i.e., goodwill) and acquired it.
    - Goodwill, although intangible, is part of the property of a business just as much as the premises, machinery, and equipment employed in the production of the product.
- There is nothing in the Act that provides for the taking of property by the government without compensation, and according to *De Keyser's*, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

Notes:

- Kaplinsky believes that the court arrived at the right result but in the wrong way because the Crown expressly granted the right of compensation for facilities that are rendered without value, and the canons of construction can be used to infer that this inclusion results in the denial of compensation for what was not included (loss of goodwill).

R v Tener, [1985] 1 SCR 533

The Teners had Crown-granted mineral claims to an area in Wells Gray Park, but eventually, Wells Gray became a provincial park and they were denied the right to conduct development work there; the Teners sued for compensation.
Unlike *Manitoba Fisheries*, where the government expropriated goodwill, the government in this case did not formally take anything, merely obstructing the Teners from getting at minerals underground (which they continued to own).

- However, the Supreme Court held that this was a rare case of regulatory taking requiring compensation.

De Facto Expropriation

American Approach

Per Se Takings

- The "*per se*" test of takings requires compensations in the presence of either:
    1. Physical invasion or intrusion (from *Loretto v Teleprompter Manhattan CATV Corp*)
        - Requires compensation no matter how minute the intrusion.
    2. Denial of all economically viable uses of land (*Lucas v South Carolina Coastal Council*)
- The *per se* test is applied first, and if a *per se* taking has not occurred, we consider the regulation *ad hoc* to determine whether it has gone too far.

Lucas v South Carolina Coastal Council, 112 S Ct 2886 (1992)

Facts:

- The plaintiff purchased two beach lots in South Carolina, but then the state passed the *Beachfront Management Act*, which had the direct effect of barring the plaintiff from erecting any permanent structures on his lots.

Issue:

- Did the legislative measure constitute a taking? **YES** (compensation required)

Rationale: (Scalia J)

- The regulation at issue denies all economically beneficial or productive use of land, which is the equivalent of expropriation from the owner's point of view.
- The state that deprives land of economically beneficial use could resist compensation only if logical inquiry shows that the proscribed use interests were not part of the title to begin with.

Takings *Ad Hoc*

- *Mahon* provides an *ad hoc* approach to discerning when regulation is compensable:
    1. Extent of the harm to the property owner (Holmes)
    2. The nature of the activity (Brandeis); if it is nuisance-like, this will weigh against compensation since a landowner does not have the right to such use in the first place.
    3. Reciprocity of advantage (Holmes); if the regulation provides benefits to the property owner, this will weigh against compensation.
- *Penn Central Transportation Co v New York City* also provided an *ad hoc* test distilling three criteria for deciding when regulation constitutes a taking:
    1. The economic impact of the regulation on the particular owner.
    2. Whether it interfered with the investment-backed expectations of the owner.
    3. The character of state action; if regulation results in a mere adjustment of benefits and burdens in economic life to promote the public good, this will weigh against a finding of a taking.

Pennsylvania Coal Co v Mahon, 260 US 393 (1922)

Facts:

- In an 1878 deed, the plaintiff granted to the defendant the surface rights to a parcel of land, but retained the subsurface, support, and mineral rights to the land, and the defendant accepted any risk from damages resulting from mining below the property. In 1921, Pennsylvania passed the *Kohler Act*, which prohibited the mining of coal in such way as to cause the subsidence of any home without compensation from the owner (i.e., it vested "support rights" in the surface owners, preventing the ability of the plaintiff to mine for coal under the property).

Issue and holding:

- Did the Kohler Act constitute a taking requiring compensation? **YES**

Rationale: (Holmes J)

- The Act, in taking away the plaintiff's ability to mine coal under the defendant's home, had the same effect as appropriating their right to do so; thus, the 5th Amendment demands that compensation be paid.
    - While property can be regulated to an extent, if regulation goes too far, it will be considered as a taking.
- A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Dissent: (Brandeis J)

- Restrictions imposed to protect public health, safety, or morals from danger threatened is not a taking, because people do not have the right to cause such danger in the first place.
    - Plus, the property remains in the possession of its owner; the state has not appropriated it or made use of it, and if the restrictions are removed, the owner will again be free to enjoy the property as before.

Canadian Approach

- If state regulation removes the ability of an owner to exercise their bundle of property rights (i.e., constructive or regulatory taking), there are *no* cases or statutes that outline whether and how much compensation is to be paid.
    - Compensation is only required where the government (1) acquires the title to land from its owner or (2) deprives the owner of all reasonable uses of the land.
        - From an equity and efficiency standpoint, this type of regulation should be treated the same as outright expropriation.

Mariner Real Estate Ltd v Nova Scotia (AG), 1999 NSCA 98

Facts:

- In 1989, Nova Scotia passed the *Beaches Act*, which prohibited the constriction of any development on beaches unless authorization from the Minister was obtained. The plaintiff sought such permission but was denied. They claimed that their lands had been *de facto* expropriated.

Issue:

- While regulation leaves the plaintiff's title to their land untouched, does it nevertheless entitle the plaintiff to compensation? **NO**

Analysis:

- In Canadian courts, restrictive land use regulation that leave paper title untouched have almost without exception been found not to constitute compensable expropriation.
    - To constitute a *de facto* expropriation, there must be a confiscation of *all reasonable private uses* of the lands in question, assessed in relation to the nature of the land and the reasonable uses to which it has been put.
        - The effect of regulation on the uses of land will be a lot stronger when the land is suited for residential development as opposed to, say, dune land.
- Where a regulatory scheme is imposed on land, its *actual application* in the specific case must be examined, not the potential, but as yet unexploited, range of possible regulation which is authorized.

Rationale: (Cromwell JA)

- The decline in value of land in this case, even though drastic, is not the loss of an interest in land requiring compensation under the *Expropriation Act*.
- Preclusion of residential development is not the extinguishment of the bundle of rights associated with ownership; hence, the plaintiff was not deprived of land within the meaning of the *Expropriation Act*.
- There is no suggestion that the province acquired title to the land in question; the beach remains private property.

    - The enhancement of the value of public land is not the same as the acquisition of an interest in land; even if it was, there is no evidence that the economic value of the Crown's land was enhanced.
- The SCC in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.* (1997) accepted the general proposition that, under our law, owners caught up in the planning process, but not expropriated, must accept the loss.

Note:

- By refusing compensation, which may be characterized as leading to an unjust result, the court might be argued to reject the principle from *De Keyser's Royal Hotel* by attributing unfair intention to the legislature.

Canadian Pacific Railway Co v Vancouver (City), 2006 SCC 5

Facts:

- In 1886, the Crown granted CPR a corridor of land. In 1902, a rail line was built on the corridor but owing to reduced traffic, CPR discontinued rail operations on the line. CPR wished to arrange a sale of the land for residential and commercial use. The City of Vancouver made it clear that it would not buy the land and designated it as a public thoroughfare, effectively freezing the redevelopment potential of the corridor and confining the CPR to uneconomic uses of the land. CPR argued that this constituted an effective taking of land.

Issue and holding:

- Did the by-law constitute a *de facto* taking of land for which compensation is required? **NO**

Analysis:

- For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it and (2) removal of all reasonable uses of the property (see *Mariner Real Estate*, *Manitoba Fisheries*, and *Tener*).
    - *Note*: a beneficial interest is the right to receive benefits on assets held by another party.

Rationale:

- Neither requirement for *de facto* taking is made out here:
    - The City has acquired no beneficial interest related to the land; they have only gained some assurance that the land will be used or developed in accordance with its vision.
    - The by-law does not remove all reasonable uses of the property; it does not prevent CPR from using its land to operate a railway, it does not prevent maintenance from being conducted on the existing track, and it does not prevent CPR from leasing the land for use in conformity with the by-law.
- Even if the facts of the case supported an inference of *de facto* taking at common law, that inference has been negated by s. 569 of the *Vancouver Charter*, which specifies that property affected by a bylaw should not be deemed to have been taken; since the *Expropriation Act* only guarantees compensation in the case of a taking, no compensation is required here.

Notes:

- This decision confirms that Canadian courts will continue to play a small role in balancing the interests of private property owners and public authorities.

INTRODUCTION TO LAW AND ECONOMICS

WHAT IS LAW AND ECONOMICS?

- Law and economics studies the relationship between legal norms and incentives. It allows us to:
    - *Predict* private and public agents' decisions (positive)
    - *Explain* legal rules and legal institutions (positive)

    - *Propose* legal reforms to improve social welfare (normative)
- Law and economics assumes that individuals are rationally self-interested; they have subjective ends that they pursue to the best of their abilities.
    - While people do not always make rational decisions, when we take a big sample size, rationality becomes a better explainer of human behaviour.
    - Of course, human rationality is "bounded," as humans tend to make mistakes and errors of judgment owing to limits in thinking capacity, available information, and time.
- Law and economics chooses legal rules with reference to which ones provide the greatest utility overall.
    - It assesses utility in terms of willingness to pay, which is an objective indicator that aggregates all of our competing preferences and values.
        - Gain is understood as what one would pay to move from A to B; loss is understood as what one would pay to avoid a move from A to B.
    - A focus on maximizing utility might create inequality in the distribution of happiness in society.
        - However, the tax system can be used to achieve a just level of distribution, even though it will reduce the overall level of utility in society.

THE MARKET PARADIGM

- Bargains are efficient because they increase overall utility.
    - e.g., if I buy a TV from Best Buy, the trade is efficient because I have been made better off with the TV (or else, why would I buy it?) and Best Buy is made better off with my money (or else, why would they accept it?); nobody is made worse off from this.
    - However, the free exchange of goods and services depends on contract law and property law; property law enjoins one from reaping where they have not sown; contracts facilitate exchange.

LAW AND ECONOMICS OF PROPERTY RIGHTS

Pigou on Externalities

- In 1920, Arthur Pigou argued that laissez-faire fails due to externalities; firms disregard the social costs of manufacturing (namely pollution), which results in inefficient production.
    - e.g., if the adoption of a technology reduces pollution costs by $20 but increases production costs by $5, the producers will not adopt the technology (and will continue to produce inefficiently) because they will incur all the costs of it but the community will receive the benefits.
    - Pigou suggests that the state must intervene to correct the market and produce an efficient allocation using taxes, incentives, and regulations.
- Critiques:
    - It is impossible for any government to obtain all information to make an optimal allocation of resources.
    - Government intervention itself entails costs; if the cost of government intervention is more than the loss created by externalities, then government intervention is inefficient.
    - The Pigouvian solution encourages rent-seeking, as economic actors are given incentives to manipulate the social or political environment rather than create new wealth (e.g., lobbying the government).

The Coase Theorem

Sturges v Bridgman, (1879), 11 ChD 852 (CA)

Facts:

- The plaintiff doctor moved next door to the defendant confectioner and built a small structure in which to conduct consultations. The defendant's mortars and pestles created a loud noise that impaired the plaintiff's enjoyment of his land. The plaintiff hence sought an injunction.

Issues and holding:

1. Can the fact that the plaintiff "came to the nuisance" by building a structure be used to deny the injunction? **NO**
2. Did the character of the area lend to the idea that there was a nuisance? **YES** (injunction allowed)

Rationale:

1. The doctor's right to enjoy his land was not lessened by the defendant's longstanding practice.
2. The activity took place in a residential neighbourhood, and a reasonable person would find this type of activity to be a nuisance in such a neighbourhood.
    - If the area in question was industrial, there would be no nuisance.
    - This allows people to enjoy their land in residential areas while protecting industrial production in non-residential areas.

Ronald Coase, "The Problem of Social Cost" (1960)

- In 1960, Ronald Coase took issue with Pigou's approach.
    - Pigou's approach sees conflicting activities through the lens of perpetrator and victim.
        - However, externalities are reciprocal: either A is allowed to harm B or B is allowed to harm A.
            - The goal should be to avoid the more serious harm (i.e., maximize utility).
    - When a firm's conduct imposes a social cost, Pigou recommends making that company liable for the harm, taxing the company, or excluding the company from areas where they could cause harm.
        - However, it is only desirable to impose these costs when their value to the community is greater than the value of the commercial activity lost.
            - Thus, if there is market failure, this does not automatically mean we should use government intervention to correct it.
- **Coase Theorem**: if property rights are clearly assigned and costless market transactions allow the exchange of property rights, the market will produce an efficient allocation of property rights.
    - In other words, decisions concerning liability for damage do not affect the allocation of resources.
    - Externalities are not the cause of market failure since you can get an efficient outcome even when one party harms another.
    - The legal allocation of property rights affects merely who pays whom and how much; thus, property rights could be crafted to shape material distributions.
    - In *Sturges v Bridgman*, the doctor was granted an injunction, but it would have been possible to modify the arrangements envisaged by the legal ruling by means of a bargain between the parties.
        - The doctor would be willing to waive his right to enjoin the confectioner for a sum greater than the loss of income he would experience by curtailing his activities, the cost of relocating, or the cost of building a noise barrier. The confectioner would be willing to pay an amount less than the cost of relocation or the fall in income curtailing his activities or changing his operations. The outcome depends on whether the continued use of the machinery adds more to the confectioner's income that it subtracts from the doctors.

        - Consider if the confectioner won the case; if the doctor's income would have fallen more from the operation of the machinery than it added to the income of the confectioner, there would be room for a bargain whereby the doctor pays the confectioner to stop using the machinery.
        - The determination of whether the confectioner would be enjoined by operating his machinery depends on the respective financial interests of the parties, not the legal allocation established through the litigation.

Transaction Costs

- Transaction costs can impair efficient exchanges; some of these transaction costs include:
    - Information costs
        - Include the costs of purchasing information (e.g., buying a book or report), searching for information, communicating for the purposes of obtaining information, analyzing information, and (sometimes) travelling to obtain information.
            - "Information" might include who is responsible for an externality, the monetary value of a property right, the legal process for transferring a property right, etc.
    - Collective action problems (increase with the number of parties on any one side of a negotiation)
        - Free-riding
            - When multiple parties on one side of a negotiation all benefit equally from it, each of them has the incentive to free-ride by withholding payments and withdrawing from negotiations in hopes of receiving the benefits regardless.
        - Holdouts
            - Once all the property owners except for one have accepted the Coasean solution, the last party is able to demand more compensation from the opposing party to part with the property right; knowing this, the other owners also have the incentive to demand more, leading to the unraveling of the bargaining process.
    - Strategic bargaining
        - Parties may bluff, getting their opponents to underestimate how much they value a property right.
        - Parties may exaggerate how much they value a property right or misrepresent their damages.
        - Parties may irrationally reject reasonable offers to garner a tough reputation for future negotiations or express disdain for what they deem to be an unfair outcome.
    - Endowment effect
        - People value something more once they have possession of it, so asking price exceeds offer price.
    - Social costs
        - Mere awkwardness and animosity may dissuade parties from bargaining.
    - Non-productive costs
        - The costs of drawing up, monitoring, and enforcing a contract may be too high.
    - Owing to differences in relative wealth between the two negotiating parties, one party might not have enough capital available to buy off the other.
- To minimize or avoid transaction costs, the law should try to mimic results that would be produced by the marketplace as close as possible.
    - e.g., assume courts assigned the right to pollute to a factory, but the residents of a city valued the right to the air more; since it would be unlikely that those residents would be able to coordinate to pay for the rights to the air the courts should just assign rights to the air to the residents to maximize economic efficiency.
- Remedies can be chosen to maximize the chances of efficient allocation occurring.

- A "property rule" (injunction) should be chosen when transactions are likely to be smooth (i.e., less costly than the courts).
    - In this case, property rights cannot be acquired without consent, and the price at which the entitlement is shifted is determined by bargaining.
- A "liability rule" (damages) should be chosen when bargaining is likely to be costly and courts more effective.
    - In this case, property rights can be acquired without consent, but the price at which the entitlement is shifted is determined by the courts.
    - Courts have costs too, entail long delays, and can get efficient allocation wrong.

THE BOUNDARIES OF PROPERTY

PUBLIC PROPERTY AND THE RIGHT TO EXCLUDE

- As J Waldron noted, our society saves the homeless from the prospect of being excluded from everywhere by carving out some areas to be held for common use.
    - The liberty of the homeless to satisfy basic needs is deprived when the majority regulates public places to restrict the ability of homeless people to perform elementary human activities.
    - Waldron states that since we seem willing to allow homelessness to continue, it is frightening that we seem hesitant to allow the homeless to act as free agents and satisfy their needs.
- On the other hand, RC Ellickson argues that checks on social misconduct do not restrict freedom but provide the foundation for it; to be a truly public space for socialization, a space must be orderly enough to invite the majority.
    - Ellickson argues that we should address the issue of street nuisances by developing three codes of varying stringency governing street behaviour to be enforced with abatement orders and minor penalties.
    - These policies would respect the freedom of the destitute while allowing the propertied to enjoy public spaces; after all, the disorderly are not the only ones with liberty interests at stake.

Victoria (City) v Adams, 2008 BCSC 1363

Facts:

- Victoria enacted a prohibition against erecting temporary overhead protection in the city. The city only has 104 shelter beds (expanding to a maximum of 326) to accommodate an estimated 1000 to 1500 homeless people. Expert evidence shows that exposure to the elements without adequate protection poses several risks to the homeless, some of which are deadly, and that overhead protection is the only way to adequately protect against these risks.

Issue:

1. Does the prohibition infringe upon the rights of the homeless to life, liberty, and security of person in a manner not in accordance with the principles of fundamental justice? **YES**
2. If yes, is the infringement justified under s. 1 of the *Charter*? **NO**

Rationale:

1. The bylaw is arbitrary and overbroad and is thus inconsistent with the principles of fundamental justice.
    - Given the housing situation in Victoria, use of public property for elementary tasks is unavoidable.
    - The government could have mandated that overhead shelters be taken down in the morning, or they could have set aside certain places of public areas for the erection of overhead shelter.
    - The prohibition imposes serious health risks on a vulnerable population, and the government cannot prohibit certain activities on public property if doing so involves a deprivation of right to protect one's bodily integrity.

- Contrary to the assertions of the City, the defendants are not asserting a private property right over public spaces; they do not claim to exclude anyone from or determine the use of these spaces.

2. The impact of the provisions is disproportionate to the advantages.

Notes:

- Kaplinsky argues that the result in this case could have been achieved by applying the reasoning in *Dwyer v Staunton* that the right to exclude does not extend to a total prohibition in the circumstances described.

R v Banks, 2007 ONCA 19

The court held that the *Safe Streets Act*, which prohibited soliciting "in an aggressive manner," was constitutional on the grounds that, while it did infringe free expression, the objective of regulating the interaction of pedestrians and vehicles is important enough to warrant overriding the right and the restrictions on free expression were not too oppressive. After all, people could continue to beg or provide services in exchange for alms in ways that were not prohibited by the statute.

LIMITS ON THE RIGHT TO EXCLUDE

- Boundaries are often thought of as clear, as dictating the agenda within the property boundaries, and as aligning the costs and benefits within them.
    - However, boundaries are often fuzzy, are physically and legally permeable (some costs and benefits transgress property boundaries), and entail costs (defining, monitoring, enforcing).

- **Nuisance**: a tort that protects use and enjoyment of land; to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*.
    - Employs a standard, not a rule (i.e., a certain standard must be met for trespass to be found).
- **Trespass**: a tort that protects the right to exclude.
    - Employs a rule, not a standard (i.e., no standards have to be met for trespass to be found).

Fontainebleu Hotel Corp v Forty-Five Twenty-Five, Inc, 114 So.2d 357 (Fla. Dist. CA 1959)

Facts:

- The plaintiff sought to enjoin Fontainebleu from proceeding with construction of an addition onto its hotel on the grounds that it would cast a shadow onto the plaintiff's premises and impair its use and enjoyment by their guests. The plaintiff argued that construction of the addition was actuated by malice and ill will.

Issues and holding:

- Does the defendant have a right to light and air that justifies halting construction of the addition? **NO**

Analysis:

- A property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property which is *recognized and protected by law*, and so long as his use is not such a one as the law will pronounce a nuisance.

Rationale:

- Absent a contractual or statutory obligation, a landowner has no legal right to the free flow of light and air across their land, even if the free flow of light and air has been conferred out of spite.
    - There is no basis for holding that the plaintiff had an easement for light and air; freely enjoying them for many years does not entitle someone to them.
    - If public policy demands otherwise, then representatives ought to change this, not judges.

Notes:

- Illustrates that you are not always protected in the boundaries of your property; not every harm is a nuisance.

Dwyer v Staunton, [1947] 4 DLR 393

Facts:

- The road running past the plaintiff's farm was covered by snow drifts, making it impassable. A path was cleared by a bulldozer, part of which went across the plaintiff's land. The defendant crossed on this path and was given a warning by the plaintiff not to attempt the cross again. When the defendant did so again that evening, as the road was still not passable, the plaintiff refused to allow him, and the cars behind him, to pass. The defendant thus drove through the barbed wire gate and was followed by the other vehicles.

Issue:

- Did the defendant, under the circumstances, have the right to proceed over the land of the plaintiff? **YES**
    - As the road was impassable, he could proceed so long as he took care not to cause unnecessary damage.
- If yes, did the defendant cause any unnecessary damage to the plaintiff in exercising that right. **NO**

Rationale:

- Per the maxim *salus populi est suprema lex*, private mischief shall be endured rather than public inconvenience.
    - In *Taylor v Whitehead* (1781), it was held that if a tract of a highway is impassable, it is for the general good that people should be entitled to pass in another line.
    - An interference with private property can be justified by the immediate urgency of the occasion, with due regard for public safety and convenience.
- No crops were killed by the defendant's actions as the ground was frozen and the bulldozer already went through (which would have been most likely cause of damage) and left a coating of snow and ice on the ground.
- The damage to the wire gate was trivial, and the plaintiff brought the damage to the gate upon himself given the necessity of the defendant's passage.

Ratio:

- A traveller who is lawfully using a public road has the right to go upon private lands at places where the public way is impassable but must take care not to cause any unnecessary damage.

Notes:

- Demonstrates limits on the right to exclude (also consider the *Surface Rights Act*, the *Hydro and Electric Energy Act*, and the *Alberta Human Rights Act*).

LAND BOUNDARIES

Settlement of the Prairies

- In 1871, the Dominion Lands Survey commenced, subdividing Crown lands into parcels that could easily be conveyed.
- In 1872, the *Dominion Lands Act* was passed.
    - It provided the legal authority under which the Crown granted lands to individuals, colonization companies, the HBC, railway companies, municipalities, religious groups, First Nations reserves, and National Parks.
    - It aimed to encourage settlement of the Prairies and prevent the area from being claimed by the US.

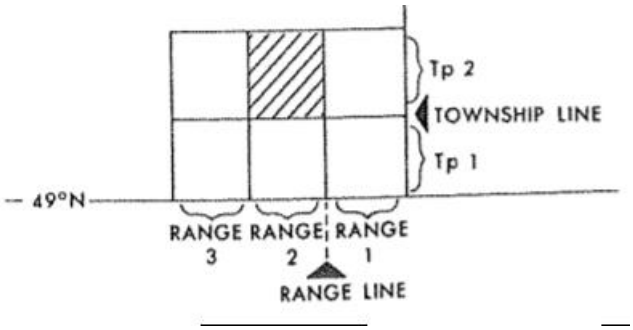
Dominion Lands Act, SC 1872, c. 23

The Township System, ss. 3-15

3(1) Dominion lands shall be laid off in quadrilateral townships, containing 36 sections of 1x1 mile (except in the case of those sections rendered irregular) together with road allowances between all townships and sections.

4 The lines bounding townships on the east and west sides [range lines] shall, in all cases, be true meridians [parallel to the Prime Meridian], and those on the north and south sides [township lines; parallel to the equator] shall intersect circles of latitude.

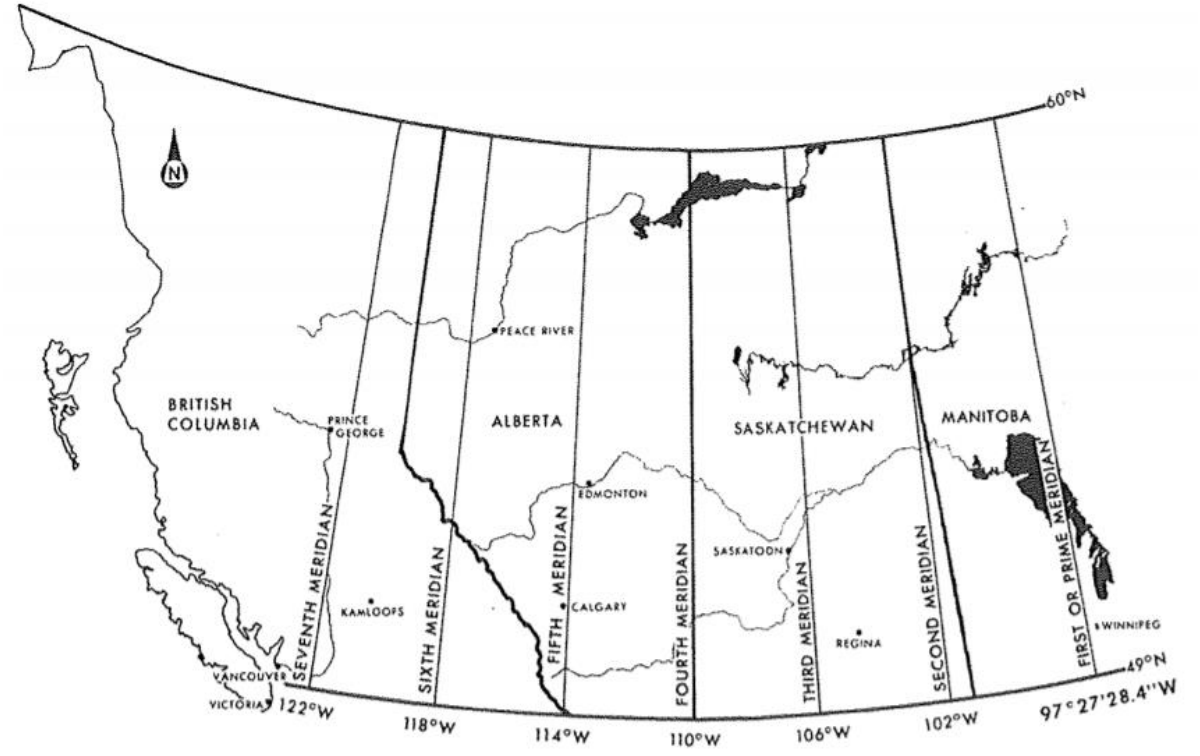
- **Township**: the east-west strip between consecutive township lines, which are placed about 6 miles apart.
    - Townships are numbered 1, 2, 3, 4… with township 1 referring to the 6-mile-wide strip parallel to the US border.
- **Range**: the north-south running strip between consecutive range lines, also about 6 miles apart.
    - Ranges are also numbered 1, 2, 3, 4… with range 1 parallel to a meridian.



- The striped parcel to the right would be identified as township 2 range 2, west of the first meridian, and would more commonly appear as 2-2-W1.

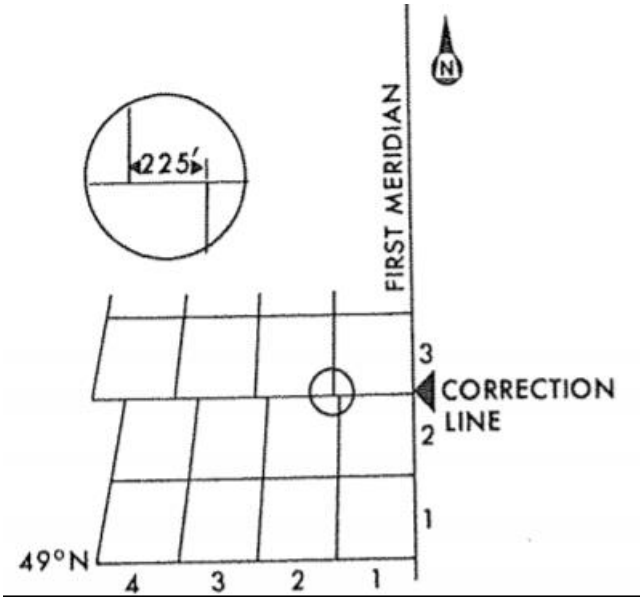
5 The townships shall be numbered in regular order, northerly from the US border, and shall lie in ranges numbered, in Manitoba, east and west from a certain meridian line styled the "Principal Meridian," drawn northerly from the said 49th parallel at a point ten miles westerly from Pembina.

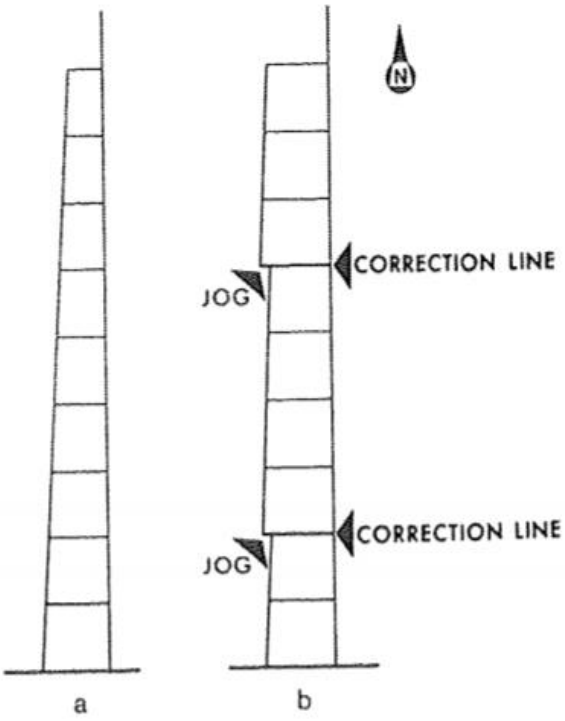
- The first meridian was established in 1869 at 97° 27' 28.4" W because it had marked the western limit of settlement up to that date.
- As they moved westward, surveyors established new meridians numbered 2-7.



9 The correction lines [those where the "jog" resulting from the want of parallelism of meridians is allowed] will be as follows: on the second township line and on every fourth township line thereafter.

- Due to the curvature of the Earth, the top of any township is slightly shorter than its bottom; if no attempt is made to correct this, northern townships will be significantly smaller than the southern ones.
- At each correction line, the range line is displaced a certain distance (jog), which increases the area of the townships north of each correction line and compensates somewhat for convergence.





15 Legal subdivisions as applicable to the survey, sale, and granting of the Dominion lands shall be as follows: a section of 640 acres, a half-section of 320 acres, a quarter-section of 160 acres, a half quarter-section of 80 acres, and a quarter quarter-section of 40 acres.

- Each quarter-section was described by its compass direction (e.g., south-west quarter).
- The quarter quarter-section (legal subdivision) was normally employed near urban centres and is often used in describing the mining sites of mineral and oil deposits.
    - Infrequently, legal subdivisions were divided into quarters described by compass direction (e.g., the south-west quarter of legal subdivision 4 of section 5 in township 1 range 30, west of the first meridian → SW of LSD 4-5-1-30-W1).

- Sometimes, chain measurements were inaccurate and survey instruments were in error; when errors were discovered, attempts were often made to average out the mistakes.
- When townships encroached on bodies of water, they were short-changed in area, creating partial sections.
- There were several areas that were not part of the Dominion Land Survey system.
    - Dominion surveys did not encroach on reserves, so partial sections arose at reserve boundaries.

- River lots were established before the Dominion surveys and were not resurveyed; they consisted of long narrow tracts.
- Lands used for HBC posts were surveyed according to plans drawn up for the local sites.
- In small towns, townships were not subdivided according to the Dominion system; they employed a settlement or group plan.

- For administrative purposes, townships were grouped into larger units (i.e., “municipal districts” in Alberta).



Homesteading Provisions, s. 34

34 Any person who is the sole head of a family, or any male who has attained the age of 18, is entitled to be entered for 160 acres or less of unappropriated lands for the purposes of securing a homestead.
A person obtaining such homestead entry shall be liable to the forfeiture thereof should he not become a bona fide occupant of the land within two months of the date of entry and continue to occupy and cultivate it.

- This feature of the *Dominion Lands Act* echoed the American homestead system by offering ownership of 160 acres of land free, except for a small $10 registration fee.
- Applicants needed to live on the lot and improve it (to prevent speculators from gaining control of the land).

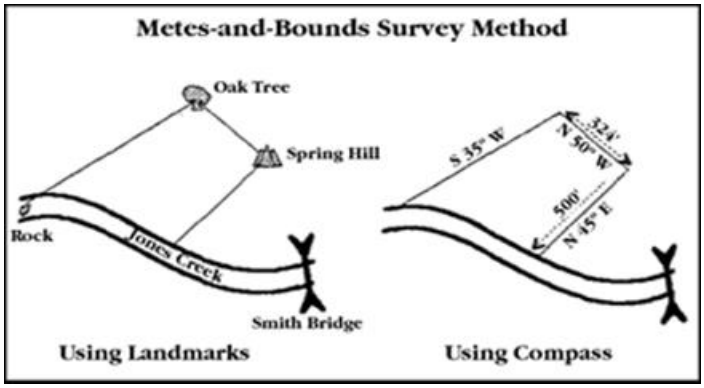
(11) At the expiration of three years the settler, upon proof that he has resided upon and cultivated the land for three years after filling the affidavit for entry, shall be entitled to a patent for the land.

Describing Land

- The location of a plot of land is described in a conveyancing document; that delineation is called a *legal description*.

Metes and Bounds

- Prior to modern survey techniques and land title registration systems, property was described using "metes and bounds," which delineated the location of the perimeter starting at one corner and describing from that vantage point various physical lengths and markers.



Public Land Survey

- The Dominion Land Survey created a large cadastral image wherein land could be identified by reference to its placement within that cadastre (e.g., the Alberta Township System)

- When land has been subdivided in irregular ways, as in a city, town, village, or acreage subdivision, the ATS description is replaced by a survey plan in which parcels are defined by plan, block, and lot number.
    - The owner of a large parcel can subdivide it, file a plan of subdivision for approval, and if it is approved (i.e., if it meets all the statutory requirements), every lot can subsequently be conveyed with reference to that plan.
    - Units in a condo are referenced by plan and unit number.

- No matter what method of description is used, there is room for error.
    - The legal description is not always controlling; it is one piece of evidence used to determine if it should be taken as an accurate reflection of the intention of the parties to the transfer.
    - The legal description may be ambiguous.
        - Extrinsic evidence may aid in determining what it meant and the best evidence is that which people are least liable to mistake: natural boundaries (given the most weight), lines actually run and corners actually marked at the time of the grant, and courses and distances.
            - Statements of area are generally accorded the least evidential weight.
    - A purpose-built monument serving as the starting reference point may not be able to be located, or it may have been placed in error at the time of initial survey.
- The intended boundary lines applicable in the sale of property are usually stated in a transfer document but when property is sold it is common for the purchaser to require a survey of the lands to determine whether the boundary markers are in the right places and whether the size of the lot specified in the agreement is accurate.
    - Plus, it may be necessary for the purchaser to know whether all zoning and planning requirements have been met (e.g., those which require structures to be set a certain distance back from the boundaries).

Title and Registration

- The difficulty with the common law system of land registration was that since it did not use a central registration system, unknown interests could attach to title and interfere with the rights of a legitimate purchaser or seller.
- In 1887, the Torrens title system was implemented in Canada under which the government guarantees the accuracy of title by becoming the custodian of all land titles and every interest registered against property.
    - It prioritizes registration of title in a centralized database; in Alberta, that database is the Alberta Land Titles Office, operating under the legislative authority of the *Land Titles Act*.
    - The Land Titles Office ensures that only legally valid changes are made to certificates of title in Alberta by creating strict processes and procedures for registering encumbrances on title.
        - The Registrar of Titles is responsible for compensating those whose title is lost due to fraud or incomplete record keeping.
    - The benefit of this system is that it is considered an accurate and complete reflection of title and ownership does not need to be proven through a series of deeds passed along from one owner to the next.
    - Completing a land titles search allows Albertans to get specific information about registrations on a property.

WATER BOUNDARIES

Riparian Rights

- At common law, ownership of lands abutting water carries with it riparian rights, which are modified by statute.
    - One right is access to the water, though the riparian owner cannot moor a vessel indefinitely on the water.

- Another right is the right to appropriate an unlimited amount of water for 'ordinary' uses, such as domestic needs, watering garden plants, or animal husbandry.
    - 'Extraordinary' uses include manufacturing and irrigation; they are limited to protect the riparian rights of owners downstream.
    - Alberta statutory law confirms this but limits the amount of water that can be taken from a river to 1250 cubic meters per year per household; it also limits extraordinary uses of water unless authorized pursuant to a statutory scheme.

Avulsion and Accretion

- When land is bound by water, changes to the shoreline will inevitably occur; this can bring changes to property.
    - According to *Robertson v Wallace*, rapid changes to the shoreline (*avulsion*) were held not to change the size of a property holding, even though the description of the land used the body of water as a reference point.
        - Therefore, the original location of the river (not its current location) still defined the boundary.
        - A sudden retreat of water leaves the boundary as it was (*British Columbia (AG) v Neilson*).
    - At common law, a riparian owner is entitled to the extension of land (*accretion*) through gradual and imperceptible changes to a water body that cannot be observed moment to moment or hour to hour.
        - The legal effect of accretion in Alberta depends on the grant of land.
            - e.g., If a grant describes land as "All that portion of section 16 not covered by the waters of Beaver Lake," the retreat of the lake will extend the grantee's property. However, if the grant describes land without reference to the body of water, the retreat of the lake would have no legal effect for the owner (though this is rare).
            - Accretion can be excluded in a grant.
        - Accretion may also occur through non-natural forces (e.g., the construction of a dam upstream).
        - Explanations for this include:
            - The law does not concern itself with trifling matters (*de minimus non curat lex*).
            - It may have made it easier to locate a boundary when the forces of nature have obscured the original location; this type of evidentiary problem is less likely when changes are abrupt.
            - It maintains the water's edge as the boundary between private and public property.
        - Hence, the conveyance of land abutting water is subject to changes to the shoreline which may take place over the years.

Erik v McDonald, 2019 ABCA 217

Facts:

- The appellants constructed a fence across the water of the Pederson reservoir (which was created when a dam expanded a small natural stream) between the north and south parts of their parcel, which had the effect of isolating the small bay of the reservoir which borders the respondent's lands, preventing them from using an area of the reservoir for recreational purposes.

Issue and holding:

- Are the appellants entitled to have a fence on that portion of their property line that is underwater? **NO**
    - The construction of the dam had the effect of vesting the bed of the Pederson reservoir in the Crown; the appellants and respondents have equal common law riparian rights to access the reservoir for recreation.

Rationale:

- s. 3(1) of the *Public Lands Act* holds that the title to the beds and shores of naturally occurring bodies of water is vested in the Crown.

- *Note*: s. 17(2) of the *Surveys Act* states the bed and shore of a body of water is that land covered by water to wrest it from vegetation or mark a distinct character on the vegetation.

- The reservoir was the result of a human act, but s. 3(3) of the *Public Lands Act* holds that a body of water does not cease to be naturally occurring because it has been diverted by human acts.
  - *Note*: If the water body was not naturally occurring, the bed of the water body would belong to the holder of the title to the land, even though the water would still belong to the province.
  - *Note*: If the dam was ever removed, and the water retreated to its original banks, the flooded land would revert to the adjacent owners through the doctrine of accretion and recession.

Concurring: (Wakeling JA)

- An owner of lands abutting a man-made body of water that is a permanent part of the landscape has the same riparian rights as another owner whose land abuts a natural water body.
  - The appellants cannot unreasonably interfere with the respondents' access rights.

SUBSURFACE RIGHTS

Edwards v Sims, 24 SW 2d 619 (Ky CA 1929)

Facts:

- Onyx cave was developed as a tourist attraction by Edwards, on whose land a man-made entrance to the cave was located. 1/3 of the cave was thought to be below the lands of Lee, who had no access to the cave from his land. Lee sued Edwards for trespass, and a dispute arose over whether a survey of the cave could be ordered. Sims was the judge that decided that issue, and against whom Edwards brought the proceeding.

Issues and holding:

1. Would Edwards be guilty of trespass on Lee's land if his cave did extend beneath his land? **YES**
2. Can Sims compel Edwards to permit a survey of the cave? **YES**

Rationale: (Stanley C)

1. A landowner is entitled to the free and unfettered control of his own land above, upon, and beneath the surface.
   - *Cujus est solum, ejus est usque ad coelum ad inferos* (to whomsoever the soil belongs, he owns also to the sky and to the depths).
2. Courts have the power to compel mine owners to permits a survey of their mines at the suit of someone who can show reasonable ground for suspicion that his lands are being trespassed upon through them (and a cave is analogous to a mine).

Dissent: (Logan J)

- The aforementioned rule should be changed so that a property owner is only the owner of everything upon, above, or below their land *which they may use for their profit or pleasure*.
  - Man owns nothing that he cannot subject to his domination.
  - This fits better present-day conditions, especially with the advent of airplanes.
  - While this would entitle Lee to mining rights under his property, it would not entitle him to the enjoyment of a cave that he cannot even access.
- Edwards is entitled to the cave through right of discovery, exploration, development, advertising, and conquest; Lee is not entitled to reap where he has not sown.
- The majority opinion will cause incalculable injury to Edwards without benefitting Lee, who has no interest in that which his motion takes away (since he cannot access the cave from his property).
  - A cave should belong absolutely to him who owns its entrance, and this ownership should extend even to its utmost reached if he has connected these reaches with the entrance.

Commentary

- Logan J's dissent may be interpreted as creating a first occupancy norm for caves, prompting races to occupy them.
    - This could have a destructive effect on the cave itself and produce wasted effort by those who work to occupy and improve the cave first but fail.
- Logan J left unanswered what would happen if the cave was close to the surface, which would inhibit development on Lee's land.
    - The court in *Cox et ux. v. Colossal Cavern Co.* found that cave owners had the right to much of the land around the cave as was necessary to preserve and maintain the cavern; similarly, the cave owner could not undermine the subjacent support of the surface.
- In *Star Energy Weald Basin Ltd v Bocardo SA* (2010) the UKSC held that while *cujus est solum* might not apply at reaches far below the Earth's crust, the defendants trespassed on the subsoil of the plaintiff in the process of drilling gas wells because the depths at issue were not at the point where strict application of the maxim would be absurd.
- In 2010, Alberta amended the *Mines and Minerals Act* to make all pore space property of the provincial Crown, with no compensation available.
    - After all, while very deep pore spaces are useless to most surface owners, the prospect of a holdout preventing a unification of the title to pore space is a huge risk.
- The *cujus est solum* maxim has been severely criticized; Sprankling argues that:
    - The maxim has only ever been applied to shallow intrusions in the US; it has never been put to the test.
    - The maxim should buckle under technological developments enhancing our ability to plumb the depths of the Earth's crust, much like it did when airplanes were invented.
    - A bright (horizontal) line rule should be adopted: surface title should extend 1000 feet downward.

An Economic Perspective

- The holding of the majority in *Edwards* facilitates efficient exchanges by ensuring:
    1. *Exclusivity*: the surface owner has clear and legally protectable control inside the boundary line.
    2. *Transferability*: the clarity of the rule reduces transaction costs that might be produced by the need to determine who has title to what lands.
    3. *Universality*: by extending rights to the depths of the Earth, the greatest possible area of land is made ownable.
    - Plus, if sole ownership of subsurface rights was maintained for the cave in *Edwards v Sims*, there would be a negative externality posed by surface owners working the minerals under their land.
- But, if ownership carries into the Earth as the majority suggests, landowners have a lot of neighbours, posing a potential anticommons problem when attempts to assimilate these slivers of title can be thwarted by holdouts.
    - An alternative is to deny the surface owner title at extreme depths, perhaps by selecting a bright-line limit.

AIRSPACE RIGHTS

- Recall the maxim *cujus est solum* ("whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell")
    - This maxim is widely attributed to Accursio of Bologna (1182-1263), who distilled the legal rule from The Digest, a code of Roman law previously thought to be lost.
    - Another origin story comes out of what is now Iraq in 450 BC during the rule of the Babylonians, which was an important centre for the Jewish Talmud, which many say features the earliest discussion of the maxim.

- Ownership of a tract of land has traditionally conferred rights in the airspace above the surface at common law, but today, *property rights to a column of air do not extend forever*.
    - Rights are limited to strikes a balance between the realistic needs of landowners and the public; some courts define limits on the basis that intrusions must not interfere with actual or potential use and enjoyment.
    - There is no fixed upper limit, and this imprecision can hamper land transactions because, without a clear rule, it may be difficult to know whether it is necessary to bargain with a landowner over the use of airspace.
        - The English case *Anchor Brewhouse Developments v Berkley House Ltd* lent some certainty by holding that any land-based object that intrudes into neighbouring land constitutes trespass.
- Urbanization has prompted changes to the law of property in airspace that allow rights to airspace to be severed from the surface and allocated separately; e.g., that is what BC's 1971 *Air Space Titles Act* allowed.

Didow v Alberta Power Ltd, 1988 ABCA 257

Facts:

- The respondent, an electrical utility company, built a power line on the road along the side of the appellant's land. The cross-arms of the poles protruded 6 feet into the air space above the land. The appellant claimed that the intrusion was actionable in trespass.
- The appellant claimed that the overhang is unsightly, would prevent trees from being planted, would pose a risk for machinery and equipment operating nearby, and would restrict the use of aerial spraying and seeding on the land.
- The respondent argued that a landowner cannot object to an intrusion into airspace that the owner is not actually occupying and using and that, as a matter of public policy, landowners should not be permitted to exclude overhead electrical installations, just as they cannot exclude aircraft.

Issue and holding:

- Has the respondent trespassed the airspace above the appellant's land? **YES** (declaratory relief granted)

Rationale: (Haddad JA)

- In cases involving permanent structural projections into the air space above another's land, the weight of authority favours the view that a direct invasion by a permanent artificial projection constitutes a trespass.
    - This is *not* like those cases involving a transient invasion into the airspace above another's land at a height not likely to interfere with the landowner, in which the invasion does not constitute trespass.
        - A transient invasion of airspace will only constitute trespass if the invader flies so low as to come within the area which an owner might be expected to make use of as a natural incident of his land.
- We must balance the rights of an owner to enjoy the use of his land against the rights of the general public to use airspace by restricting the rights of an owner in the air space above his land to such a height as is necessary for both the *actual* and *potential* ordinary use and enjoyment of his land and the structures on it.
    - The cross-arms constitute a low-level intrusion which interferes with the appellant's potential, if not actual, use and enjoyment.
- Many miles of transmission lines already trespassing the air space above private property will not transform an unlawful practice into a lawful one.

Ratio:

- A landowner is entitled to freedom from permanent structures which impinge upon the actual or potential use and enjoyment of his land.

Notes:

- Following this, Alberta amended the *Hydro and Electric Energy Act* to permit the type of airspace intrusions that were at issue in *Didow* without compensation required from power companies.

Crown Grants

- The starting position of the common law is that minerals except gold and silver are part of the land itself and belong *prima facie* to the owner of the land unless a grant of land reserved any other minerals expressly.
    - However, this common law rule is modified in all parts of Canada; Alberta's *Public Lands Act* (s. 35(1)) specifies that every Crown grant of land impliedly reserves all mines and minerals.
        - This is one reason why minerals are very often in public ownership in most parts of Canada.
        - Thus, any mines and minerals need to be granted in new dispositions expressly.
        - The reservation of minerals was not widespread in Canada until 1976.
- Alberta no longer grants permanent interest in mines and minerals; operators can acquire a right to work the minerals under a *profit à prendre* (allows the holder to enter the land of another and to take some natural produce).

Private Grants

- Generally, once ownership of a mineral estate has been granted, a sale between private individuals will pass mines and minerals automatically unless those interest are expressly excluded.
    - The *Law of Property Act*, s. 7(1) holds that every grant transfers all rights and title that the transferor has in the land unless otherwise stated.

The Distribution of Mineral Rights in Alberta

- In Alberta, titles to mineral rights are distributed as follows: the federal Crown (10%), the provincial Crown (81%), and private hands (9%).
- This distribution reflects historical patterns of grants and reservations.
    - Since the first homesteading grants made under the *Dominion Lands Act* were not subject to any reservation, homesteaders typically received the rights to the mines and minerals under the surface.
        - In 1887, homestead grants were made subject to a reservation of mines and minerals.
    - When the HBC surrendered Rupert's Land to the Dominion it was agreed that they would hold onto 5% of land in the "Fertile Belt," including mines and minerals.
        - Subsequently, grants of such lands from HBC to settlers included the mines and minerals until 1908.
    - From 1869, the Crown granted 22 million acres of land to CPR, including mines and minerals, and CPR granted some of these lands to farmers, including mineral rights, until 1902, when CPR began to reserve coal, petroleum, and valuable stones (but not natural gas, giving rise to split title to minerals).
        - Beginning in 1912, CPR began to reserve *all* mines and minerals in new grants.

Surface Access Rights

- The sale of the right to work the mines and minerals gives rise to an implied right at common law to enter onto the surface lands as a means of access, as well as a right to use reasonable means to recover the minerals granted (but you are liable to unreasonable damage to the surface).
    - In Alberta, the *Surface Rights Act* altered this to favour rural surface owners. It provides that a right of entry must be expressly granted and the consideration paid for that right must be explicitly and separately set out

in the transfer document. Otherwise, an access order must be obtained from the Surface Rights Board, which has the power to set out the terms and conditions and order that compensation paid to the surface owner.

- A grantee cannot just pay one lump sum for the mineral rights and the right of access; they have to specify separately what they are paying for the right to access.

What are "Mines and Minerals"?

- In Alberta, the *Mines and Minerals Act* defines "minerals" and gives the surface owners of land rights to certain substances that they can access through surface operations (e.g., clay and sand).
    - When disputes arise regarding which substances are "minerals," we resort to one of the following tests:
        1. *The vernacular test*; in deciding whether a substance is a "mineral," the true test is whether it is currently regarded as such in the vernacular of miners, commercial people, and landowners.
        2. *The purposes and intentions test*; in construing a grant of mines and minerals, regard must be had not only to the words used, but also to the parties' intentions at the time of the grant.
        3. *The exceptional circumstances test*; the word "minerals" in a reservation does not include the ordinary rock of the district, but rather the exceptional substances in use, value, or occurrence.
    - If no limitations are imposed in the severance, "minerals" is to be construed in the widest sense, meaning all things not animal or vegetable, but if used with "metals" or "oil," it is given narrower interpretation.

Mineral Exploration Rights

- Except for oil and gas, there is no competitive bidding process for mineral exploration rights in Canada; land locations are selected by companies or individuals provided the area is not held by somebody else or reserved.
    - In cases of disputed claims, the first person to mark a claim out on the ground obtains the claim.
        - There is a specified time within which the claim must be recorded for the claim to hold.
    - Holders of claims in good standing must obtain a mining lease to proceed with development.
        - Mining leases require that claim boundaries be surveyed by a Registered Land Surveyor, and they are usually valid for 20 or 21 years and can be renewed.

FIXTURES

- When a chattel becomes a fixture, it ceases to be personal property and the title to it is subsumed into that of the realty and is transferred through gift, sale, mortgage, or lease (unless intentionally excluded).
- Determining whether a chattel has been transformed into a fixture is a matter of intention, objectively determined.
    - When a chattel is attached to land, the rebuttable presumption is that the item has become a fixture, and the strength of the attachment determines the strength of the presumption.
    - When a chattel is resting on its own weight, the item is presumed to remain a chattel.
    - The sole ground for the rebuttal of these presumptions is the object/purpose of the annexation.
        - The test is whether the purpose of the attachment was:
            1. To enhance the land (which leads to the conclusion that an item is a fixture), or
                - *Haggert v Brampton (City)* added that (1) an object enhancing the value of the premises or improving its usefulness or (2) having the intention of being *permanently* affixed lends support to the articles becoming part of the realty.
            2. For the better use of the chattel as a chattel.
            - If the object is equivocal, there is no basis for rebutting the presumptive characterization.

        - Given the ambiguity of the purpose test, the BCSC has maintained the following principles apply:
            1. Items resting on their own weight or those that are merely plugged in would be chattels unless appreciable damage would result from their removal.
            2. When equipment is attached to a structure, all of its components are to be regarded as fixtures if removal of that part would render the machine/fixture inoperative.
- Whether or not a chattel becomes a fixture cannot be conclusively controlled by contract; it must be that, by reference to external manifestations, the treatment of an item as a chattel or fixture can be ascertained.
    - This is mean to protect third parties who may be dealing with the land at some future point.
- A contract may operate between parties to allow one of them to restore a fixture to its chattel status and remove it.
    - However, this agreement cannot bind future owners of the realty.
- Decorations and furnishings have been held to be fixtures where they are an integral part of the building, even when they are not affixed to the realty.
- Mobile homes have been held to be part of the realty even when the degree of annexation to the land was slight.

Tenant Fixtures

- *Tenant* fixtures can be severed and taken back by the tenant to not dissuade them from improving rental properties.
    - Intentions of landlord and tenant must be considered when determining whether a thing can be removed.
- The tenant's right of restoration is subject to four considerations:
    - At common law, the items must fall within a set of protected fixtures; this group includes items for the purposes of trade (does not include agricultural fixtures), ornamentation, and domestic convenience.
    - Removal may be precluded if it will cause serious damage to the property.
    - The right of detachment might be abridged by contract (which should be construed against the landlord).
    - There must be a timely removal; this requirement is met if the tenant acts before a fixed-term lease expires, and it has been held that the right of removal extends for a reasonable period afterward.
- In *Levesque v J Clark & Son Ltd* (1972), the NBQB held that additions by a tenant might be held to have become fixtures if they complement the use to which the premises are normally put, which creates a strong presumption that neither party to the lease contemplated their removal upon the lease's termination.

Security Interests

- A chattel may be sold subject to a security interest under which the vendor enjoys a right of repossession in the event of a default on payment.
- When a chattel has become attached to land that is also encumbered with a mortgage, priority rules are needed to determine which of the two secured creditors will prevail in the event of a default in the obligations.
    - Under the common law, the rule is that when the chattel becomes affixed it falls under the land security, and the security holder of the chattel loses the right of possession.
    - In Alberta, the *Personal Property Security Act* holds that a security interest in a chattel will normally enjoy priority over a subsequent land mortgage if that security interest is taken before the item becomes a fixture.
        - However, the failure to register a security interest in the land titles office will lead to a loss of priority over those who deal subsequently with the landowner.
        - If a security interest in goods is acquired after those goods have already become fixtures, generally priority will be enjoyed by those holding existing land mortgages.
    - Where the chattel security interest has priority, a right of removal in the event of default can be exercised, subject to some restrictions.

- A notice must be given to those having an interest in the land, who can pay off the chattel security holder to prevent removal.
- The process of removal must be undertaken in a way that minimizes damage and inconvenience; an action may be launched by any person who has an interest in the land for damage.

La Salle Recreations Ltd v Canadian Camdex Investments Ltd (1969), 68 WWR 339 (BCCA)

Facts:

- Wall-to-wall carpeting in a motel had been purchased under a conditional sales agreement, under which the carpet vendor, La Salle, retained title as security until the full purchase price was paid. The building that the carpet was in was subject to a mortgage interest from Camdex. Since the conditional sales agreement was not registered in the land registry office, it was not binding against the mortgagee. When the motel became insolvent, a dispute arose between the carpet vendor and the mortgagee over the right to repossess the carpeting.

Issue and holding:

- Had the carpets become fixtures such that the mortgagee obtained priority over the vendor of the carpets? **YES**

Rationale: (McFarlane JA)

- Carpet is slightly affixed; it is held firmly in place but is removable with little difficulty and without causing damage.
- However, the annexation of the carpets was for the better and more effectual use of the building as a hotel, not for the better use of the goods as goods.
    - It is true that there is a market for used carpeting and that carpeting is typically replaced every 3-5 years (both of which help rebut the presumption that the carpet is a fixture), but unfinished plywood flooring or carpet left resting on the plywood flooring would not suffice.

Notes:

- In *Re Davis* (1954), it was held that bowling alleys were not fixtures, as they were not of much permanence and were not affixed for the better use of the building but so that bowling could be more efficiently carried on.

Diamond Neon (Manufacturing) Ltd v Toronto-Dominion Realty Co, [1976] 4 WWR 664 (BCCA)

Facts:

- The plaintiff, pursuant to a contract, installed (1) a metal pole attached to a block of concrete embedded in the soil, (2) a large sign hanging from the pole, and (3) a large sign attached to a shack. Each of the signs bore the name of the plaintiff. In the contract, the plaintiff retained property rights to the displays, held them not to be fixtures, and rented them to Uptown Motors Ltd Later, Dueck on Broadway Ltd became tenant of the land and Uptown assigned the rights under the contract to Dueck. When Dueck's lease expired, the displays remained on the land, with the plaintiff expecting to possibly lease them to the next tenant. The owner of the land, Western Canadian Properties Ltd, sold it to the defendant, TD Realty, who, not knowing about the contract with the plaintiff, sold the things on it to Nettie Holdings Ltd. It was this sale that the plaintiff held to be a wrongful conversion of its chattels.

Issue and holding:

- Were the displays on the land fixtures when the defendant purchased the land? **YES** (conversion action fails)

Rationale: (Robertson JA)

- The degree and object of annexation force the conclusion that the things had become part of the realty before the defendant bought the land.
- The defendants could not be bound by the contracts for renting the sign when it had no knowledge of them, and even if it did, this knowledge would not affect the character of the articles as fixtures.
- The defendant was under no obligation to make inquiries to ascertain whether the signs were part of the realty.

Dissent: (Carrothers JA)

- The wording on the sign shows that the articles affixed to the land were intended continue as chattels.
    - An object bearing the name of and stating the business of a former tenant ought to have put the purchaser on enquiry as to whether these signs were to be included in the conveyance of the realty.
- The fact that the defendant severed the signs from the realty and sold them as chattels is confirmatory of the expectation that they might have been viewed as chattels at the time of the sale and the purchase of the realty.
    - *Kaplinsky says*: just because you detach something and sell it does not mean that that thing was not a fixture.

Notes:

- Diamond Neon lost the right to recover its signs when the lease of the land to Dueck expired.

TRANSFORMATION OF PROPERTY IN CHATTELS

Confusion

- **Confusion** (commingling, intermixture, admixture): occurs when fungible items are inseparably combined to the extent that it is impracticable to distinguish the particles in respect of ownership.
    - When goods are mixed pursuant to an agreement, rights to the combined mixture are determined it.
    - When the confusion is innocent, the owners of the separate goods become co-owners of the bulk in proportionate shares; if the extent of the contributions are unknown, then the bulk is split 50/50.
    - In the case of wrongful intermixture, the culprit traditionally lost title to everything.
        - But, in *Indian Oil v Greenstone*, where oil was mixed with oil of the same grade, a claim for the entire shipment failed; the plaintiff was only entitled to their initial share.
            - From *Glencore*, if the grades would have been different, respective monetary values would determine the ratio of entitlement.

Glencore International AG v Metro Trading International Inc, [2001] 1 Lloyd's LR 284 (QB (Comm Ct))

Facts:

- MTI was in the business of buying, mixing, and storing oil. Glencore, alongside other oil companies, had a contract for the storage of oil in MTI's facility. The oil was commingled with oil of similar quality. In 1998, MTI went bankrupt, and questions arose over how to deal with the leftover oil.

Analysis/holding: (Moore-Bick J)

- When one party wrongfully blends their goods with those of another with the result that a new product is produced, that new product is owned by them in common.
    - Building off *Indian Oil*, the proportions in which the contributors own the new blend should reflect both the *quantity* and the *value* of the oil which each has contributed (i.e., you do not just go by liters, but by value).
    - Any doubts about quantity or value contributed by the innocent party are resolved against the wrongdoer.
    - The innocent party is entitled to recover damages from the wrongdoer in respect of any loss which he has suffered because of the wrongful use of his goods.

Ratio:

- When one party blends their goods with those of another, the proportions in which the contributors own the bulk reflect the quantity and the value of that which each has contributed to it, with any doubts being resolved against the innocent party and with the innocent party retaining a right to sue for loss suffered as a result of the confusion.

Accession

- **Accession**: when two or more chattels become fused (e.g., when A's paint is attached to B's car).
    - This is distinct from confusion, wherein co-ownership of combined goods can be maintained.
    - When this occurs, the title of the principal chattel subsumes that of the other chattels, and the owner of the minor chattels may be left with a monetary award.
        - The principal chattel may be defined as that with the greatest market value or by determining what is the essence of the final product.
    - Under Alberta's *Personal Property Security Act*, even a minimal attachment constitutes accession.
- Whether two items are inseparable can be determined by:
    - **Injurious removal test**: can the items be removed without serious physical injury to the principal chattel?
    - **Separate existence test**: has the separate identity of the acceded chattel been lost? (e.g., when a plank is added to a ship)
    - **Destruction of utility test**: would removal of the combined item(s) destroy the utility of the principal chattel?
    - **Fixtures test**: looking at the degree and purpose of annexation and the intention of the parties, has accession occurred?

McKeown v Cavalier Yachts Pty Ltd (1988), 13 NSWLR 303 (SC, Eq Div)

Facts:

- The defendant Spartech mistakenly undertook $24,409 worth of work on the plaintiff's hull, which started with a value of $1,777. Spartech said it was not paid for the work and assumed control of the completed yacht, saying that the value they added made it theirs.

Issues, holdings, and rationale: (Young J)

1. Has accession occurred? **YES**
    - The accretions to the hull cannot be conveniently detached without destroying the article.
2. Which is the principal chattel? **Hull**
    - While it might be argued that the accretions are the principal chattel, as they are worth more than the hull initially was, the accretions were gradual, and they, bit-by-bit, acceded to the hull, which thus remained the "principal" chattel owned in its entirety by the plaintiff.
3. What is the appropriate remedy? **Return of yacht**
    - The court has discretion as to whether to order the return of goods or order the payment of damages.
    - The yacht is sufficiently unique to justify a specific return of the yacht to the plaintiff.
4. Is the improver (Spartech) entitled to repayment? **YES–$4409**
    - The plaintiff should have to pay compensation in the amount of the incontrovertible benefit they received from the work of the defendant.

Ratio:

- Gradual accretions accede to the principal chattel, even when their combined value is greater than that of the principal chattel.

Notes:

- The conclusion of the court regarding which is the principal chattel is controversial. Does it really matter for property rights whether the accretions are made all at once or sequentially?
- One approach to this case would be to look at the *total* value of the accretions relative to that of the initial chattel.
- Another approach to this case would be to consider the essence of the final product, in which case, the hull might be considered the principal chattel, since everything is built around it.
- Principles under accession determine ownership of newborn animals; the general rule is that the owner of the mother owns the offspring.

Gidney v Shank (1995), [1996] 2 WWR 383 (MBCA)

Facts:

- Feuerstein had a canoe that was stolen before May 1983. In May 1983, Gidney purchased a canoe in good faith from a third party for $100. He put 100 hours and $806.25 into repairing it. In November 1983, the police seized the canoe and a returned it to Feuerstein. Gidney sued for either the return of the canoe or $1906.25 (the estimate of the value of time and money put into the canoe). He argued the case based on restitution and unjust enrichment.

Issue and holding:

- Did the return of the canoe to Feuerstein constitute unjust enrichment? **NO**

Rationale:

- There are three elements of unjust enrichment: (1) enrichment, (2) a corresponding deprivation, and (3) an absence of any juristic reason for the enrichment.
    - In this case, there was enrichment on the part of Feuerstein and deprivation on the part of Gidney.
    - However, there *was* a juristic reason for the enrichment: Feuerstein owned the canoe and never consented or acquiesced to the improvements made by Gidney (since they had no relationship).

Notes:

- It seems glaring that the court made no mention of accession in this case.

Alteration

- **Alteration**: occurs when A *substantially* transforms a chattel owned by B into some new item.
    - The degree of change required is not clear in the jurisprudence; some believe that alteration occurs when a new species of good is created (e.g., turning corn into liquor) or the effect of the alteration is irreversible.
    - Once alteration occurs, the problems that arise resemble those that affect accessions, and similar principles should apply to resolve disputes as to who should own the newly created goods.

POSSESSION

BASIC CONCEPTS

- The right to possession, not ownership or title *per se*, determines the ability of an owner (or other aggrieved person) to sue in tort in response to a wrongful interference with chattels.
    - The law of ownership and possession does not identify absolute entitlement but *priority of entitlement*.
- At the core of possession are two components:
    1. *Animus possidendi* (an intention to possess)
    2. *Factum* (physical control, sometimes referred to as *corpus*)
    - When the physical or mental elements are watered down, *constructive possession* is created.
        - From *Clift v Kane*, seal carcasses remaining on the ice were possessed by those who killed them.
        - In *The Tubantia*, the court recognized that a group of divers could take possession of a sunken ship for salvage operations even though they could not be said to assert physical control over the ship.
- Possession is sometimes contrasted with custody (the protective care or guardianship of something).
    - e.g., when an employee is holding goods, they have custody over goods still belonging to the employer.
    - e.g., transfer for a fixed term, as when someone signs a six-month car lease.
    - The custody/possession dichotomy is governed more by common sense than by any clear legal rule.

Popov v Hayashi, 2002 WL 31833731 (Cal SC)

Facts:

- In 2001, Barry Bonds broke the record for most homeruns in a season. The ball, which was going to be very valuable, landed in the webbing of the plaintiff Popov's glove. A crowd of people then swarmed Popov while he was still in the process of completing the catch, knocking him to the ground. At some point, the ball left his glove and ended up in the possession of Hayashi, who was also involuntarily forced to the ground.
- The plaintiff Popov has pled conversion, trespass to chattel, injunctive relief, and constructive trust.

Issue and holding:

- Does Popov have a cause of action for conversion? ***Sort of*** (plaintiff's cause of action for conversion sustained only as to this equal and undivided interest)
    - The ball must be sold and the proceeds divided equally amongst the parties.

Analysis:

- Conversion is the wrongful exercise of dominion over personal property; thus, conversion does not exist unless the baseball rightfully belongs to Popov.
- The baseball started as possessed by MLB; at the time it was hit, it became abandoned property; the first person to come in possession of the ball became its new owner.
- Possession requires (1) physical control over the item and (2) an intent to control it or exclude others from it.
    - While it is obvious that Popov intended to control the baseball, did he reduce the ball to his exclusive dominion and control?

Rationale:

- For a catch to be completed in baseball, the actor must retain control of the ball after incidental contact with people and things; applying this rule, Popov did not have full possession.
- However, as a matter of fundamental fairness, and out of a desire to see rule of law instead of rule by force, Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity.
    - Where an actor undertakes significant but incomplete steps to achieve possession of an abandoned chattel and the effort is interrupted by the unlawful acts of others, the actor has a pre-possessory interest in it.
- But this rule does not address the interests of Hayashi, who was also a victim of the same bandits that attacked Popov and happened to be lucky enough to find the ball on the ground.
    - Thus, since depriving Hayashi of the ball would be unfair, and given that Popov established only a qualified pre-possessory interest in the ball (not a full right to possession), each man has an equal and superior claim to the ball against the world.
- Since the legal quality of the claims of both men are equal, they are entitled to an equal interest in the ball.

Ratio:

- Possession requires full physical control after incidental contract with people and things.
- To establish a qualified pre-possessory interest, the claimant must (1) take significant, but incomplete steps calculated to achieve possession which are (2) interrupted by the unlawful acts of others.

Pierson v Post, 3 Caines Reports 175 (1805, NYSC)

Issue and holding:

- Has Post, by the pursuit with his hounds, acquired a property right to the fox, as will sustain an action against Pierson for killing and taking him away? **NO**

Rationale: (Tompkins J)

- Mere pursuit of a wild animal gives no right of possession; only mortal wounding can give someone possessory rights.

    - Through mortally wounding an animal, the pursuer manifests an *unequivocal intention of appropriating* it, has deprived that animal of his natural liberty, and has brought him within his control.
        - Thus, manual control is not always demanded for a finding of possession, provided the pursuer be within reach or have a reasonable prospect of taking what he has discovered.
    - Similarly, intercepting animals with nets and toils such that escape is impossible, thus depriving them of their liberty, gives possession of them to those persons who have worked to apprehend them.
- If one could take possession of an animal just by pursuing it, this would give rise to many disputes.

Dissent: (Livingston J)

- Since foxes are so harmful to farmers, hunting them provides a public benefit; thus, the decision of the court should encourage hunting foxes.
    - However, if someone who pursued an animal could have the fruits of their labour kept from them by a "saucy intruder," this would dishearten hunters and discourage them from hunting.
    - *Note*: this judgment is based on economic analysis and draws on Locke's labour theory.
- This case should be left to the arbitration of sportsmen (i.e., let local custom decide); if the court did this, Post would be victorious, as most hunters would regard pursuit as giving rights to first possession.

Notes:

- The majority values a clear rule that separates the commons from private property while the dissent values reward to useful labour.
- *Yanner v Eaton* described ownership over wild animals as "qualified" in that a proprietor obtains title of a wild animal on private land until they escape.
    - However, while the title to wild animals is normally lost when the animals escapes control, this rule is not applied if it can be demonstrated that the animal possesses *animus revertendi* (the habit of returning).
    - Plus, a landowner generally holds the exclusive right to hunt and capture animals on their land.

FINDERS

- A finder of a chattel acquires a title that is good against the world *except* for those with a continuing antecedent claim (e.g., a previous owner, previous finder, etc.) (*Armory v Delamire*).
    - This rule rewards those who have brought found goods back into social use and disincentivizes trespass on found goods (which would be a free-for-all).
- In *Keron v Cashman*, a group of boys found a stocking and began playing with it before it burst open and money was inside. The court held that the money was found while in common possession of the defendants as a plaything but that none of the boys treated the stocking as an article over which possession was intended until it burst open, at which point the requisite *factum* and *animus* was present in all the boys. Thus, the money was split amongst them.
    - Had the stocking been a wallet or just one boy picked up the stocking with the intention of examining its contents, then possession might be vested in just one of the boys.

Trespassing and Felonious Finders

- Even a trespassing or felonious finder has a title that the law will protect.
    - In *Bird v Fort Frances*, a boy found money on private property. The money was taken by police but was returned to him after no claim was made for it.
    - However, in *Baird v British Columbia*, Baird was denied a large sum of money that he stole on the grounds that one should not profit from their wrongdoing (*ex turpi*).

- This case was distinguished from *Bird* on the grounds that, in *Bird*, it was a kind of finders keepers case where there was not the same degree of criminality or culpable immorality.

Finder vs Occupant of Land

- In *Parker v British Airways Board*, someone found a gold bracelet on the floor of an executive lounge at Heathrow Airport. He gave it to the owners of the land (the British Airways Board) for them to attempt to find the true owner. When this did not happen, the Board sold the bracelet.
    - The main issue in the case was whether the occupant was already in possession of the item when the finder claimed to take the item into their possession.
        - The Board claimed that they had possession of the item, because they looked after the executive lounge and employees were required to give those items to their employer.
    - The claims of the finder were found to be superior to those of the occupant of the premises.
        - The court held that the Board lacked the necessary manifest intention to control the area in question, which was a place of regular public access.
    - The court laid out some basic propositions on the law of finding:
        - Relating to the rights and obligations of a finder:
            - A finder of a chattel acquires no rights over it unless (1) it has been *abandoned or lost* and (2) he takes it into his care and control.
            - The finder of a chattel, whilst not acquiring absolute ownership of it, acquires a right to keep it against all but the true owner.
            - Any servant or agent who finds a chattel in the course of employment does so on behalf of his employer, who acquires finder's rights to the exclusion of those of the actual finder.
            - A person having a finder's rights has an obligation to take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding.
        - Relating to the rights and obligations of an occupier:
            - An occupier of land has rights superior to those of a 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 a finder of chattels upon or in that building 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*.
                - Relevant to this is whether the premises were private or open to the public.
            - An occupier who acquires rights superior to those of a finder is under an obligation to acquaint the true owner of the finding and to care for the chattels meanwhile.
            - An "occupier" of a chattel (e.g., a car, boat, ship, etc.) is to be treated as if they were the occupier of a building for the purposes of the foregoing rules.
        - Where the finder is a trespasser, the landowner will normally be preferred, even where the victim of the trespass shows no manifest intention to control.

Abandonment

- Personal property can be relinquished through *abandonment*, which requires relinquishment of physical control and the requisite subjective intention to renounce title (*animus reliquendi)*.
    - If someone misplaces an item and all efforts to locate it prove fruitless, losing hope of recovery is not equivalent to the *animus* of abandonment.

- Abandonment does not require the chattel to be acquired by someone else; upon an owner relinquishing title to a chattel, it ceases to be owned by *anyone*.
- In Canada, one cannot abandon title to corporeal hereditaments.
    - The likely explanation is that abandonment would free the landowner of paying property taxes and cause land to become derelict, the cost of which would be borne by neighbours.

Trachuk v Olinek (1995), 177 AR 225 (ABQB)

Facts:

- The plaintiff Trachuk and the four defendants each claim the right to possession of $75,960 which was uncovered from under the surface of a quarter section of farmland next to a fenced-in gas well near Two Hills.
- Marathon Realty Company: owner of the quarter section.
    - Did not possess the site where the money was found, so they could not assert possessory rights to it.
- Trachuk: leases the land for cultivation and grazing cattle; asserted *de facto* possession over the area in the fence.
- Amoco Canada Resources: has a surface lease for a gas well and an access road (did not claim the money)
    - Amoco has possession of the well site, so since the money was found embedded in the ground in an area in their possession, they could likely assert possessory rights good against everyone except the true owner.
- Signalta: has a pipeline easement from Amoco (withdrew claim)
    - Since an easement is a non-possessory interest, they could not claim the money.
- Olinek: contracted by Signalta for pipeline work and employed additional subcontractors who, alongside Olinek, discovered the money.
    - Unless the occupant of the land was already in possession of the money, Olinek and the workers would have a superior claim to the money good against everyone but the true owner.
- "True owner": unknown
    - If known, they would have a superior claim to the money*, unless* they abandoned it.

Issues and holding

- Does the plaintiff or the four defendants have the right to possession of the money? **Defendants**

Analysis:

- Recovery of a chattel entitles the finder to possessory title subject only to the rights of the occupier of the land.
    - Generally, where a person has possession of a house or land *with a manifest intention to exercise control over it and the things which may be upon or in it*, then, if something is found on or in that house or land, the presumption is that the possession of that thing is in the owner of the location in question.
        - *Note*: The comparable rule from *Parker v British Airways Board* requires us to consider intention *only if* the item is not embedded in the realty. This rule, however, requires us to consider intention even where the item is embedded in the realty.
- From this, the question becomes: Did Trachuk have the *de facto* possession (occupancy) of the lands where the money was uncovered, or had he been granted such a right?
    - *De facto* possession exists only where there is intent and ability to control the land and exclude others.

Rationale: (Gallant J)

- Trachuk's was *not* in *de facto* control of the portion of the lands on which the money was found.
    - He seldom entered the fenced area (only to remove calves) and he manifested no intention to exclude workmen like the defendants, who had permission and implied authority to excavate.
    - He probably could have been restrained from entering the portion of the quarter section at issue.
    - Hence, he was not in possession of the money when it was found by the defendants.

Ratio:

- Possession to personalty may be acquired by occupation, which requires the intent and ability to control the land and exclude others.

ADVERSE POSSESSION

Land

- A person has *possessory title* to land when they enjoy the rights attached to it; they must have an intention to possess (*animus possidendi*) and demonstrate the requisite *factum* (physical occupation).
    - Possessory title is good against the world except the rightful owner.
- Possession may serve as a source of title to realty through the law of *adverse possession*.
    - Under these principles, the right of the true owner of land to sue may be statute-barred against a person who has been in adverse possession of that land for 10 years (*Limitations Act*, s. 3).
        - In effect, the running of the full time *extinguishes* the rights of the true owner, preventing them from suing for trespass or re-claiming the land through re-entry (*Limitations Act*, s. 3(6)).
    - Even before the full expiration of the limitation period the squatter's interest is not merely incipient: it can found an action in trespass and it can be transferred.
    - In Alberta, adverse possession of Crown land has been abolished (*Public Lands Act*, s. 4; *MGA*, s. 609).
- For adverse possession of land to succeed, possession must be:
    - Open and notorious (not clandestine)—the trespass must be open for the world to see.
        - The clock on the limitation period will not run if the adverse possession is not open and notorious.
    - Adverse (without permission)
        - If the superior right of the true owner is acknowledged (e.g., by offering to purchase the land from the registered owner) an adverse possession claim may fail.
        - A successful claim may come from a previously permitted presence (e.g., where a grant of a right-of-way is so overused as to amount to an assumption of full control).
        - Permission cannot be implied by acquiescence (*Moore v McIndoe*).
    - Exclusive (a dispossession or discontinuance of occupation by the true owner)
        - If a parcel of land is used freely by a variety of individuals, one party may not be able to assert title.
            - This would be different if one dominant party allowed others onto the land.
        - Fairly trivial acts of dominion by an owner will typically suffice to prevent adverse possession.
    - Peaceful (not by force; justified by policy considerations)
    - Actual (generally)
        - Adverse possession is limited to the ground the squatter occupies, cultivates, or encloses.
        - However, where the claimant enters the land under colour of title (e.g., where the legal description erroneously includes the land at issue), actual possession (i.e., occupation, cultivation, enclosure) of part of the land will count as possession of the entire property.
    - Continuous (not occasional or for a limited purpose)
        - In some cases, intermittent use will meet the continuity requirement (e.g., a summer cottage).
        - Plus, the continuity requirement is not breached if A sells their possessory title to B (but it is if A *gifts* possessory title to B).
        - If B merely enters the land upon A's departure, B can enjoy the time A previously accumulated.
        - The presence of a tenant of the squatter can serve to run down the clock on behalf of the squatter.
    - If any one of these things is missing, at any stage during the statutory period, no rights against the paper-title holder can be successfully asserted.

        - In some cases, it has been held that possessory title does not arise unless the squatter is using the land in a way that is inconsistent with the rights of the true owner (see *Keefer v. Arillotta*).
- Claims as to the function(s) of adverse possession include:
    - Delays in bringing an action for trespass against a squatter can prejudice the preparation of a defence (witnesses may die, evidence may disappear, etc.).
    - Laying to rest old disputes can serve as a means of proving that a vendor holds good title, thereby inducing a new owner to invest in the parcel.
    - Adverse possession prompts paper-title holders to take positive action to use the land.
    - Adverse possession protects the expectations of an adverse possessor who has acted on the assumption that his/her occupation will not be misguided.
    - Adverse possession may also serve a redistributive function, taking land from where it is seemingly not needed and giving it to someone that needs it.

Keefer v Arillotta (1976), 13 OR (2d) 680 (ONCA)

Facts:

- The respondents had a right-of-way across a narrow strip of the appellants' land. The main use of the strip by the respondents has been a driveway, which they used and maintained. The other use of the strip, on the west side, was a grassy area that the respondents used and tended to for BBQs, picnics, and even a skating rink. In 1952, the respondents moved a garage located at the rear of their property to the rear of the strip. None of this was objected to by the Cloys, but the trial judge held that it far exceeded the rights accruing from the specific grant of right-of-way.
- The appellants' premises have always been used as a store, and there was an apartment over the store. The appellant never parked his car in the driveway, but trucks parked there occasionally when unloading supplies if it was clear. Customers also parked there occasionally. Tenants of the apartment did not park in the driveway but moving trucks would park there when tenants were moving in or out. Because the store was closed in the winters when the Cloys went to Florida, no customer cars or delivery trucks would park in the driveway.

Issue and holding:

- Did the respondent's right-of-way mature into possessory title? **NO** (appeal allowed)
    - The respondents are entitled to a declaration that the appellants' title has been extinguished only on the part of the strip occupied by the respondent's garage (because this was inconsistent with the plans of the owner).

Analysis:

- Possessory title cannot be acquired by depriving the original owner of uses of his property that he never intended or desired to make of it.
- In *Pflung and Pflung v Collins* (1952), the court made it clear that a person claiming possessory title must establish:
    1. Actual possession for the statutory period by themselves and those through whom they claim,
    2. That such possession was with the intention of excluding from possession the owner, and
    3. Discontinuance of possession for the statutory period by the owner.

Rationale: (Wilson JA)

- The respondents have not discharged the onus of proving discontinuance of possession of the strip.
    - The appellants never intended or wanted to use the strip for parking; this is clear from the fact that they gave the owner of the adjoining property a right of ingress and egress over it and did not fuss when the respondents parked their car in the driveway.
        - The respondents' use of the grassy area as a skating rink in the winter has no real significance in terms of the ouster of the true owner, since the appellants went to Florida in the winter anyway.
        - The appellants were just accommodating neighbours anxious to avoid any trouble.

- The respondent failed in both (2) and (3) above; it is not clear that while the Cloys owned the strip of land in issue the Keefers ever intended to oust them from the limited use they wanted to make of it.
    - The relationship between the Cloys and Keefers was excellent and there was never any trouble when delivery trucks occasionally used the driveway for unloading supplies, when customers parked for short periods of time when they were making purchases at the store, when tenants were moved in and out of the upstairs apartment, or when tenants came and went to the apartment.

Notes:

- The test of inconsistent use was repudiated under English land law in 2002 in *J.A. Pye (Oxford) Ltd. v. Graham*, where the HL said that hinging a claim to adverse possession on the intention of the paper owner is "heretical and wrong."

Moore v McIndoe, 2018 ABQB 235

Facts:

- The Moores purchased Lot 10 in 1989. The fence between Lots 9 and 10 was built on Lot 9 before the Moores purchased their land. The Moores occupied the strip of Lot 9 that was on their side of the fence. Despite knowing that the fence was on Lot 9, the Moores continued to occupy the rest of the strip as if it was part of their yard.
- The McIndoes purchased Lot 9 in October 2002, knowing that the fence was on Lot 9 when they did so. They did not ask the Moores to leave the disputed land until 2014. The Moores then brought a claim to quiet title to the disputed land based on s. 74 of the *Land Titles Act*. The McIndoes did not dispute that the Moores had openly, continuously, and exclusively occupied the disputed land for more than 10 years.

Issues and holding:

- Was there a revocable license to occupy that prevented the 10-year limitation period from running? **NO**
- Should the court decline a remedy because adverse possession conflicts with the goals of the highly regulated land development and planning regime that exists in urban areas of Alberta? **NO**

Rationale:

- A license (which would make Moore's possession not adverse) cannot be implied based on mere acquiescence.
- The law of adverse possession is old and well-defined, and it is possible for a knowing trespasser to succeed.
    - It is not material whether the adverse possessor was or was not aware that they were in possession of another person's land; all that matters is the actual attributes of the possession and the adverse possessor's intention to possess.
- A claim for adverse possession may be made against a portion of a lot in a certificate of title.

Notes:

- The court in this case rejected the inconsistent use test in Alberta.

ALRI, "Adverse Possession and Lasting Improvements to Wrong Land," (April 2020)

- The ALRI recommends that adverse possession be abolished in Alberta, which would prevent new claims from being brought in the future but would not affect claims that have been resolved or filed with the court previously.
    - This would mean that a registered owner of land could recover possession at any time.
    - While adverse possession is not common in Alberta, it is inconsistent with the land titles system.
        - While adverse possession continues to serve a valid purpose in Alberta, in many instances that purpose is served by s. 69 of the *Law of Property Act* regarding lasting improvements, which has the advantage of not allowing a deliberate trespasser to benefit from their wrongdoing.

Chattels

- The right to sue for the recovery of personal property might be barred through the passage of time.
    - In this regard, Alberta law provides a general 2-year period, which is applicable to actions for the recovery of personal property and is engaged by the discovery or discoverability of the cause of action and the culprit.
        - Even absent discoverability, the action must be launched within 10 years of the wrongdoing.
    - Unlike with land, there is no express provision for the extinguishment of title to personalty at the end of the limitation period; thus, after the limitation period expires, a legally recognized right of self-help exists to recoup the choses in possession.
- There is a good reason why adverse possession of personalty should be different from that of land, as personalty is movable, more easily concealed, and not registered, so ascertaining ownership is more difficult.
    - But while land and chattels are not the same, the problems of permitting litigation after lengthy delays apply equally to disputes over them, and there is value in quieting title to personal property.

Barberree v Bilo (1991), 84 Alta LR (2d) 216 (ABQB)

Facts:

- B1 owned a motorcycle. In 1985, A (B1's estranged spouse) took the bike unlawfully. The two-year limitation period expired in 1987. In 1990, A sold the bike to B2, who B1 then sued for the bike's return.

Issue and holding:

- Was B1 entitled to sue B2 to recover the bike? **YES**

Rationale:

- The limitation period for commencing an action in conversion begins to run from the time a demand to turn over the chattel is made and refused.
- While the limitation period for commencing an action against A had expired, once the property passed to B2, the limitation for an action against him begins to run anew since he has now committed a fresh conversion.
    - Since an action was initiated before the 2-year limitation period elapsed, B1 can recover the bike.
    - *Note*: this might undermine the purpose of statutes quieting title and protecting against stale claims.

Notes:

- The cause of action accrues to the owner upon making a demand to the person in possession and being rebuffed.
- Assume that A dispossessed B1 in Dec 2017. This morning the motorcycle was parked in front of A's house. B1 came to the house, started the motorcycle using spare keys, and drove away.
    - There is no provision in the *Limitations Act* that extinguishes title to personalty subject to adverse possession like s. 3(6) does in relation to realty. Hence, while B1 cannot sue to recover the bike, and she can employ peaceful self-help to get the bike back since her title is not extinguished.

O'Keeffe v Snyder, 416 A2d 862 (NJSC, 1980)

Facts:

- O'Keeffe was dispossessed of 3 paintings in 1946. The paintings were discovered in Snyder's possession in 1975 when they are exhibited in a gallery. O'Keeffe demanded their return and Snyder refused. O'Keeffe sued Snyder in conversion. Snyder said he purchased the paintings from Frank, who acquired them by gift from his late father. Beyond that, the provenance is disputed.
- O'Keeffe's argument was that the limitation period did not start running until she knew that Snyder was in possession of the paintings. She also argued that thieves only have possessory title, so Snyder's predecessors in title could only have conveyed possessory title which is trumped by O'Keeffe's claim.
    - The policy argument from O'Keeffe's side is that an owner of stolen goods should not be prejudiced by the passage of time when they cannot discover who has their property.

- Snyder's argument is that the limitation period had expired. He also held that he bought the paintings from someone in good faith.
    - The policy argument from Snyder's side is that we should protect good faith purchasers and support market transactions in personalty.

Issue and holding:

- Could an action be brough in 1976 to recover a painting that had been stolen in 1946 when, throughout the 30-year period, the whereabouts of the painting were unknown to the plaintiff? **YES**

Rationale: (Pollock J)

- *If* the paintings were stolen, the thief acquired no good title and could not transfer good title to others regardless of their ignorance of the theft.
- The clock only starts to run on the limitation period when the plaintiff first knew, or ought to have known through the exercise of due diligence, the identity of the possessor of the stolen personalty.
    - Under this *discovery rule*, if a true owner pursues their property diligently and seeks to recover possession, the clock does not begin to run against the owner if they do not know the identity of the possessor.
        - This rule permits someone who uses reasonable efforts to report, investigate, and recover their personal property to preserve rights of title and possession.
    - If the clock began to run when the paintings were stolen, this would promote theft.
- The limitation period is *not* interrupted by a transfer of the property by one wrongful possessor to another (contrary to *Bilo*); separate acts of conversion do not start the statute of limitations running anew.
    - Holding otherwise would undermine the purpose of statutes quieting title and protecting against stale claims.

Notes:

- The court then refers the case back to the lower courts to assess O'Keeffe's conduct over the years to determine if she did enough to prevent the clock from running; however, in this case, the parties chose to settle.
- *O'Keeffe* thus holds that title is extinguished once the clock stops running, it allows tacking, and it calls for diligence on the part of the deprived owner.
- In *Guggenheim Foundation v Lubell*, a museum sought the return of stolen art acquired by an innocent purchaser. The NYCA held that the cause of action for return of stolen goods accrues when the true owner makes a demand for return and the person in possession refuses, at which point the possession becomes wrongful.
    - This approach rejected less protective measures (e.g., those which would start the clock when the goods were stolen or when they were purchased in good faith) to discourage the trafficking of illicit art.
    - This approach also rejected the discovery rule, which places the burden of locating stolen artwork on the true owner and limits the rights of that owner to recover their property if the burden is not met.
        - Thus, the approach in this case places the burden of investigating the provenance of a work of art on the potential purchaser.

GIFTS

- **Gift**: a gratuitous transfer of ownership without consideration; distinct from a bargain and a mere promise of gift.
    - A gift may be made of any interest in real or personal property, including intangibles.
    - **Gift *inter vivos***: a gift transferred during the lifetime of the grantor.
    - ***Donatio mortis causa***: a gift made by a person in contemplation of impending death, the transfer of which occurs when the donor dies.
- There are three recognized methods of making a valid gift *inter vivos*: deed, declaration of trust, and delivery.
    - A declaration by the donor that property will be held in trust for the donee will be binding.
        - The continued possession of the donor will be in their capacity as a trustee for the recipient, who will be treated as a beneficial owner of the trust property.

- One can also transfer property by deed that is signed, sealed, and delivered.

- Absent a declaration of trust or deed, there are three requirements of a valid gift *inter vivos* (*Nolan v Nolan*):
    1. **Intention to donate**: a desire to divest oneself of title voluntarily.
        - This is usually expressed through words of gift, but words of gift are not required *if the donee can show that donative intent was made manifest and expressed with certainty*.
        - *Ex post* acknowledgements which show that the gift giver subjectively believed that they made a gift are capable of manifesting donative intention.
        - A putative donor's acquiescence to an ascription of ownership to the donee may constitute evidence that donative intention existed at a particular time.
        - Documents purporting to show donative intent must be look at with suspicion when the purported donor cannot speak for themselves.
            - *Note*: per the *Alberta Evidence Act*, s. 11, oral evidence is never sufficient in an action by or against an estate unless it is corroborated by material evidence.
        - The donor must have the mental capacity to appreciate the nature of the transaction.
    2. **Acceptance of the gift**: an understanding of the transaction and a desire to assume title.
        - In the ordinary case, acceptance is presumed to exist; the donee may rebut this presumption.
    3. **Delivery**: transfer of possession, marking the end of the donor's dominion.
        - *Note*: as a general matter, the donor must have done everything possible to perfect the gift.
        - Absent delivery, an unequivocal manifestation of intention to gift is not sufficient to pass property to the intended donee; a mere promise to gift is not enforceable.
        - For delivery to pass property to the donee, the donor must maintain donative intention all the way until the delivery occurs; any time before delivery, the donor can validity retract the gift.
        - Delivery can be manual (physical transfer) or constructive.
            - *Note*: constructive possession may occur when:
                1. The means of getting at and controlling the gift are handed over (e.g., a key).
                    - It is likely not enough to give access to the donee; the donor must be given power and control to the exclusion of others, including the donor.
                    - This sort of constructive delivery should apply generally when ordinary delivery is not practicable.
                2. Where there is no change of factual possession, but there is a change in the capacity in which that person has possession (e.g., where the donee is in possession of the subject matter of the gift before the making of the gift).
                    - Where the donee already has possession of the subject matter of the gift, delivery can occur with the manifestation of intention.
                - Delivery may be symbolic (some representation of the goods is handed over), but there is little authority on which to base the view that this constitutes delivery.
            - For delivery of goods to occur between cohabitants in a common establishment, there must still be some unambiguous act of transfer.
                - Otherwise, claims between cohabitants and executors and in bankruptcy would proliferate and there would be an increased uncertainty in the determination of these claims.
            - Provides tangible proof of a gift; it is the way donative intent is shown concretely.
        - If these things occur, the resultant gift of property is as irrevocable.
            - To allow otherwise would often produce an unjust result, as there may be detrimental reliance.

- The elements of *donatio mortis causa* are (*Re Bayoff Estate*):
    1. Impending death from an existing peril.
    2. Delivery of the subject matter.

3. The gift is only to take effect upon death and will revert to the donor should he/she recover.

Nolan v Nolan & Anor, [2003] VSC 121

Facts:

- The plaintiff Jinx Nolan claimed that her adopted father Sidney Nolan gifted three paintings to Jinx's mother Cynthia Nolan before she died in 1976. Jinx was a major beneficiary of Cynthia's estate. Following Cynthia's death, the three paintings remained in Sidney's possession until his death. Jinx claimed that proof of the gift being made to her mother (mostly based on documents from exhibitions) had only recently come to light.

Issue and holding:

- Did Sidney Nolan complete a valid gift of personalty to Cynthia Nolan? **NO**

Rationale: (Dodds-Streeton J)

- In this case, the plaintiff does not assert that a gift was affected by deed or declaration of trust, and regarding the three elements of a valid gift by delivery:
    1. Upon extensive review of the documents and the rules of evidence, donative intent was not proven.
        - The fact that Sidney gifted many paintings to Cynthia over his life is consistent with the conclusion that he did not intend the paintings to be given as gifts, since he retained possession of them.
        - The fact that Sidney was upset by the terms of his wife's wills but made no attempt to challenge her estates' entitlements suggests that Sidney honoured gifts and recognized them as binding.
    2. *(Presumed)*
    3. The continuation of control over the paintings by Sidney is inconsistent with a valid delivery.
        - Although Cynthia cohabited with Sidney, the paintings were only in the house for two years from 1974 to 1976, and in that time, there was no evidence of her access to or control over them.
        - While there is evidence that Cynthia took possession of two of the paintings for a time, there is no evidence that Sidney delivered possession to Cynthia.

Notes:

- For an *inter vivos* gift of land, the counsel of perfection is to complete the transfer just as in the case of a sale.
    - However, even in jurisdictions where legal title does not pass until registration, providing the donee with all the documents necessary to obtain registration will satisfy the requirement.

Re Bayoff Estate, [2003] 3 WWR 445 (SKQB)

Facts:

- Ivan Bayoff had terminal cancer. He retrieved his safety deposit box key and, in the presence of his lawyer, gave it to Antoinette Simard with the words "everything there is yours." That same day, he instructed Simard to go to the CIBC and clean out his safety deposit box and signed a paper authorizing her to do so. Simard was denied access, since CIBC required that authorization be filled out on their forms. Bayoff died without signing the papers required to permit Simard to access the safety deposit box. The day after his death, Bayoff's lawyer went to CIBC with Simard and removed, among other things, $70,000 worth of Canada and Saskatchewan Bonds and sixteen coins.

Issue and holding:

- Did Bayoff make a valid gift of the bonds and coins which were in his safety deposit box to Simard? **YES**
    - Bayoff gifted these things to Simard during his lifetime, and this *inter vivos* gift was perfected when Simard became the executor of his estate and was able to take possession over his property.

Rationale: (Krueger J)

- Regarding each of its three elements it is likely that the gift was not a *donatio mortis causa*:
    1. There is no doubt that the donor was facing impending death from an existing peril (terminal cancer).

2. Although he did not actually deliver the contents of the safety deposit box to Simard, his actions were enough to constitute delivery; delivery was complete when Bayoff handed the key over to Simard, notwithstanding that the appropriate and necessary paperwork was not completed prior to Bayoff's death.
    - By handing over the key, Bayoff gave up the only means he had of getting to the contents of the safety deposit box, thereby parting with control over its contents.
3. However, since Bayoff was terminally ill and there was no chance of recovery, his words suggested that he wished Simard would have *immediate* ownership of the contents in the safety deposit box (i.e., the gifts of the contents of the safety deposit box were intended to be gifts *inter vivos*).

- Regarding the three elements gifts of gifts *inter vivos*, only delivery is at issue; intention to donate and acceptance of the gift occurred in the presence of independent witnesses.
    - Simard did not complete delivery of the contents of the safety deposit box, even though she had keys to it; she had papers to access the contents, but they were inadequate, so the gift was not fulfilled.
    - But an unfulfilled gift will be treated as complete if the donee becomes an executor under the will of the donor and assumes control of their property, which is treated as the functional equivalent of delivery.

Notes:

- The delivery element of a *donatio mortis causa* is diluted; a transfer of partial control (one that might be ineffective to perfect an incomplete gift) can be adequate.
- Most courts in Canada have refused to recognize the *donatio mortis causa* of land, but one Canadian case has.
    - It is hard to find a compelling reason to justify the distinction between realty and personalty in this area.

ESTATES

- At the heart of the doctrine of estates is that there could be no direct relation of ownership to the land outside the allodium (land owned absolutely) of the Crown.
    - The object of each tenant's ownership was instead an artificial proprietary construct called an "estate" rather than absolute ownership of a tangible thing (the land).
- An estate is land for a time; each landholder owns not land, but a slice of time in the land.
    - Any slice of entitlement to land could be viewed as having a present existence, notwithstanding that its owner was not entitled to use and enjoy the land until some future date.
    - Common law courts insisted that at any one time, there would be someone who would be "seised" of a freehold estate and be responsible for delivering the obligations of tenure; there is no "abeyance of seisin."
- The doctrine of estates balances autonomy and utility.
    - The law of estates allows a grantor/devisor the ability to control from the grave how their land is used.
    - However, sometimes stewardship and trade may demand that we not respect the wishes of the dead.
- The doctrine of estates is inapplicable to personalty; chattels can be owned outright.
    - This is the result of the English ecclesiastical courts, which possessed jurisdiction over the rules governing personalty and were influenced by Roman law.
    - There are some exceptions to this rule:
        - The granting of a temporary interest in a chattel (a bailment) is possible.
        - Equity will recognize time-limited gifts of personalty contained in trust.
        - The dividing up of the legal title of personalty under a will is valid.
        - Estate interests in personalty can be introduced through statute (e.g., the *Dower Act*).

FEE SIMPLE

- **Fee simple**: an estate of potentially unlimited duration; practically the equivalent of full ownership.
    - There are few limitations on the owner's power to dispose of an estate in the land, which is underlined by important policy considerations (i.e., economic efficiency).
    - The fee simple will endure so long as the titleholder has some designated heir; the *Unclaimed Personal Property and Vested Property Act*, holds that land owned by an intestate (a person who dies without having made a will) is vested in the Crown in right of Alberta [s. 15(e)].
- As a function of the close bond between the lord and vassal, early estates were probably for the lifetime of the tenant, with the tenement reverting to the feudal superior when the tenant passed away; the problem with this is that tenants who knew that the land would not pass to their heirs would have no incentive to look after the land.
    - It soon became law that the tenant's heirs have the right to ascend on payment of "relief" in accordance with the rules of primogeniture.
    - Legislation converted the fee simple into a fully alienable estate.
        - Statute Quia Emptores (1290) allowed substitution without the permission of the feudal superior.
        - Statute of Wills (1540) allowed tenants to devise land by will.
- Perpetual ownership rights internalize the benefits and burdens of property.
    - Because the current market value of Blackacre is the present value of the eternal stream of rights and duties that attach to it, a rational, self-interested owner will adopt an infinite planning horizon when considering how to use his parcel and is spurred to install improvements and avoid premature exploitation of resources.

Creating an Estate in Fee Simple

- A fee simple estate can be created by an instrument (a *grant* or a *devise*) or by operation of law (e.g., *Dower Act*).
- **Grant**: a transfer of property between living persons (*inter vivos*).
    - At common law, the words necessary to create an *inter vivos* grant in fee simple at common law are "To A and her/his heirs," "To A, her/his heirs, executors, and assigns," or something very similar.
        - The words "To A" are *words of purchase*; the words "and his/her heirs" are *words of limitation* delineating the duration of the estate conferred.
        - If the strict language requirements of the common law were not met, even if it was apparent that a fee simple was intended, the grantee would receive only a life estate.
    - The strict requirements of the common law have now been relaxed; the *Law of Property Act*, s. 7(1) holds that, absent words of limitation, the entire estate is transferred unless a contrary intention is expressed.
- **Devise**: a testamentary gift of real property by will.
    - In the case of property devised by will, a more relaxed position developed in the common law: a fee simple would be found so long as the language was sufficiently clear to convey that meaning.
    - The *Wills and Succession Act* states that a disposition of property by will is a disposition of every interest in the property that the testator had the capacity to give unless a contrary intention is expressed [s. 9(2)(b)].

Thomas v Murphy (1990), 107 NBR (2d) 165 (NBQB)

Facts:

- The plaintiffs acquired title to a property from the beneficiaries under a will. The grant of the property to the beneficiaries was to “the grantees, their successors, and assigns…” They maintained that because the grantees did not receive a grant to themselves and their heirs, they could not dispose of a fee simple to the property.

Issue and holding:

- Did the grantees in the trust deed receive a fee simple interest in the property which they could convey? **YES**

Rationale: (Creaghan J)

- The requirement of words of limitation in the grant should be seen to have been supplied by the clear intention in the deed to pass the fee simple interest of the grantors.
    - i.e., the beneficiaries under the will should not be prejudiced by the fact that the grantor used the word "successors" rather than "heirs."

LIFE ESTATE

- **Life estate**: an estate in land that is coextensive and coterminous with the life of the grantee.
    - Can be created under a will or conveyance by carving this limited freehold interest out of a fee simple; unlike the fee simple, no special terminology is needed to create a life estate at common law.
    - You cannot give a life estate to an artificial person since an artificial person never dies.
    - A life estate can be created:
        - Expressly: "to A for life"
        - At common law, with a failed attempt to create a fee simple.
        - Language construed to confer a life interest.
            - e.g., "to A for as long as she wishes."
        - By operation of law (e.g., the *Dower Act*)

Conventional Life Estates

- ***Pur sa vie***: an estate for one's life.
    - A gift of land "To A for life" confers on A an estate *pur sa vie* (i.e., it lasts so long as A is alive).
    - This interest is transferable, though the original life tenant remains as the measuring life.
- ***Pur autre vie***: an estate for someone else's life.
    - A gift of land "To A for the life of B" confers on A an estate *pur autre vie* (i.e., it lasts so long as B is alive).
    - The transfer of a life estate *pur sa vie* transforms it into one *pur autre vie*.
- ***Cestui que vie***: the person designated as the measuring life.
    - If more than one *cestui que vie* is chosen, the estate will not end until the last *cestui que vie* has died.
- If O grants "To A for life," and then A grants "To B," A acquires a life estate *pur sa vie* and B acquires a life estate *pur autre vie* (i.e., it lasts so long as A is alive).
    - Where A dies before B, wills legislation provides for the property to transfer along with the rest of O's estate.

Rights and Duties of Life Tenant and Remainderer

- A life tenant is liable for all current expenses, including property taxes, interest due on a mortgage, improvements, and repairs (except, perhaps, repairs done in the name of preserving the property).

The Doctrine of Waste

- The tenant for life who has land in possession has an incentive to drain that land of all its value.
    - Because the remainderer may be unknown, a child, or not even born, they may not be able to negotiate with the tenant for life to secure their interests.
- Common law and equity offer a solution to this problem in the form of the doctrine of *waste*, which makes the life tenant liable to the remainderer for action or inaction which might permanently alter the land's physical character.

- It prevents the life tenant from unreasonably interfering with the expectations of the remainderperson by ensuring that costs and benefits are shared over time through injunctions and damages.
- There are four types of waste which limit the power of a life tenant to enjoy property at common law:
  - **Ameliorating**: acts that changes the character of the property but enhances its value.
    - Courts have been unwilling to restrain ameliorating waste (because it confers a financial benefit) but ameliorating waste that significantly transforms the property may be actionable (since there is often more to the enjoyment of property than its market value).
  - **Permissive**: injury that results from failure to maintain the realty, leading to dilapidation.
    - A life tenant is not impeachable for permissive waste unless the grantor specifies that the life tenant has an active duty to repair and maintain the realty.
  - **Voluntary**: positive diminution of the value of land (e.g., removing fixtures, opening mines, etc.).
    - A life tenant is liable to the remainderperson for voluntary waste unless the terms of the grant give him specific exemption.
  - **Equitable**: malicious and wanton destruction of the land.
    - A life tenant can be restrained from equitable waste if they are otherwise unimpeachable.
    - The *Law of Property Act* says: "An estate for life without any impeachment of waste does not confer. . . a legal right to commit [equitable waste], unless an intention to confer the right expressly appears by the instrument creating the estate" (s. 71).

- The modern solution to resolve the conflict between the life tenant and remainderer is the *trust*, which avoids the need for judicial supervision.
  - A trust places legal title in the hands of a trustee, who holds the property on trust for the life tenant and those who own the remainder.
    - The trustee has fiduciary obligations to a beneficiary, which are enforceable in a court of equity.
  - The responsibility for making payments can be delegated to the trustees with instructions as to how to allocate expenses.

FEE TAIL

- **Fee tail**: an estate in land which endured so long as the original grantee or any of his lineal descendants were alive.
  - If an estate in tail was given to A, when A died, the estate would devolve to the children (the system preferred the eldest male) again and again along the particular line of descent until it became extinct.
  - Designed to retain land within the family by securing from risk that the family's representative in any one generation would dispose of the land or otherwise lose it.
    - Unlike the owner in fee simple who can convey the entire estate, the owner of an estate in tail could transfer only his present right to possess.
  - *Law of Property Act* states that "Any devise or limitation that previously would have created an estate tail creates a fee simple estate or the greatest other estate that the devisor or transferor had in the land" (s. 9).

AMBIGUOUS GRANTS

- An issue of construction can arise as to whether the donee was meant to receive a life estate or a fee simple.

Re Walker (1924), 56 OLR 517 (ONCA)

Facts:

- John Walker, the testator, gave to his wife "all of my real and personal property", but added that "*should any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her the remainder shall be divided as follows*…" When the wife died, people sought money from the original testator's will, alleging that the value of her estate represented the undisposed part of his property that remained when his wife died.

Issue and holding:

- Does the wife take an absolute interest under the will of Walker or only a life interest? **Absolute interest**

Analysis:

- The court will try to ascertain the dominant intention of the testator; any other intention will be disregarded.
- A testator cannot give property to someone, intending him to have all the rights incident to ownership but adding to this a gift over (a gift of property to a second recipient if a certain event occurs) of that which remains at his death.
- The will is open to two possible interpretations:
    - A fee simple has been transferred and other desires for later use of the land are repugnant.
    - All that is transferred is a life estate and the gifts after the death of the life tenant are valid.
    - There is a third class of cases into which some fall where a testator transfers a life estate to someone but *explicitly* gives them the power to sell that property during their lifetime (a power to encroach on the remainder). If this is the case, then the gifts will be void if the property is sold.

Rationale: (Middleton JA)

- This was an absolute transfer, as the testator's dominant intention was to benefit his widow, not anyone else.
    - The words "undisposed of" do not refer to a testamentary disposition (transfer of property under a will) but rather to a disposal by her during her lifetime (a transfer of possession to another).
    - The gift to the wife must prevail and the attempted gift over must be declared repugnant and void.

Ratio:

- An absolute transfer of land (fee simple) cannot be accompanied by directions on how to deal with the land upon the death of the receiver; however, if all that is transferred is a life estate then these types of gifts are valid.

Notes:

- *Kaplinsky says*: the testator clearly wanted to benefit two sets of beneficiaries—the widow and the remainderpersons—and the court has not given effect to those wishes.

Re Taylor (1982), 12 ETR 177 (Sask Surr Ct)

Facts:

- The will of John Taylor read:

    I Give, Devise and Bequeath all my real and personal estate of which I may die possessed to my wife Kathleen. . . to have and use during her lifetime.

    Any Estate, of which she may be possessed at the time of her death is to be divided…between my daughters…
- John Taylor died in 1965. His wife Kathleen used portions of his estate until her death. In Kathleen's will there is a direction to her executors to convert the assets in her estate to money to be dispersed according to her instructions.

Issue and holding:

- Does Kathleen take an absolute interest under the will of John or only a life interest? **Life interest**

Analysis:

- If Kathleen takes an absolute interest, any property which she acquired under the will of John forms part of her estate; if she takes only a life interest, any part of the estate of John remaining in her hands at her death passes to the daughters upon a gift over under the will of John.
- There are cases (like *Re Walker*) where the testator leaves the impression that the donee is to have an absolute interest but purports to give a gift over, with the result that the gift cannot be given effect to; in other cases, the testator uses clear words to indicate an intention to give only a limited interest so the gift over is not repugnant.

Rationale: (Scheibel J)

- The language used evinces an intention on the part of the testator to give to Kathleen a life interest coupled with a power to encroach on capital (distribute some of the capital) for her own proper maintenance.
    - The words "during her lifetime" operate as clear words of limitation, defining the size of the estate.
    - Any significance a right to encroach on capital may have as evidencing an intention to give an absolute interest is displaced by the clear words of the testator.
    - Unlike in *Re Walker*, there is no inconsistency in the language that requires us to choose between two alternative intentions based on the dominant intention of the testator.
    - In *Townsend v MacInnis*, the PEICA held that when a life interest is coupled with the words "to be used and disposed of as she wishes during her lifetime," the donee takes an absolute interest.
        - But here, Kathleen only has a power to encroach on capital *for her own maintenance* and cannot freely dispose of the subject matter of the gift.

Ratio:

- Where a testator uses plain language to indicate an intention to give a life interest only, that interest is not enlarged to an absolute interest because the testator has declared that the donee is to have the right in her discretion to encroach on capital for their own proper maintenance.

Notes:

- The court says that the widow's power to encroach on the remainder is not unlimited, as Kathleen only acquired the ability to encroach on the remainder "for her maintenance."
- It is not clear in the will that there is any limitation on the power to encroach. Can the widow sell 1 acre out of the estate to pay for a cruise? Is this use of money for her "maintenance"?

Christensen v Martini Estate, 1999 ABCA 111

Facts:

- The appellant ("Martini") is the widow of the testator. The respondents are sisters, Sandra Christensen and Sonya Nadon ("the Christensens"), who were longtime friends and neighbours of the testator. The testator's will said:
    4. *I give, Devise and Bequeath all of my estate, both real and personal, including any property over which I may have general power of appointment to my Trustee, upon the following trusts, namely:*
        a. *I direct my Trustee to transfer my savings account. . . to Sandra Christensen of the city of Calgary.*
        b. *I forgive any money that Sandra Christensen owes me.*
        c. ***I give to my wife [Martini] of Calgary 2203 32 Ave SW Calgary for her use. When she no longer needs 2203 31 Ave SW Calgary that she give said property to [the Christensens] . . .***
- Martini applied for a received probate of the will. The Christensens applied thereafter for a declaration as to their interest, and that of Martini, in the property.

Issue and holding:

- Did the testator give Martini a life estate? **YES**

Analysis:

- In interpreting provisions in a will, *a court should endeavour to give effect to the testator's intentions as ascertained from the expressed language of the instrument and the surrounding circumstances*.
- Courts will endeavour to reconcile apparently conflicting provisions in a will rather than ignore one of them or finding one of them void for uncertainty.

Rationale: (Hunt JA)

- The testator intended to benefit both Martini and the Christensens; this is supported by the language of clause 4(c) itself, the entire will, and the surrounding circumstances and was not disputed by either party.

- The most likely interpretation of clause 4(c) is that the testator intended Martini to have a life estate without a power of encroachment, with a gift over to the Christensens.
    - If the gift is interpreted as a life estate to Martini with a power of encroachment, the "said property" could be diminished the Christensens get it; this does not appear to be what the testator intended.
    - The absence of the words "during her lifetime" does not necessarily mean that the testator did not intend to grant his wife a life estate, especially since the testator was a lay person and drafted the will himself.
    - While it is possible that cl. 4(c) anticipates the land going to the Christensens during Martini's life, it is equally possible that the testator would assume that Martini would "no longer need" the property upon her death.
    - Martini and the testator lived together in the property following their marriage, which further supports the notion that the testator intended that Martini had the right to continue to occupy the property.

ABORIGINAL INTERESTS IN LAND

The Doctrine of Discovery

- The doctrine of discovery gave European nations the right to govern the territory and the underlying (or radical) title to the land but did not give it the right to oust the prior proprietary claims of Indigenous groups (*Johnson v M'Intosh*).
- The doctrine of discovery was premised on the English legal doctrine of *terra nullius*, which presupposed that the Americas were a "no man's land" waiting to be settled.
    - Most British colonies settled in the 17th and 18th centuries were not treated as *terra nullius*, recognizing the rights of Indigenous people to land as a burden on the Crown's underlying title.
        - This was due to pragmatism; the British Crown wanted to avoid military conflict given the relative parity between Indigenous communities and the British in northern North America.
    - But some British territories settled in the 19th century were treated as *terra nullius*, including BC; there, the Crown asserted a claim to both sovereignty and full beneficial ownership of these lands.
    - *Terra nullius* has since been repudiated by courts in both Australia (*Mabo*) and Canada (*Calder*).

The Recognition of Aboriginal title

- Aboriginal title has been recognized for at least two centuries; *Johnson v M'Intosh* was the key early decision.
    - In *Johnson v M'Intosh* (1823), the USSC held that whichever European nation had "discovered" territory acquired sovereignty over it; Indigenous peoples were to retain possession and use of land, but their sovereignty as independent nations was diminished.
    - The recognition that Indigenous peoples had an interest in lands traditionally occupied was recognized prior to *Johnson v M'Intosh* by entering land treaties in the early days of British settlement.
- The *Royal Proclamation, 1763* formally recognized Aboriginal title in Canada.
    - It held that Aboriginal land rights could only be transferred to the Crown via treaties; the corollary of this was that Aboriginal peoples could negotiate over land rights *only* with the Crown.
    - Treaties, which were entered under inequalities of bargaining power, were pursued in most of Ontario and the prairies and typically involved Aboriginal rights and title being surrendered in exchange for treaty rights.
- In *St. Catherine's Milling v R* (1888), the JCPC described Aboriginal title as merely a "personal and usufructuary right" and not a full-fledged property right like fee simple.
- In *Calder* (1973), the SCC left open the possibility of Aboriginal title claims being made in BC, as most of BC was never ceded to the Crown by treaties; this resulted in an extensive treaty negotiation process (though most claims in BC remain unresolved).

    - Absent a resolution through agreement, some Indigenous communities initiated litigation seeking declarations of Aboriginal title from the courts (e.g., *Delgamuukw*, *Tsilhqot'in*).
- The recognition of Aboriginal title is most important in areas not surrendered by treaties: British Columbia, the Atlantic provinces, and parts of Yukon, the Northwest Territories, and Quebec.

Aboriginal Rights

- Even where an Aboriginal group is unable to make out a claim to title, they may nevertheless possess Aboriginal rights that are recognized and affirmed by s. 35(1).
    - Aboriginal rights are rights to engage in specific practices rather than rights to the exclusive possession of land (e.g., hunting, fishing, ceremonial practices).

R v Marshall; R v Bernard, 2005 SCC 43

Facts:

- Marshall was charged with cutting down timber on Nova Scotia Crown land without a permit. In the second case, Bernard, a Mi'kmaq was charged with possession of logs stolen from a rural New Brunswick saw mill that were cut from Crown lands. Marshall and Bernard asserted an Aboriginal right short of title to cut timber.

Issue and holding:

- Did the Indian status of the accused give them right to log on Crown land for commercial purposes? **NO**

Analysis:

- For a claim of rights short of title to be recognized, the centrality and significance of the practice to the group *before contact* with Europeans needs to be made out.
    - The Court's must examine the pre-sovereignty practice and translate it as faithfully as it can into a modern legal right (e.g., if the right in question is the right to hunt, this might be translated into a *profit a prendre*).
        - In finding that equivalent right, both the Aboriginal and the common law perspective is considered.
    - The Court needs to take a generous approach that is respectful of Indigenous practices and culture and that is consistent with the duty and honour of the Crown.

Rationale: (McLachlin J)

- There were no treaty rights conferring the right to cut timber.
- The evidence does not support the conclusion that commercial logging formed the basis of the Mi'kmaq's traditional culture and identity.

Notes:

- One criticism of the jurisprudence on this topic is that it freezes Indigenous culture in time.
    - Aboriginal rights are not entirely static and may assume present-day attributes so long as the difference between the past and present practice is not too stark to be regarded as an evolution of a traditional use.
- Aboriginal rights are not dependent on proof of Aboriginal title, and exclusive occupation does not have to be shown.

Aboriginal Title

Delgamuukw v British Columbia, [1997] 3 SCR 1010

Issues and holding:

1. How is Aboriginal title distinguished from "normal" proprietary interests in land?
2. What is the content of aboriginal title?

3. What is required for proof of Aboriginal title?
4. How can infringements on s. 35(1)'s protection of Aboriginal title be justified?
5. Did BC have the power to extinguish Aboriginal rights after 1871?

Analysis: (Lamer CJ)

1. Aboriginal title is a *sui generis* (unique) estate in land informed by common law and Aboriginal perspectives; the features of Aboriginal title which distinguish it from "normal" proprietary interests, like fee simple, are:
    a. *Inalienability*—lands held under Aboriginal title cannot be transferred, sold, or surrendered to anyone other than the Crown, which ensures that Indigenous peoples are not dispossessed of their land and reflects the relationship and connection an Indigenous group has with the land.
    b. *Its source*—it arises not from the *Royal Proclamation* or s. 35, but from prior occupation by Aboriginal peoples *before* the assertion of British sovereignty (whereas fee simple estates arise afterward).
    c. *It is held communally*—it cannot be held by individual persons; it is a collective right to land held by all members of an Aboriginal nation, who make decisions with respect to that land.
2. The content of can be summarized by two propositions:
    a. It encompasses the right to exclusive use and occupation for a variety of purposes, *not all of which need be aspects of practices, customs, and traditions integral to the distinctive cultures of Aboriginal groups*.
        - Aboriginal rights to engage in specific activities do not constitute Aboriginal title *per se*; therefore, Aboriginal title is not merely a personal and usufructuary right.
    b. Those protected uses must be reconcilable with the nature of the group's attachment to the land.
        - The law of Aboriginal title affords legal protection to prior occupation in the present day; implicit in this is a recognition of the importance of the continuity of the relationship of an Aboriginal community to its land over time, including continuity into the future.
        - Uses of the lands which would threaten the future relationship of an Aboriginal community with its land (i.e., that which would destroy the land's special, non-economic value) and the power to alienate the land to third parties are excluded from the content of Aboriginal title.
        - Aboriginal groups are *not* restricted to those uses that the group traditionally engaged in, and they can still surrender to the Crown in exchange for valuable consideration.
3. To make out a claim for Aboriginal title, the Aboriginal group asserting title must satisfy the following criteria:
    a. The land must have been occupied prior to the time at which the Crown asserted sovereignty over it.
        - Sufficiency of occupation requires a consideration of the dual perspectives of the Aboriginal group and the common law notion of possession.
            - The common law requires that the Aboriginal group act in a way that would communicate to third parties an intention to hold and use the land; this does not necessarily demand notorious or visible use (e.g., dwellings, cultivation, the regular use of definite tracts for hunting, fishing, or exploiting resources).
            - A focus on Aboriginal perspectives recognizes the way an Aboriginal group sees possession as shaped by its laws, practices, size, technological ability, and the character of the land (i.e., if an Aboriginal society had laws in relation to land, those laws would be relevant).
    b. An Aboriginal group may provide evidence of present occupation as proof of pre-sovereignty occupation; if so, there must be a *continuity* between present and pre-sovereignty occupation.
        - What is required is a substantial maintenance of the connection between the people and the land, not necessarily an unbroken chain of continuity.
    c. At sovereignty, occupation must have been exclusive.
        - Proof of exclusivity must rely on both common law and Aboriginal perspectives—at common law, a premium is placed on actual occupation; this must be considered alongside the intention and capacity of the Aboriginal group to retain exclusive control.

        - An act of trespass would not undermine a general finding of exclusivity if Aboriginal groups intended to and attempted to enforce their exclusive occupation.
        - Where other groups were allowed access, the fact that permission was asked might be evidence of exclusive control.
    - This does not preclude joint title, as when two Aboriginal groups share exclusive possession
4. The test for justifying infringements on Aboriginal title has two parts:
    a. The infringement must be in furtherance of a compelling and substantial legislative objective.
        - This reconciles of prior occupation of Indigenous societies with Crown sovereignty by recognizing that Aboriginal societies exist within and part of a broader social, political, and economic community.
        - One such objective is the recognition and affirmation of Aboriginal rights benefiting the broader community, which limits on Aboriginal title may be able to achieve.
            - e.g., placing limits on fishing to ensure that there are fish for generations to come.
    b. The infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.
        - Requires the government to take Aboriginal rights into account and ensures that the allocation of the resource are respectful of the priority of those rights.
            - e.g., accommodating the participation of Aboriginal peoples in resource development.
            - e.g., making barriers to Aboriginal uses of lands (e.g., licensing fees) somewhat reduced.
        - Whether the Aboriginal group has been consulted is always relevant.
            - Consultation must always be undertaken in good faith, and with the intention of substantially addressing the concerns of the Aboriginal people whose lands are at issue.
            - Where a breach is relatively minor, the duty to consult will be no more than a duty to discuss; where a breach is severe, the duty to consult may require full consent.
        - Fair compensation will ordinarily be required when Aboriginal title is infringed, with the amount varying depending on the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.
        - *Note*: this has since been understood as requiring a degree of proportionality between the legislative objective pursued and the degree of infringement on Aboriginal title.
5. Provinces are precluded from extinguishing Aboriginal title by s. 91(24) of the *Constitution Act, 1867*.

Notes:

- Other reasons for the inalienability of Aboriginal title include:
    - Giving the state a monopsony over negotiating with Indigenous peoples increases its bargaining power.
    - It reflects an outdated paternalism towards Indigenous peoples.
    - Many Indigenous legal systems did not traditionally treat land as an alienable commodity (but Indigenous legal systems are not static, and some did treat land as an alienable commodity).
    - It ensures the maintenance of a collective land base as a locus of self-government.
- Criticisms of Lamer CJ's justification of restrictions on Aboriginal title include:
    - It assumes that there is a single, pan-Indigenous perspective on or relationship to land.
    - Indigenous cultures can change over time, changing how land under Aboriginal title ought to be used.
    - It is not the role of the Court to define and police restrictions on Aboriginal title based on its view of an Indigenous group's culture.
- Whether there is such thing as common law Métis title is an open question in Canadian law.
    - Another unresolved question relates to the potential for Aboriginal title claims to private land.

Facts:

- The Tsilhqot'in Nation has lived in a remote valley in central BC for centuries, and is one of hundreds of Indigenous groups in BC with unresolved land claims. In 1998, during a dispute over logging, the Tsilhqot'in Nation claimed Aboriginal title over a small area of land. The federal and provincial governments opposed the claim.

Issues and holding:

1. Has the Tsilhqot'in Nation established Aboriginal title? **YES**
2. What duties were owed by the Crown at the time of the impugned government action? **Significant consultation and accommodation**
3. Did BC's land use planning and forestry authorizations violated this duty? **YES**

Analysis:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
    - Aboriginal land rights survived European settlement and remain valid unless extinguished by treaty.
        - Thus, the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada.
    - The Crown's underlying title is held for the benefit of Aboriginals and is constrained by the Crown's fiduciary obligation to the group, which emerged as the Crown assumed discretionary control over Aboriginal peoples.
- Owing to the Crown's underlying title, and to reconcile Aboriginal societies with the broader political community, governments can infringe Aboriginal title without consent (*Delgamuukw*).
    - While s. 35 does not contemplate the permissibility of violating Aboriginal title, the SCC has read in a right of derogation that bears a close resemblance to that found in s. 1 (*Sparrow*).
    - Where the Crown contemplates conduct that might adversely affect Aboriginal title, it must (*Sparrow*):
        1. Have a compelling and substantial purpose,
            - e.g., economic development, protection of the environment, building infrastructure, etc.
        2. Establish that the infringement is consistent with Crown's fiduciary obligation to the group.
            - The Crown must not substantially deprive future generations of their benefits to the land.
            - The infringement must be necessary to achieve the government's goal (rational connection), the government must go no further than necessary to achieve it (minimal impairment), and the benefits expected to flow from the infringement should not outweighed by the adverse impacts effects on the Aboriginal interest (proportionality of impact).
            - The Crown has to discharge its duty to consult and accommodate.
                - This duty arises where the Crown has knowledge of the actual *or potential* existence of Aboriginal title accruing to an Aboriginal group (*Haida Nation*).
                - The degree of consultation and accommodation required depends on the strength of the claim and the severity of the infringement (*Delgamuukw*; *Haida Nation*).
                    - The duty to consult or accommodate is greatest where title is established.
                    - If the Crown begins a project before Aboriginal title is established, it may be required to cancel the project upon establishment of the title if continuation would be unjustifiably infringing.
                - Consultation and accommodation must be undertaken in good faith and with a view to addressing the concerns of the Aboriginal group.
                - Where the Crown fails to discharge its duty, various remedies are available, including injunctions, damages, or an order that consultation or accommodation be carried out.

Rationale: (McLachlin CJ)

1. The evidence supports the trial judge's finding of sufficient, continuous, and exclusive occupation.
    - Part of the claimed land were regularly used by the Tsilhqot'in.

    - Present occupation is rooted in pre-sovereignty times, as archaeological, historical, and oral evidence all indicate a continuous Tsilhqot'in presence in the area claimed.
    - The Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it.
        - BC objects that the trial judge's conclusions were arbitrary or insufficiently precise, but this ignores that historical evidence is by its nature sometimes imprecise; the trial judge's conclusions thus should not be lightly set aside absent demonstrated error.
2. The Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant; thus, the Crown had a duty to consult and accommodate that was significant as well.
3. By issuing licenses permitting third parties to conduct forestry activity on the land without getting consent from or consulting and accommodating the interests of the Tsilhqot'in, the province breached its duty owed to the Tsilhqot'in.

Notes:

- According to J Borrows, the Court's assertion that the Crown acquired underlying title to all land in Canada directly contradicts the assertion that *terra nullius* never applied in Canada.
    - There is no explicit justification for why the Crown and not the Tsilhqot'in have underlying title to the land, an outcome which denigrates Indigenous peoples' laws and ways of life.
- The common law used to recognize that Aboriginal title could be extinguished by a clear act of Parliament, but in *R v Van der Peet*, Lamer CJ stated that after s. 35(1), Aboriginal rights cannot be extinguished and can only be regulated or infringed.

Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511

Facts:

- In 1961, the BC government issued a license permitting a private firm to harvest trees in a designated area of Haida Gwaii. In 1999, this license was transferred to Weyerhaeuser Co. The Haida challenged the government action and sought an order for the transfer to be set aside.

Issue and holding:

- Is the Crown entitled to use the resource at issue as it chooses pending resolution of the Aboriginal title claim? **NO**
    - The honour of the Crown prevents it from running roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof.

Rationale: (McLachlin CJ)

- The duty to consult arises when the Crown has *actual or constructive* knowledge of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.
    - The duty to consult and accommodate is part of the process of reconciliation that flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which itself flows from the Crown's assertion of sovereignty over an Aboriginal people.
        - To unilaterally exploit a claimed resource during negotiations to resolve an Aboriginal claim to that resource is not honourable.
    - Difficulties associated with the absence of proof of claims are addressed by assigning appropriate content to the duty, not denying the existence of it.
- The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and the seriousness of the potentially adverse effect upon the right or title claimed.
    - Where there is a dubious *prima facie* claim to title or the potential for infringement is minor, the only duty for the Crown may be to give notice, disclose information, and discuss issues.
    - Where there is a strong *prima facie* claim to title or the potential for infringement is large, deep consultation to find a satisfactory interim solution and accommodation based on that consultation may be required.

        - Consultation may entail submissions, formal participation in decision-making, and provision of written reasons to show that Aboriginal concerns were considered.
        - Accommodation may require amending policy proposals to minimize the effects of the infringement.
        - The duty to accommodate does not give Aboriginal groups a veto, but it requires that parties seek compromise to reconcile conflicting interests.
    - In between these two extremes are other situations, the requirements of which should be determined by asking what is necessary to maintain the honour of the Crown to balance societal and Aboriginal interests.
    - In any event, the Crown must act in good faith with the intention of substantially addressing Aboriginal concerns; Aboriginal groups must also act in good faith and not take unreasonable positions or try to thwart the Crown's reasonable good faith attempts (though there is no duty on either party to agree).

Tenure under Statutes

Indian Act

- The *Indian Act* imposed a uniform governance and land tenure regime on all Canadian First Nations, ignoring existing legal orders and institutions and disregarding the unique laws, practices, of individual groups.
- The main features of the *Indian Act* when it was enacted as it relates to property were:
    - Reserve land is Crown land set aside for the use and benefit of individual bands.
    - For each band, the Act recognized an elected chief and band council and granted certain powers that enabled them to grant and remove property rights, with the approval of the appropriate federal Minister (s. 20).
    - The Act recognizes individual property interests within the reserve enforceable in courts based on the Certificate of Possession (which confers ownership conditional on the holder remaining on the reserve).
        - Property held on a reserve under a Certificate of Possession granted the party named an exclusive right to use and possession that could not be arbitrarily deprived by the band council.
        - Rights conferred by a Certificate of Possession can be devised by will and can be transferred *inter vivos*, but only with approval and only so long as the band member who holds it remains on the reserve; otherwise, the land reverts to the band.
    - Reserves were under federal jurisdiction, so provincial property legislation did not apply on them; this has now been rectified by federal legislation that allows such arrangements to govern reserve land.

First Nations Lands Management Act

- Allows First Nations to opt out of the default land tenure provisions of the *Indian Act* and adopt their own land codes relating to reserve lands (subject to the parameters of the Act).
    - The rationale of providing an opt-out option is to avoid reproducing colonialism by having the Crown impose land codes on First Nations.

Métis Settlements Act

- The fee simple of all the lands in Métis settlements is vested in the Métis Settlements General Council, which can grant three kinds of rights: (1) Métis title, (2) provisional Métis title, and (3) allotments.
    - Métis title is a statutory interest in settlement lands; each parcel of land has Métis title that is either in the name of the settlement or, if it has been transferred, in the name of the member of the settlement.

        - This kind of interest confers the right to exclusive use and occupancy, to make improvements to the land, to transfer and devise title, and to grant lesser interests.
        - Land held under Métis title cannot be given as security for a debt and may not be held under joint tenancy or a tenancy in common.
    - Provisional Métis title is granted for a fixed term and is renewable; if certain conditions are met (generally, building on the land or improving it), the holder will acquire full Métis title.
    - Allotments can be granted for a set time-period for the purpose of allowing the holder to use the parcel to operate a farm, ranch, or other business.

Modern Treaties

- In 1998, the conclusion of the *Nisga'a Final Agreement* (NFA) delivered constitutionally-protected property rights of the Nisga'a to nearly 2000km^2 in northwest BC as an estate in fee simple and includes broad rights of the owner to alienation and exploitation (though it is still subject to government regulation).
    - It is now possible for the Nisga'a First Nation to sell, lease, mortgage, and encumber all Aboriginal title lands demarcated in the NFA; they can also grant certain fee simple lands to Nisga'a citizens in fee simple.
- The opportunity of Nisga'a citizens to own residential properties in fee simple is part of the process of increasing the economic prosperity of the Nisga'a since, as de Soto argues, privatizing communal lands clarifies the rights of individual owners, promoting facilitates access to credit and promotes investment in those lands through certainty.
- However, critics argue that the NFA puts the future control of community land, and the connection that First Nations have with their land, at risk.
    - The conversion of Nisga'a lands to fee simple might facilitate its divestment to non-Nisga'a, undermining the right of Nisga'a citizens to occupy lands by virtue of their membership in the community.
    - Fee simple ownership may also concentrate ownership in the hands of a few Nisga'a citizens and undermine the goals of developing capital wealth for numerous Nisga'a citizens.
    - Considering these adverse effects, the Nisga'a are likely to call for laws and policies that ameliorate the effects of disinvestment and recognize cultural practices related to the distribution of property.

EQUITABLE INTERESTS

ORIGINS OF EQUITY

Historical Context of the Use

- After the Norman Conquest, as local customs were coalescing into the common law, a separate development of a flexible and discretionary form of justice (equity) was emerging as a judicial cure for the shortcomings of the law.
    - The source of this body of law was the Crown, which delegated the task of reviewing special petitions to the office of the Lord Chancellor, and in time to a Court of Chancery.
- In the decline of the feudal system, the personal bond between lord and vassal was breaking down.
- There was a growing importance of the incidents of tenure, the primary source of state revenue.
- The Black Death, which killed 1/3 of Europe's population, increased the power of villeins by creating a surplus of land and labour shortages and undermined the Catholic church by instilling the notion that everyone was equal, which helped erode the backbone of feudalism.
- England's economy was transforming; land declined in importance and manufacturing gained importance.

Early History of the Use

- The modern trust arose under the *use*, which was a device under which legal title was transferred to a trusted friend, who was to hold it not for personal benefit but for the purpose of carrying out the transferor's instructions.
    - The person who transferred the land was called the "feoffer of uses," the person to whom the land was transferred was the "feoffee of uses," and the person for whose benefit the land was conveyed was the "*cestui que use*."
        - A feoffee to uses acquires legal title by a deed to uses, but equity recognizes the *cestui que use* as the true beneficiary (owner) under the terms of the use.
        - When there are several feoffees, they hold it jointly; if one of them passes away, their interest is extinguished, and title is held by the others (who can then appoint another joint owner), meaning that relief never has to be paid.
- Conveying land to uses had several advantages:
    - Designating heirs (before the *Statute of Wills*)
        - The common law did not provide for testamentary transfers of land; instead, the rules of primogeniture governed the devolution of realty.
        - But a landowner could convey land to feoffees to hold to the uses declared in the conveyor's will, bypassing the common law prohibition against devises of land.
    - Making charitable gifts to religious institutions
        - When monks arrived in England, they needed some land for their monastery but could not own property; thus, what donors would do is pass land to a trusted person who will hold the land for the benefit of the monks.
    - Avoiding feudal burdens, since the feoffee became the legal owners of the fee simple, and they alone were subject to the tenurial incidents.
        - Incidents like wardship, relief, and primer seisin were lucrative sources of royal income that fell due to a lord on the descent of land from an owner to their heirs.
            - Uses could be inserted lawfully into land transfers so that the property would pass on death in a way that did not attract this 'tax' liability.
    - Shielding property from dower rights and creditors.
- The use would continue long after the disappearance of the tenurial incidents that made them popular.

The Court of Chancery and the Use

- Increasing popularity led to frauds by dishonest feoffees, but the common law refused to protect the *cestui que use*, for the accepted doctrines of the common law had no place for separate legal and beneficial ownership.
    - By the latter half of the 15th century, the Chancellor was applying consistent principles to protect beneficial interests behind the use (enforcing deeds to uses) based on the premise that the feoffee's consciences bound them to observe the terms of the use.
        - The *cestui que use* came to be thought of as holding an equitable proprietary interest, while the legal interest held by the feoffee was seen as purely managerial.
- The Chancellor came to enforce the beneficial interest not merely against the original feoffees, but against all who acquired interests in the land in such a way that in conscience that they could not disregard the interest; the use thus acquired the characteristics of a proprietary interest.
    - Donees, heirs, and devises of the feoffee were bound by the use, and purchasers who knew or ought to have known of the existence of the use were bound by it too.

- However, *bona fide* purchasers for value of a legal interest in the land without notice of the beneficial interest were not bound by the use.

- In developing the concept of equitable ownership, successive Chancellors largely adopted the doctrine of estates: the *cestui que use* might have an equitable fee simple, an equitable fee tail, or an equitable life interest.

The *Statute of Uses*

- Since uses considerably reduced the exposure of landowners to the remaining tenurial incidents (especially relief), Henry VIII forced an unwilling Parliament to pass the *Statute of Uses* in 1535.
  - s. 1 said that when person A is seised to the use of B (person or corporation), B's equitable interest is enlarged by a corresponding legal interest, and A's interest is executed.
- The aim of the statute was to divest the legal estate from the feoffee and vest it in the *cestui que use* (converting the *cestui qui use*'s beneficial interest into a legal interest; "executing the use").
  - e.g., to P and his heirs to the use of Q and her heirs.
    - After the Statute: Q holds the legal and equitable fee simple, and P holds nothing.
  - e.g., X → to A and her heirs to the use of B for life, remainder to the use of C and her heirs.
    - After the Statute: B gets a life estate in both the equitable and legal life estate, C gets the equitable and legal fee simple in remainder, and A gets nothing.
  - e.g., "to F and his heirs to the use of A for life"; after the statute, F took nothing, A took a legal life estate, and the conveyor took the legal fee simple in reversion.
- The *Statute of Uses* created previously unrecognized interests in land.
  - e.g., after the Statute, and while in London, X transfers to Y the use of Whiteacre, Yorkshire
    - A method called *bargain and sale* would raise a use, imposed on X in favour of Y; the Statute could then execute the use, taking the legal title from X and placing it in Y, eliminating the need for livery.
  - e.g., O conveys Blackacre: "to Lady Mary when she marries Matthew."
    - This gift was void at common law allowed because O and Lady Mary would have to go on the land and perform livery of seisin, so either O could transfer title now, or when she marries Matthew.
    - After 1536, O can covenant: "To stand seised for the benefit of Lady Mary and her heirs when she marries Matthew." The Statute executes this use, transferring legal title from the feoffee to the *cestui que use* ("springing use").
- However, before long, methods were devised to escape the full impact of the statute:
  1. Avoidance
     - The Statute did not apply where the feoffee to uses held only a leasehold interest, for a leaseholder cannot be seised to the use of another.
       - e.g., with "to F for 999 years to the use of A and his heirs," the statute did not execute the use; the conveyance took effect as it had done before 1535.
     - The Statute did not execute the use if the feoffee was a corporation rather than a natural person.
       - e.g., in a conveyance "to F Ltd to the use of A and his heirs," the statute did not execute the use; F Ltd continued to hold the legal title and A received the equitable title only.
     - The statute did not apply where the feoffee was seised to his/her own use, as the statute held that a use was executed only when one is seised to the use of *another*.
       - e.g., with "to A, to the use of A" gives the grantee both legal and equitable title.
     - The Statute was not invoked if the feoffee/trustee was given active duties to perform, duties that would require legal title to be maintained.
       - e.g., "to A to hold the property and to manage it and to pay the rents and profits to the use of B in fee simple."

- The feoffee with active duties to perform could not lawfully have conveyed the legal estate to the *cestui que use*, for that would breach the terms by which the feoffee held the land.

2. Exhaustion
    - With "to A and her heirs, to the use of A and her heirs, to the use of C and her heirs," the Statute is exhausted after "to A and her heirs, to the use of A and her heirs," and since A is not seised to the use of *another* person but to the use of herself, A becomes seised to the use of C in fee simple.
        - Abbreviated to "unto and to the use of A, to the use of C."
    - However, *Tyrrel's Case* held that the use upon a use was void.

The Development of the Trust

- In 1660 when the *Tenures Abolition Act* abolished the remaining burdensome feudal incidents, the Crown's financial interest in prohibiting equitable ownership ceased, and the Chancellors began to enforce the use upon a use; as a result, equitable interests in land could now be created as freely as before 1535.
    - After 1660, conveyancers began employing them not to avoid feudal incidents or acquire the power to devise, but to take advantage of the freedom the use allowed in manipulating beneficial interests.
- A change in terminology also occurred; the new relationship became a "trust" with the legal owner the "trustee" and the phrase "in trust for" was used to indicate the creation of an equitable interest.
    - The term 'use' described a conveyance designed to be executed by the *Statute of Uses*.
        - e.g., "To G to the use of H," with a view to transfer legal and equitable title to H.
    - The term "trust" described a conveyance drafted to separate the legal and equitable interest.
        - This requires language that exhausts the *Statute of Uses*: "Unto and to the use of P, in trust for Q."

The Essence of Modern Equity and the Trust

- In the latter half of the 19th century, the courts of equity and common law courts were fused and courts were clothed with the capacity to apply both common law and equitable principles.
    - Where common law and equitable principles conflict, equity prevails (although equitable remedies are discretionary, and will only trump common law rules where equity considers that justice is served by it).
    - Even so, in important respects, an equitable interest is more fragile than a legal entitlement.
        - A right in equity is dependent on the availability of equitable remedies, and equity will not impose an obligation against a *bona fide* purchaser for value of a legal interest who had no notice of an antecedent equitable claim.
- The trust remains a vital mechanism of private law estate planning and commercial practice.
    - The trustee was not just a placeholder that stood seised of Whiteacre to the benefit of someone else; their job is to take new forms of wealth, manage them, and invest them.

RESULTING TRUSTS

- Whereas express trusts arise from an explicit declaration that the legal title holder holds the property for the benefit of another, resulting trusts arise when the title holder acquired the property in circumstances *where equity presumes that the parties intended that the title holder hold the property wholly or in part on trust for the benefit of another*.
    - Equity recognizes resulting trusts in two main circumstances.

Failing to Dispose of all Beneficial Interests in Property

- When a trust document has failed to dispose fully of all the beneficial interests in the property, equity presumes a resulting trust for the benefit of the settlor to fill in the gap.
    - e.g., "to Acme Trust in fee simple to hold in trust for B for life," the words creating the trust do not state the trustee's obligations at the end of B's life, equity imposes a resulting trust *for the benefit of the settlor or the settlor's estate*.
        - This is because it is unlikely that the settlor intended for Acme Trust to hold the fee simple absolute. Equity therefore regards the settlor as having retained that which was not expressly conferred.
    - e.g., S → "Unto and to the use of A and his heirs in trust for B for life." We infer a resulting equitable fee simple (comparable to a legal reversion) in S.
    - e.g., "Unto and to the use of A in trust for the first of my grandchildren who graduates from law school."
        - There will be a resulting trust in favour of the settlor or the settlor's estate until we know which grandkid (if any) will graduate from law school.
    - e.g., "Unto and to the use of A in trust for the first of my grandchildren to be convicted of a felony."
        - The court would refuse to enforce this trust for policy reasons and impose a resulting trust for the benefit of the settlor or the settlor's estate (the settlor or the settlor's estate gets equitable title).

Gratuitous Transfers

- When A purchases property and asks that title be placed in the name of B gratuitously, equity presumes that A intended to make B a trustee, holding legal title for A's benefit.
    - The presumption of a resulting trust can be rebutted by showing that a gift was truly intended; if this happens, the legal and equitable titles are held by the donee and no trust arises.
- But, in transfers from a parent to a minor, dependent child (not an adult dependent child), equity presumes that the transferor intended to gift the property to the transferee, so that the transferee holds both legal and equitable title ("presumption of advancement," which can be rebutted).
    - The *Family Property Act*, s. 36(1), states that the Court shall no longer apply the doctrine of presumption of advancement to a transaction between spouses in respect of property.
        - The fact that property is placed in the name of both spouses or AIPs as joint owners is proof, absent evidence to the contrary, that joint ownership of the beneficial interest is intended, and

Pecore v Pecore, [2007] 1 SCR 795

Facts:

- In 1994, Hughes transferred assets into accounts held jointly with his daughter Paula. In 1996, to avoid capital gains tax liability, he declared that he was "the 100% owner of the assets and the funds are not being gifted to Paula." The residue of his estate was to be divided equally between Paula and her husband Michael. In his application for divorce and a division of marital property, he claimed held of the value of the accounts, arguing that on her father's death, they became part of the residue of Hughes' estate. Paula held that the accounts became hers entirely upon Hughes' death by the right of survivorship and thus did not become part of the deceased's estate.

Issue and holding:

- Did Hughes intend to make a gift of a beneficial interest in the accounts upon his death to his daughter alone or did he intended that his daughter hold the assets in the accounts in trust for the benefit of his estate? **Gift**

Analysis:

- There is either a presumption of trust or presumption of advancement, each of which are rebuttable.
    - Advancement is a gift to a transferee who is financially dependent on the transferor; the relationship between parent and *minor*, dependent children gives rise to the presumption of advancement.

- A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original owner.
    - The presumption of trust is the general rule for gratuitous transfers, depending on the nature of the relationship between the transferor and the transferee.
    - To rebut the presumption of a resulting trust, the court can consider evidence relating to the quality of the relationship between the transferor and transferee and the degree of dependency the transferee had with the transferor to help determine whether the transferor intended to gift the right of survivorship to whatever assets are left in their joint accounts.

Rationale: (Rothstein J)

- Since Paula is not a minor, there is no presumption of advancement.
- There is, instead, a presumption of trust, but this presumption can be rebutted.
    - At the time of the transfers, Paula and her father had a very close relationship, and given Paula's financial hardships, her father preferred her over her siblings.
    - While Hughes may have grown close to Michael, they were simply good friends.
    - Paula and her family relied on her father for financial assistance, because Michael was injured in a car accident and Paula devoted a lot of time to his care (depriving her of employment opportunities).
    - His lawyer testified that Hughes was of the view that the accounts would not form part of his estate.
    - While Hughes wrote to the financial institutions saying that the transfers were not gifts to Paula, the trial judge found that those letters were simply to avoid capital gains taxes.

Notes:

- In *Madsen Estate v Saylor*, a father put his assets into joint accounts with his adult daughter. When he died, his daughter tried to claim the funds as her own rather than including them in her father's estate. The SCC held that the evidence of intention to make a gift was insufficient to rebut this presumption, largely because the other siblings contested their sister's claim to beneficial ownership.
- Where property is transferred into the name of another to insulate it from the transferor's creditors, the transferor will often try to claim against creditors that no title is retained, but perhaps later say to the transferee that in fact the beneficial interest has resulted back; according to Lord Denning, "that will simply not do" (*Tinker v Tinker*).
    - According to *Tribe v Tribe*, evidence that property was transferred to protect it from creditors reinforces a presumption of advancement.

CONSTRUCTIVE TRUSTS

- A constructive trust is a third kind of trust (besides express and resulting) that is *imposed notwithstanding the intentions of the parties*; there are two main kinds of constructive trusts.

Institutional Constructive Trusts

- An institutional constructive trust is imposed where a person has acquired property for their own benefit at the expense of another to whom the person owes a fiduciary duty.
    - e.g., a prosecutor took bribes from criminals which he used to buy property in NZ. The Privy Council held that this property was held in trust for the Crown to prevent the prosecutor from profiting from his crime.
- One of the established forms of institutional trust arises on the sale of real estate.
    - In Canada, in the eyes of equity, the moment a sale agreement is reached, the buyer acquires an equitable interest in the property (the land is held in constructive trust by the vendor in favour of the buyer).

- The seller must maintain the property and not deal with it in a manner that would be detrimental to the interests of the buyer.
- But if the seller sold the house to another good faith purchaser for value before the closing date and that transfer is registered, the original buyer has no equitable remedy against the second buyer.

- In the past, a purchaser could generally count on a court of equity to conclude that the uniqueness of a parcel of land would make specific performance an appropriate remedy.
  - However, in *Semelhago v Paramadevan*, the Court (in *obiter*) suggested that specific performance should not be granted absent evidence that a substitute for the property would not be readily available (i.e., the presumption is that the land is not unique).
    - This suggests that the presumption is that land is *not* held in a constructive trust for the benefit of a purchaser before closing.
  - But in *Raymond v Raymond Estate*, the court reviewed the post-*Semelhago* case law and concluded that specific performance remained the principal remedy for a breach of contract involving the sale of farmland.
  - One way to address this uncertainty is by an original buyer making part of the sale agreement an acknowledgement by the seller that the property is unique and that, in case of breach, the buyer will be entitled to specific performance.

Soulos v Korkontzilas, [1997] 2 SCR 217

Facts:

- Korkontzilas was a real estate broker and Soulos was his client. Through Korkontzilas, Soulos made an offer of $250,000 to purchase a building. When the vendor made a counteroffer, Korkontzilas did not tell Soulos. Instead, Korkontzilas' wife bought the property in her name and then transferred title to herself and her husband as joint tenants. When Soulos learned about what happened, he brought an action.

Issue and holding:

- What remedy, if any, does the law afford Soulos for Korkontzilas' breach of duty of loyalty? **Constructive trust**

Analysis:

- Constructive trusts treat the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention.
- The constructive trust is not just for remedying clearly established loss, but for holding persons in relationships of trust to high standards of probity and deterring them from retaining property which in "good conscience" they should not be permitted to; this upholds the integrity of commercial and other social institutions.
  - Hence, a constructive trust may be imposed where good conscience so requires; the inquiry into good conscience is informed by:
    - The situations where constructive trusts have been recognized in the past.
    - The dual reasons for which constructive trusts are imposed: to do justice between the parties and maintain the integrity of institutions dependent on trust-like relationships.
    - The absence of an indication that a constructive trust would have an unjust effect on the defendant or third parties.
  - There are two categories of situations which a judge may consider in deciding whether good conscience requires imposition of a constructive trust:
    1. Situations where the defendant has not acted wrongfully in obtaining property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself.

2. That which concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation and breach of duty of loyalty; four conditions satisfy the imposition of a constructive trust based on wrongful conduct:
    a. The defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands,
    b. The assets in the hands of the defendant must be shown to have resulted from agency activities of the defendant in breach of his equitable obligation to the plaintiff,
    c. The plaintiff must show a legitimate reason for seeking a proprietary remedy as opposed to just damages, either personal or related to the need to ensure that others like the defendant remain faithful to their duties, and
    d. There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case (e.g., the interests of creditors must be protected).
- The two categories are not mutually exclusive.

Rationale: (McLachlin J)

- Applying the four-step test above, Korkontzilas' breached of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust.
    - Mr. Korkontzilas was under an equitable obligation in relation to the property at issue.
    - The assets in the hands of Korkontzilas were a direct result of his breach of his duty of loyalty to Soulos.
    - While Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust.
        - Soulos suffered a deprivation because of his continuing desire, for non-monetary reasons, to own the particular property in question.
        - A constructive trust is required to ensure that agents and others in positions of trust remain faithful to their duty of loyalty.
    - There are no factors which would make imposition of a constructive trust unjust.
        - No third parties would suffer from an order requiring Korkontzilas to convey the property to Soulos, nor would Korkontzilas be treated unfairly.

Notes:

- In this case, the plaintiff would have had to pay for the equitable interest in the property.
- The plaintiff could have just sought damages, but he would have had a hard time establishing loss.

Remedial Constructive Trusts

- Remedial constructive trusts provide a remedy where a title holder would be unjustly enriched unless equity compelled him or her to share the property with someone who contributed to acquiring or improving the property.
- Remedial constructive trusts have been used most commonly to compensate those engaged in (otherwise unrewarded) household labour by providing a proprietary remedy as payment for work, thus preventing the unjust enrichment of one of the parties.
    - In *Pettkus v Becker*, the SCC held that a constructive trust can be imposed as an equitable remedy to unjust enrichment of one partner at the other's expense.
    - In *Rawluk v Rawluk*, a wife claimed a beneficial interest in a farm property (that she did not have title to) by way of constructive trust; the SCC said that the imposition of a constructive trust recognizes that the titled spouse is holding property that has been acquired through the money or effort of another.
        - The equitable interest comes into existence when the contribution is made and is *confirmed* by the declaration of constructive trust, which allows the beneficial owner to enforce their rights against third parties and the co-owner, but not against a *bona fide* purchaser for value without notice.

    - In *Peter v Beblow*, the SCC held that a common law partner's contribution to household well-being through housework and child care, without contributions of cash or other labour, could provide the basis for a beneficial interest in property.
    - In *Kerr v Baranow*, the SCC held that where the couple conduct their lives as a "joint family venture," all the assets accumulated during the relationship may be imprinted with the constructive trust.
- Now, the *Family Property Act* provides a mechanism for dividing property between spouses and AIPs, making constructive trusts largely irrelevant to family property disputes.

Moore v Sweet, 2018 SCC 52

Facts:

- Michelle and Lawrence were married. In 1985, Lawrence purchased a life insurance policy and designated Michelle as the beneficiary. In 1999, the couple separated and entered into an oral agreement whereby Michelle would pay the premiums and be entitled to the proceeds of the policy on Lawrence's death. In 2000, Lawrence began living with Risa, and later that year, Lawrence designating Risa as the *irrevocable* beneficiary of the policy under Ontario's *Insurance Act*. He did not advise Michelle of this change, and Michelle continued to pay all the premiums under the policy until Lawrence's death. Lawrence died in 2013, and Michelle was advised that she was not listed as the beneficiary of his life insurance policy.

Issues and holding:

- Has Michelle made out a claim in unjust enrichment? **YES**
- If yes, is a constructive trust the appropriate remedy? **YES**

Analysis:

- A constructive trust is a vehicle of equity through which one person is required to hold certain property for the benefit of another where good conscience so requires.
    - Unjust enrichment may provide an equitable basis for a remedial constructive trust, so long as the plaintiff can also establish that a monetary award is insufficient and that there is a link between his or her contributions and the disputed property.
- Unjust enrichment requires:
    1. That the defendant be enriched and that the plaintiff suffer a corresponding deprivation
        - The plaintiff's loss must have a causal connection with the defendant's gain.
        - “Loss” captures a benefit that was never in the plaintiff’s possession but that the court finds would have accrued for his or her benefit had it not been received by the defendant instead.
    2. The absence of any juristic reason for the enrichment and corresponding deprivation; this analysis proceeds in two stages.
        a. The plaintiff must show that the defendant’s retention of the benefit cannot be justified based on any of the “established” categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations.
            - If none of the categories apply, then the plaintiff has established a *prima facie* case.
        b. The defendant must rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery.
            - The court should consider the reasonable expectations of the parties and public policy.
    - Where unjust enrichment is found, the defendant will be required to restore benefits to the plaintiff.
- Remedies for unjust enrichment can be personal or proprietary.
    - A personal remedy is a debt or monetary obligation that may be enforced against the defendant; this is the default remedy for unjust enrichment.

- A proprietary remedy is an entitlement to enforce rights against a particular piece of property; the most pervasive proprietary remedy is the *constructive trust*, a broad and flexible equitable tool.
    - Courts will impress disputed property with a constructive trust if the plaintiff can establish 2 things:
        1. A personal remedy would be inadequate (e.g., the defendant is broke, the object at issue is a family heirloom).
        2. The plaintiff's contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed.
    - A constructive trust will be imposed only to the extent of the plaintiff's proportionate contribution (direct or indirect) to the acquisition, preservation, maintenance or improvement of the property.

Rationale: (Côté J)

- The elements of unjust enrichment are made out in this case.
    - Risa was enriched to the extent of $250,000 by virtue of her right to receive the insurance proceeds.
    - Michelle stands deprived of the right to receive the entirety of the policy proceeds, which corresponds with Risa's gain in that Risa's receipt of the proceeds of the policy would not have been possible but for Michelle performance of her obligations under the oral agreement between her and Lawrence.
        - Michelle's deprivation should *not* just be limited to the $7000 she paid in premiums.
    - There is an absence of any juristic reason for Risa's enrichment and Michelle's deprivation.
        - None of the established categories apply in these circumstances, so Michelle has made out a *prima facie* case of unjust enrichment.
            - An irrevocable designation under the *Insurance Act* cannot constitute a juristic reason for Michelle's deprivation; it did not give Risa a right to keep the proceeds as against Michelle.
        - The *prima facie* case has not been rebutted.
            - Risa's expectation cannot take precedence over Michelle's prior contractual right to remain named as beneficiary, regardless of whether Risa knew that this was the case.
            - It would be bad policy to ignore the fact that Michelle was effectively tricked by Lawrence into paying the premiums of a policy for the benefit of some other person of his choosing.
- In the circumstances, a remedial constructive trust should be imposed for Michelle's benefit.
    - While a monetary award could work, the insurance money has been paid into the court and is available to be impressed with a constructive trust; giving the money back to Risa and then requiring Michelle to enforce a judgment against Risa personally would unnecessarily complicate things and create a risk that creditors could access the money in the meantime.

Bulun Bulun v R & T Textiles Pty Ltd (1998), 157 ALR 193 (FCA)

Facts:

- Bulun Bulun was an Aboriginal artist in Australia. In 1978, he painted a work that featured subject matter that was sacred to the Ganalbingu people. R & T Textiles manufactured fabric with a design that reproduced substantial aspects of the work. Bulun Bulun proceeded against the company and George Milpurrurru joined the action as a senior person of the Ganalbingu people, who said that they were equitable owners of the copyright in the work. The company admitted its copyright infringement and withdrew the offending fabric from sale. Milpurrurru continued with his claim to obtain recognition of the rights of the Ganalbingu people and the injury caused by the infringement.

Issues and holding:

- Does the law recognize communal title in works of art? **NO**
- Do Milpurrurru and those he represents have an equitable interest in the copyright of the artistic work? **NO**

Analysis:

- The critical feature of fiduciary relationships is that the fiduciary undertakes to act in the interests of another person in exercise of a power of discretion which will affect the interests of that other person in a legal or practical sense.
    - The relationship gives the fiduciary a special opportunity to exercise their discretion to the detriment of that other person who is vulnerable to abuse by the fiduciary of his position.

Rationale: (van Doussa J)

- While joint ownership of a work by two or more authors (those who have contributed skill and labour to the production of the work itself) is recognized by the *Copyright Act*, collective ownership by reference to the membership of the author in a community whose customary laws invest the community with ownership of any creation of its members is not yet recognized.
- Milpurrurru and those he represents have the power under customary law to regulate and control the production and reproduction of the corpus of ritual knowledge; it is contended that this places Bulun Bulun in the position of a fiduciary and makes him a trustee for the artwork, either pursuant to an express or constructive trust.
    - The possibility of an express trust can be dismissed, as Bulun Bulun's sale and the retention of the proceeds is inconsistent with there being an intention to divest himself of the beneficial interest and become a trustee.
    - The nature of the relationship between Bulun Bulun and the Ganalbingu people was a fiduciary one which gives rise to fiduciary obligations owed by Bulun Bulun these people.
        - The grant of permission by the Ganalbingu people for the creation of the artwork is predicated on the trust which those granting permission have in the artist to use the artwork in accordance with the requirements of law and custom and do whatever is necessary to prevent misuse.
            - *Note*: treats indigenous law merely as part of the factual matrix which characterizes the relationship as one of mutual trust and confidence.
        - The nature of the relationship does not vest an equitable interest in the ownership of the copyright in the Ganalbingu people; their primary right in the event of a breach of obligation by the fiduciary is a right *in personam* to bring action against the fiduciary to enforce the obligation.
            - That said, Bulun Bulun has obtained remedies for the infringement, so there is *no need for equity* to provide a remedy to the beneficiaries of the fiduciary relationship.
            - In other cases, *equity could intervene to impose a constructive trust on the legal owner of the copyright in favour of the beneficiaries where it is necessary to do so to achieve a just remedy and prevent the fiduciary from retaining an unconscionable benefit*.

FUTURE INTERESTS

BASIC CONCEPTS

Qualified vs. Absolute Interests

- A transferor of property may attach terms of acquisition or retention.
    - Terms of acquisition are what the transferee needs to do to acquire the property.
    - Terms of retention are terms that specify what is required for the transferor to keep the property.
- Property interests are either *vested* or *contingent*.
    - An interest is vested when no condition stands in the way of enjoyment; it is *guaranteed but for the passage of time*; it is a present right to future enjoyment that can be transferred *inter vivos* and devised.
        - e.g., X: to W for life, then to C in fee simple.
            - W's life estate is *vested in possession*; C's interests is *vested in interest*.
            - C can transfer her interest to D, though D will not take possession while W is alive.

- An interest is contingent (qualified) if vesting is delayed pending the occurrence of some *condition precedent*, the happening of which is not inevitable.
    - Postponing the enjoyment of an estate until the natural ending of the prior estate does not make the estate contingent; the condition must relate to some other event.

Stuartburn (Municipality) v Kiansky, [2001] 8 WWR 145 (MBQB)

Facts:

- Under Manitoba election law, to hold elected office, a person must be an owner, tenant, or occupier of land in the relevant district. An application was brought to determine whether Kiansky, the Reeve of Stuartburn, was entitled to hold that office. Kiansky had sold his home and moved from the relevant district, but he continued to hold real estate there that was subject to a prior life estate in favour of his grandmother.

Issue and holding:

- Does Kiansky's remainderman interest in real property in Stuartburn satisfy the ownership requirements of the election laws? **YES**

Rationale: (Wright J)

- Kiansky's remainder interest is of a right to a freehold estate in fee simple; the remainder interest is a *present* right that co-exists with the life estate even though enjoyment and possession of the real property is postponed until termination of the life interest.

Ratio:

- A future interest is a presently-existing interest in property in which the right to possession or enjoyment of property is postponed to a future time.

Classifying Qualified Interests

1. A determinable limitation
    - e.g., O: to A until he marries.
    - The grantee acquires an interest subject to a determinable limitation; if the stipulated eventuality materializes, A's fee simple ends *automatically*, and the right to possession will revert to O or O's estate.
    - The grantor (or their estate) retains a *possibility of reverter*, which is treated as vested at common law.
        - When a determinable interest is created, the stipulating event is seen as marking the full duration of the estate and is not a supervening event that cuts short the interest.
2. A condition subsequent
    - e.g., O: to B, but if B enlists in the army, my estate may enter.
    - The grantee acquires a fee simple *subject to a condition subsequent*; if the stipulated eventuality ever materializes, the grantor may *elect* to enter the land and cut short B's title.
    - The grantor (or their estate) retains a *right of re-entry* (option to enter the land and end the grantee's estate).
3. An executory limitation
    - When an estate is subject to an executory limitation, it ends when a specific condition is met and then transfers to a third party.
        - e.g., O: to Son A, provided he marries by the age of 25, otherwise to Son B.
        - B's interest is known as an *executory interest*; A's interest is subject to an *executory limitation*.
    - Executory interests can be created by a will or by a use, since the common law does not allow someone to give fee simple and then cut it short by attaching a stipulation.
        - To create an executory interest via use, the grantor could say "to Lawyer X, for the use of Son A provided he marry before the age of 25, otherwise to Son B."

        - When a person creates an executory interest in a will, the estate is given to the executors and the executors are bound to the wishes of the testator to do what the testator intended.
    - e.g., O: the mineral rights to PlodCo Oil Ltd for 7 years and so long thereafter as oil or gas are produced in paying quantities; and thereafter to Quicksilver Oil Ltd for 7 years.
        - Gives PlodCo Oil an incentive to work the minerals under the land lest they lose that right.
4. A condition precedent
    - A condition precedent is an event that must occur if a contingent interest is to vest.
    - e.g., O: to W for life, then to C at age 21.
        - C does not acquire a vested remainder, but a remainder contingent on the condition being satisfied (i.e., C does not vest in interest until she reaches age 21).
    - e.g., O: to W for life, then to the children of A.
        - This is a class gift to the children of A, but we will not know who A's children are until A passes away; thus, the gift is contingent until we know who, if anyone, satisfied the condition precedent.
- The determinable limitation and condition subsequent are both conditions of retention, while a condition precedent is a condition of acquisition.

Principles of Construction

- How can we ascertain the grantor's intentions?
    1. Language (*Caroline v Roper*)
        - Terms that are framed in *durational language* are typically understood to impose determinable limitations (e.g., "so long as," "while," "until").
        - *External stipulations* contained in a separate clause (e.g., "on condition," "but only if," "but should") or in another part of the gift give the grantor only a right of re-entry.
    2. The instrument as a whole
    3. Rules of construction (i.e., presumptions)
- In *St Mary's Indian Band v Cranbrook (City)*, reserve land was given to the federal government. It was agreed "that should at any time the said lands cease to be used for public purposes they will revert to the St. Mary's Indian Band."
    - Lamer CJ rejected the idea that the interpretive devices used to distinguish between a condition subsequent and a determinable fee should be determinative to prevent native intentions from being frustrated by formalistic and alien common law rules.

McKeen Estate v McKeen Estate, 1993 CarswellNB 35 (QB)

Facts:

- The testator dies in 1981. His will directed that his estate be held in trust for his wife for her life, and on her death, the trustees were directed to divide the residue of the estate equally between his sisters, Alice and Beatrice, if they were both still alive or to only the surviving sister if there is only one such sister. The two sisters died in 1989, and the testator's wife died in 1992.
    - *Note*: there are two alternative interpretations of the gift considered:
        1. The equitable fee simple in remainder is a future interest of Alice/Beatrice/both, contingent on surviving the life tenant (an interest that is subject to a condition precedent).
            - If this is the case, the sisters have not met that condition, and, because the testator had made no provisions for an alternative gift, he would be intestate.
        2. The equitable fee simple in remainder vested in the sisters on the death of the testator, subject to a condition subsequent that one sister be divested if the other survives.

        - If this is the case, the remainder would pass to the sisters' estates.

Issue and holding:

- Did the testator intend to make the gifts to his sisters contingent on their surviving his wife? **NO** (interpretation #2)

Analysis:

- Courts apply several presumptions in construing wills where the intention was not clearly expressed.
    - They presume that testators intend to dispose of all their property by will to avoid whole or partial intestacy.
    - They presume that testators intend to create vested rather than contingent interests.
    - *Browne v Moody* established that a remainder conditional only on surviving the life tenant is presumed vested (i.e., as subject to the condition subsequent of being divested if not surviving the life tenant).
        - Exemplifies the law's preference for "early vesting" and its abhorrence to contingencies.

Rationale: (Landry J)

- Given the precision in the bequests to selected relatives, the testator McKeen did not intend a partial intestacy.
- Applying the authorities and in particular the rule from *Browne v Moody*, the residue of the estate vested in McKeen's sisters equally at the date of McKeen's death, subject to the possibility of divesting of interest of the deceased sister if only one sister survived the life tenant.
    - However, the distribution would be postponed because a life interest was previously given to McKeen's widow, so that the residue could not be paid until her death.
    - This interpretation is favoured since there is a fair amount of ambiguity and doubt.

Notes:

- Courts prefer, if possible, to read ambiguous language as creating a gift that vests in interest immediately, although vesting in possession may be postponed by a prior interest.

Kohlman Estate, 2018 SKQB 133

Facts:

- Alphonse Kohlman's will stated that the family farm shall be held in trust for 15 years. During that term, his son Keith would be entitled to work the farm for a fixed rent to be divided equally among Alphonse's other children. Keith was to have the right to buy the farm from the estate at any time during the period, in which case the proceeds would form part of the residue of the estate. Otherwise, the land would form part of the residue of the estate after 15 years. The will devised the residue of Alphonse's estate to his 10 children in equal shares, absolutely. If any of his children should die before being entitled to receive their share of the residue, then their share would form part of the residue to be distributed among the surviving children.
- In February 2016, Alphonse Kohlman passed away leaving 10 surviving adult children. His wife predeceased him. In December 2016, Garry Kohlman, one of Alphonse's children, passed away.

Issues and holding:

- Is Garry Kohlman's estate entitled to his share of the residue of the estate? **YES**
    - i.e., does each of Alphonse's children have to wait for 15 years to elapse to be "entitled" to their share or is each child entitled to their share *a morte testatoris*? ***A morte testatoris***
    - i.e., is Garry's interest subject to a condition precedent or did the gift vest immediately? ***Immediately***

Analysis:

- The golden rule in interpretation of wills is to give effect to the testator's intention as ascertained from the language.
    - For this purpose, it is important to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context of the clause.
- *Browne v Moody* provides that a gift of the remainder of an estate will be treated as vested if it is postponed in the will solely for the convenience of the testator's estate.

Rationale: (Dovell J)

- There is no evidence that Alphonse intended to disinherit any of his children if they died after him but before the land had either been sold or the 15 years had gone by.
- Canadian courts prefer early vesting as outlined in the rule of *Browne*.
    - The 15-year period was merely a postponement for the convenience of the estate to allow for sufficient time to determine if Keith Kohlman could exercise his option to acquire the farmland and keep the family farming operation together.

Notes:

- Each child became entitled to the residue of the estate at the testator's death, but the contents of the residue will be determined only after 15 years or after Keith purchases the farm.

Caroline (Village) v Roper (1987), 37 DLR (4th) 761 (ABQB)

Facts:

- In 1949, Thomas Roper's widow transferred his land to a community group after receiving written assurance that the land would continue to be used for a community centre. The land came to be held by the Village of Caroline, the applicant. In 1981, the community centre burned down. The Village wanted to sell the land for a commercial purpose. It brought an application for a declaration that the trust contained in the above document is void on the grounds that its wording offends the rule against perpetuities.

Issue and holding:

- Can the grantee retain the property once it was no longer being used for a community hall? **NO**

Rationale: (Cavanaugh J)

- The key words in the document given by Mrs. Roper are "This acre ... shall revert ... if used for other than a community centre"; the words seem to make the fee simple that was given that day defeasible if a future event occurs. They do not put a condition on the fee simple that it is good only so long as a certain use is made of it.
    - Thus, the document in its present form is void because it violates the rule against perpetuities.
- However, since the Ropers' only reason for transferring title was to help the community, the document should be rectified to show that the transferees received title *as long as* the property was used as a community centre.
    - The application is therefore dismissed; the property shall be conveyed back to the Ropers.

Notes:

- Since possibilities of reverter are treated as vested interests, if the deed created a determinable fee simple, the rule against perpetuities would not have applied to prevent the grantor from demanding the return of the property once it was no longer used as the site of a community hall.

Kotsar v Shattock, [1981] VR 13 (SC Full Ct)

Facts:

- The will of the testatrix stipulated that her trustees were to pay her residuary estate to Oilme Kotsar if and when she turns 21 provided that upon turning 21. In the event of failure of the trust in favour of Oilme, the residue was to go to charitable institutions. The testatrix died in 1971. The residuary beneficiary turned 21 in 1975.

Issue and holding:

- Is Kotsar's interest subject to a condition precedent (i.e., she needs to reach the age of 21) or a condition subsequent (i.e., she has an interest but becomes divested if she dies before the age of 21)? **Subsequent**

Rationale: (Crockett J)

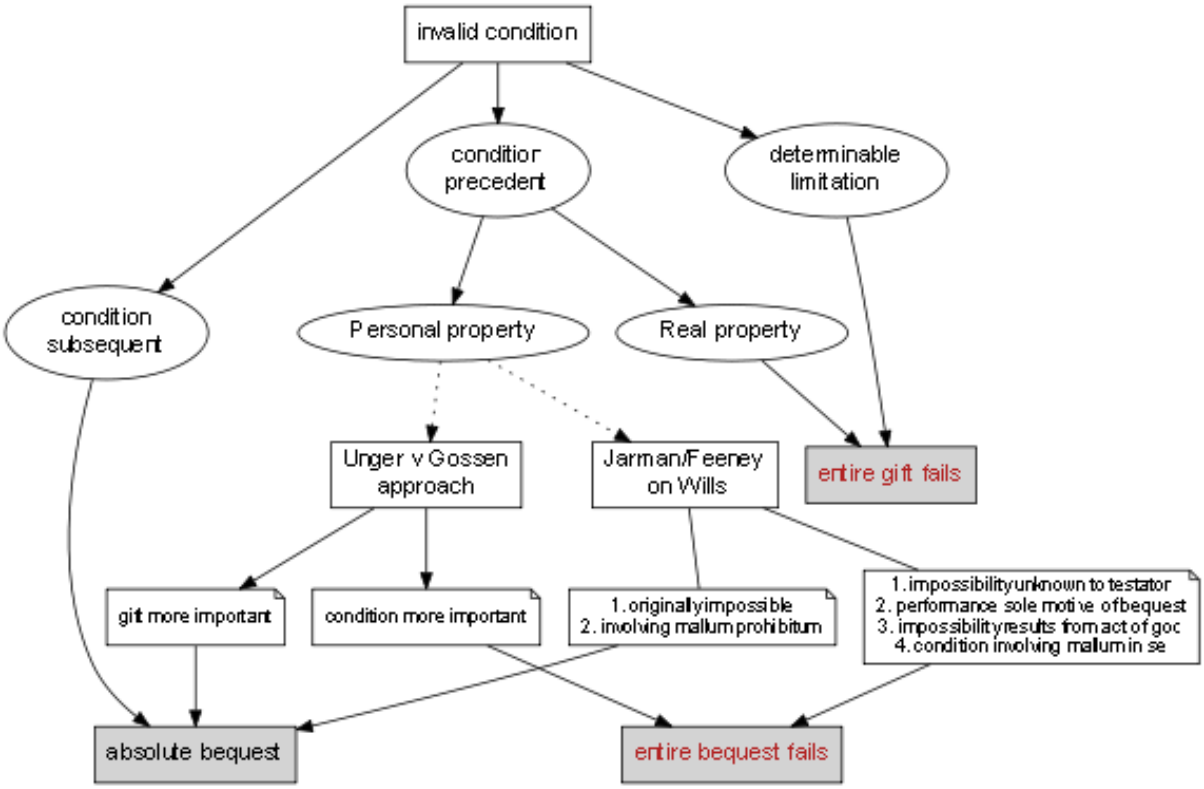
- From *Phipps v Ackers*, when a gift to a devisee is made subject to compliance with a condition, with a gift over in the event the condition is not satisfied, the condition is presumed to be a condition subsequent where there is no explicit direction as to vesting (i.e., the gift over divests the first gift, meaning the first gift was vested from the beginning).

- In the present case, there is no such direction; accordingly, the gift to Oilme is to be construed as operating to vest the interest in that gift in her subject to divestment in favour of those taking under the gift over in the event that the conditions imposed for the retention of the interest are not met.

STATE LIMITATIONS ON PRIVATE POWER

- Proprietary freedom in Canada is not absolute; not all conditional dispositions will be enforced.
- Conditions *in terrorem* intended to deter a legatee from contesting the will are unenforceable, but if the testator provided for a gift-over that is not against public policy, the condition may be upheld.
    - e.g., "Should Edward contest the terms of my will, he shall forfeit his legacy." The court will ignore this condition subsequent.
    - e.g., "Should Edward contest the terms of my will, he shall forfeit his legacy, and it shall go instead to the Humane Society." This is a valid condition subsequent.
- There are several grounds on which a condition or determinable limitation will be invalidated: (1) public policy, (2) uncertainty, (3) impossibility, (4) restraint, and (5) perpetuities.
- The effect of invalidity depends on the qualification and whether the subject of the gift is real or personal property.
    - An invalid condition subsequent is severed from the grant, destroying the grantor's right of re-entry and rendering the gift absolute.
    - An invalid determinable limitation results in the entire grant failing; both the determinable interest and the grantor's right of reverter are destroyed.
        - Many argue that the remarkable distinction between the effects of invalidity on a determinable limitation and a condition subsequent is without justification and suggest getting rid of determinable limitations and treating them as conditions subsequent.
            - But this may prevent a grantor from framing a term as a determinable limitation so that if it is struck, the grantee will get nothing; this may be done when the performance of a condition is important to the grantor.
                - But these ends may arguably still be achieved with a condition subsequent if the owner says, "If the condition is invalidated, the gift will be void."
    - If an invalid condition precedent is attached to a grant of real property, the entire gift fails.
    - If an invalid condition precedent is attached to a grant of personal property, there are two approaches:
        - Jarman/Feeney on Wills—based on the substance of the condition.
            - A bequest is absolute if the condition was originally impossible or it involves a *mallum prohibitum* (conduct that constitutes a wrong only by virtue of statute).
                - The law presumes that where the condition was originally impossible, the grantor intended for an absolute gift; but this assumption may not always be sound, as when a grantor devises "to A, when pigs fly."
            - However, the entire bequest fails if:
                - The impossibility was not known to the testator;
                - The performance of the condition is the sole motive of the bequest;
                - The impossibility was created when possible but has since become impossible by an act of God, or a law making it illegal, or some act not attributable to the testator; or
                - The condition involves a *mallum in se* (conduct that is evil in and of itself).
        - *Unger v Gossen*—based on the intention of the grantor.
            - Where an invalid condition precedent is attached to a gift of personalty, the condition will fail (and the gift will be absolute) where the performance of the condition is not the sole reason for the gift (i.e., the gift is more important than performance of the condition).

- This approach, from a trial decision in BC, is not as strongly supported by case law.



Public Policy

- Courts try to balance individual autonomy and the power to dispose of property with society's interests and can refuse to enforce terms in transfers of land that offence public policy.

Re Leonard Foundation Trust, 1990 CarswellOnt 486 (CA)

Facts:

- In 1923, Reuben Wells Leonard (the settlor) created a trust ("the Foundation"), the income from which was to be used for educational scholarships. The trust document included several recitals explaining that the persons eligible to receive the scholarship should be white, Protestant, and a British subject. While women were eligible, they were entitled to receive no more than 1/4 of the funds in a year. The operative provisions of the trust document referred to the class of persons outlined in the recitals. The trustee sought the direction of the court after the OHRC filed a formal complaint against the Leonard foundation, which itself followed years of intense public scrutiny.

Procedural history:

- At first instance, the judge held that the provisions were not invalid because the recitals merely set out the settlor's motive and were hence irrelevant to interpreting the trust document.

Issue and holding:

- Are the recitals relevant to interpreting the trust document? **YES**
- If yes, are the terms of the scholarship contrary to public policy? **YES**
- If yes, should the trust fail? **NO**

Analysis:

- While the operative provisions of a trust document will ordinarily prevail over its recitals, where the recitals are not clearly severable from the rest of the instrument and contain words intended to give meaning to the operative provisions, the instrument should be reviewed in its entirety.
- The freedom of an owner of property to dispose of it as they choose is an important social interest that is deeply rooted in our law; however, that interest must be limited by policy considerations.
    - Engaging with policy can introduce a danger that the judge will impose his own values; public policy should therefore only be invoked in clear cases, where harm to the public is *substantially incontestable*.
- Under the *cy-près* doctrine, if a trust created for a charitable purpose cannot be carried out as specified by the settlor, the court can revise the terms of the trust to carry out the settlor's intentions as closely as possible.

Rationale: (Robins JA)

- The trust document should be reviewed as a whole; the recitals are not severable from the rest of the document.
    - The recitals do not conflict with the operative provisions, and are intended to give meaning to the operative provisions by setting out the standards to be considered when making awards.
- This trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.
    - It is premised on the idea that white people are best qualified by nature to preserve, develop, and progress civilization; this is at variance with the democratic principles governing our pluralistic society.
- The trust should not fail; since the trust serves a charitable purpose, the court should apply the *cy-près* doctrine and bring the trust into accord with public policy by removing all restrictions with respect to race, colour, religion, ethnic origin, and sex.

Concurring: (Tarnopolsky JA)

- This holding does not mean that any charitable trust which restricts the class of beneficiaries would also be void as against public policy.
    - It will be necessary in each case to undertake an analysis like that adopted by the courts when approaching s. 15 of the Charter to determine if a trust impedes equality.
        - A trust established to promote the education of disadvantaged groups or to support those in financial need or with disabilities would be permissible.
    - This decision also would not affect private, family trusts that are not charitable; it is the public nature of charitable trusts that attracts the requirement that they conform to public policy against discrimination.

Ratio:

- Where a charitable trust is inimical to public policy, the court can revise the terms of the trust under the *cy-près* doctrine to carry out the settlor's intentions as closely as possible within the limits of public policy.

Notes:

- If the court dealt with a non-charitable trust, a finding that a condition precedent violated public policy would likely have resulted in the trust failing, and the money allocated to it would have become part of Leonard’s estate.
- In *Re Ramsden Estate*, a scholarship in favour of Protestant students was *upheld* even in the face of the *Leonard* decision. It did not contain the kind of blatant religious supremacy and racism found in the Leonard Foundation Trust.
- In *Royal Trust Corp of Canada v University of Western Ontario*, the trustee sought direction regarding the following terms in a will: "To provide funds. . . for awards or bursaries to Caucasian male, single, heterosexual students. . . Further, to similarly provide funds for an award. . . under the same terms as the awards above, except this award is to go to a hard-working, single, Caucasian white girl who is not a feminist or lesbian. . ."
    - The court had no problem declaring the qualifications relating to race, marital status, and sexual orientation and philosophical ideology void as contrary to public policy.
- Within the private sphere, one form of discriminatory action can be found: conditioning a gift on a legatee's affiliation with a given religion or marriage to a person with a given religion.

- These have been struck down for being too uncertain to be enforceable (e.g., how do you determine if someone is Catholic?).
- Regarding public policy, the HL in *Blathwayt v Baron Cawley* held that a term disinheriting a beneficiary should they become a Roman Catholic was not inimical to public policy.
- However, in *Murley v Murley Estate*, a gift conditioned on the beneficiary adhering to one of the mainstream Christian churches was contrary to public policy by restricting religious affiliation.

McCorkill v McCorkill Estate, 2014 NBQB 148

Facts:

- Harry McCorkill passed away in 2004, leaving his entire estate to the National Alliance, an American-based neo-Nazi organization to which McCorkill belonged. In 2010, the executor applied for, and was granted, Letters Probate. However, in 2013, McCorkill's sister challenged the validity of a will, arguing that it was against public policy.

Issue and holding:

- Is the will invalid as alleged? **YES**

Rationale: (Grant J)

- The National Alliance is an organization that advocates hate-inspired, white-supremacist racism and whose publications clearly violate criminal law prohibitions against the wilful promotion of hatred.
  - Such activity contravenes Canadian public policy, rendering the devise invalid.

Ratio:

- Public policy renders invalid gifts to groups whose activities are inimical to public policy.

Notes: (comments by Bruce Ziff)

- Cases such as these are a contest of values, with concerns over equality, respect, and dignity on one side and concerns about proprietary freedom (and even freedom of expression) on the other.
- This case was precedent-setting in two ways:
  1. In all previous cases in Canadian law the doctrine of public policy was applied to some offensive stipulation in the granting document; here, the gift was absolute, and there were no strings attached.
     - Even if the National Alliance alters its ideology, is it to be forever ineligible to receive bequests? Other groups, such as Greenpeace, have pursued their goals in illegal ways; are they unworthy heirs?
  2. Invalidity was premised on the unworthy character of the recipient.
     - Prior to this case, only two types of unworthy heirs were recognized: (1) a donee who culpably kills the donor with the result that the inheritance is triggered and (2) terrorist groups to whom it is a criminal offence to provide financial support.
     - The National Alliance, on the other hand, is not *per se* an illegal organization; nevertheless, the fact that gifts to it are merely invalid, not criminal, represents a rationally calibrated response.
- Building on the reasoning of Grant J, Ziff suggests a two-pronged test for invalidating gifts when:
  1. At the time the gift takes effect, a core and substantial aim of an organization is to pursue a policy that manifestly violates extant Canadian public policy, and
  2. The donee has pursued those policies using illegal means.
  - This test will confine and render more certain the application of public policy.

Uncertainty

- Stipulations cannot be enforced if they cannot be interpreted with certainty (e.g., "to B, so long as he's loyal").
- What degree of certainty is required depends on the nature of the stipulation.

    - With a condition subsequent or determinable limitation, the court must be able to see from the beginning, *precisely and distinctly*, what events must happen to cut the estate short (*Sifton v Sifton*).
    - In interpreting a condition precedent, the court only must be able to see whether the recipient falls within a reasonable, plausible, or sensible meaning of the terms used (Ziff).
    - It is not settled whether an executory limitation needs to be stated in certain terms or just terms capable of some reasonable interpretation.
- It is not clear whether appointing an arbiter for matters in dispute helps overcome uncertainty.
    - In *Re Tuck's Settlement Trusts*, a grant stated that "as to which facts in case of dispute or doubt, the decision of the Chief Rabbi in London shall be conclusive."
        - Lord Denning MR held that this arbitration clause was an effective means for overcoming uncertainty; Eveleigh LJ held that the trust was valid because of the Chief Rabbi clause.
    - There is a good argument that a certain judgment by a third-party arbiter provides a certain event for bringing an estate to an end.

HJ Hayes Co v Meade, 1987 CarswellNB 66 (QB)

Facts:

- In Thomas Hayes' will, he left half of his farm to his wife for her life, and then to his son Harold. He divided the other half of the harm into two lots and gave one to each of his younger sons on the condition that they "reside on said land and cultivate the same." If either of them desired not to live on and cultivate said property, then the lot designated for him would become property of Harold on payment to Harold of $1000. One of the sons, James, moved to the US at some unestablished date and did not reside on his lot until the late 1960s, at which point he built a home on the lot. The defendants are his successors in title. The plaintiff company is owned by Harold's widow and children.
- The plaintiff's position was that Harold took the property because James did not fulfill the conditions under the will (even though Harold never paid $1000 to Harold). The defendant's position was that the provisos for residency and cultivation are conditions subsequent and void for uncertainty and, in the alternative, the conditions have been met.

Issue and holding:

- Did the testator intend to create conditions precedent to his son James obtaining the disputed property, or a condition subsequent for retaining the property? **Subsequent**
- Are the conditions void for uncertainty? **YES**
    - Thus, James took absolute title to the disputed property at the time of his father's death.

Analysis:

- The cardinal rule of interpretation of wills is that effect must be given to the intentions of the testator.
- From *Sifton v Sifton*, where it is doubtful whether a condition is a condition precedent or a condition subsequent, the court *prima facie* treats it as being subsequent for there is a presumption in favour of early vesting.
- From Feeney in *Canadian Law of Wills*, if a will is susceptible of two constructions, one of which will result in the disposal of the whole estate, the other of which will result in part of the estate remaining undisposed of, the courts will prefer the construction which will see the disposition of the whole estate.
- In *Clavering v Ellison*, the HL held that where a vested estate is to be defeated by a condition subsequent, that condition must be such that the Court can divine from the beginning, precisely and distinctly, what event would cut the vested estate short.

Rationale: (Godin J)

- Justice is more likely to be done by interpreting the provisos as conditions subsequent.
    - This gives effect to the testator's clearly expressed intention to confer a benefit on each of his sons.
    - This is more consistent with the law's preference for a vesting construction.
    - This is more consistent with the presumption against intestacy.

- If the provisos are construed as conditions precedent, the property could not vest in James at the time of his father's death, nor could it vest in Harold, as he never paid the $1000 to James; thus, the bequest of property would fail completely and the disputed land would fall into the residue of the testator's estate; since there is no residuary clause, the result is an intestacy with respect to the disputed property.

- The uncertainty as to the period within which the residence requirement must be met as well as the uncertainty as to whether the beneficiary would forfeit his right if he left the property for any period of time make it clear that the condition does not meet the test put forward in *Clavering v Ellison*.

Fennell v Fennell, 2012 CarswellNfld 85 (SC (TD))

Facts:

- Josephine Fennell died in 2008 having executed a will earlier that year. In an earlier will, she left the family home to one of her grandchildren. In the 2008 will, she left the home to the five of her eleven children who no longer lived in Newfoundland and Labrador "WITH THE CONDITION that all of my family can make use of the same house at any time without costs PROVIDED THAT they share in the upkeep of said house."

Issue and holding:

- Is the condition subsequent void for uncertainty? **NO**
    - *Remedy*: The impugned condition is declared invalid and expunged from the 2008 will.

Analysis:

- Courts must look at the entire circumstances and not just the words of the will to determine a testator's intentions.
- A practical level of clarity, assessed on a common-sense basis, is demanded of conditions in a will; *the donee must be able to see clearly and distinctly from the outset those actions that will lead to a loss of the interest*.
    - In *Re Schaffer Estate*, the ABCA held that the term "family" was ambiguous.

Rationale: (Whalen J)

- It is impossible on the face of the will and on the evidence to decide, with any degree of certainty, the meaning of "family" intended by the testatrix.
- There are no adequate guidelines contained within the 2008 will to determine the method of payment for use and the law demands "a practical level of clarity."

Notes:

- Whalen J described the impugned condition as repugnant to the right of the owner of property to do as he or she pleases with the property; a testatrix giving an absolute interest in her property cannot, at the same time, impose a condition on the gift which deprives the beneficiary of the rights recognized as part of the essential nature of that gift.
- Courts have had trouble interpreting words like "reside," "residence," and "family."
    - In *Sifton v Sifton*, the trustees were instructed to pay the beneficiary sum of money annually "so long as she shall continue to reside in Canada" and the condition was held to be void for uncertainty.
    - But in *Kotsar v Shattock*, the testatrix made a gift to Oilme Kotsar conditional on being "resident in one of the countries of the British Commonwealth of Nations"; the court held that this is certain enough.

Impossibility

- Conditions can are impossible to perform are invalid (e.g., "to C if pigs fly").

Unger v Gossen, 1996 CarswellBC 1248 (SC)

Facts:

- Malvina Toews' left her estate to her sister for life, and on her sister's death, in equal shares to three nephews, who all resided in the Soviet Union. The bequest to the nephews was subject to a stipulation that they become residents in Canada within 15 years of the testator's death. The testator's sister predeceased her and none of the nephews immigrated to Canada, emigrating to Germany after the fall of the USSR. The executor of the testator's estate applied for an order allowing the estate to be distributed to the nephews.
- Malvina Toews' overriding concern was that she did not want her funds to go to any beneficiary in a communist state, as it was believed that the state would confiscate them. In 1989, Toews got dementia and lost her capacity to alter her will to reflect the changed circumstances after the USSR fell and the nephews moved to Germany.
- The condition that the nephews had to fulfill became impossible under Canadian law. Regulations passed under the *Immigration Act* made it impossible for the nephews to move to Canada. This was not known to the testator.

Issue and holding:

- Should the court direct a distribution of the estate as desired by all potential beneficiaries? **YES**

Analysis:

- Where a testator grants a bequest, subject to a condition which is impossible, the condition must fail (and the gift made absolute) unless is could be shown that the principal concern of the testator was the condition and not the gift.
    - This is because to intentionally draft into a will a void condition is an absurdity.

Rationale: (Stromberg-Stein J)

- With regard to the testator's wishes, and because the condition is impossible to fulfil by law, the condition fails and the estate should be distributed according to the terms of the will and the beneficiaries' wishes.
    - The condition of residency is a condition precedent; however, the gift, not the condition, was the testator's motivation and the performance of the condition was not the very reason for the gift.
        - The testator's dominant consideration was to make the gift to her nephews; the purpose of the condition was to ensure that the gift did not fall into the hands of the government of the USSR.
    - The question whether the testator knew of the impossibility of the performance of the condition when she drafted the condition is not determinative.
        - She was incapacitated and unable to change her will when her nephews' circumstances changed and there was no longer any reason for concern on her part.

Ratio:

- Where an invalid condition precedent is attached to a gift of personalty, the condition will fail (and the gift will be absolute) where it is shown that the performance of the condition is not the very reason for the gift (i.e., the gift is more important than performance of the condition).

Restraints on Alienation

- The development of land law has been a struggle between making land freely alienable and enabling landowners to use their rights of ownership to restrict what their successors in title can do with the land.
- Powers of disposal may be abridged in three ways:
    - Restricting the *mode* of alienation (e.g., the property may not be sold or mortgaged).
    - Prohibiting alienation to some *class* of recipients (e.g., prohibiting sale out of the family).
    - Precluding dealings for a specified *time* (e.g., prohibiting sale within 25 year of the grantor's death).
- Courts will declare invalid any condition that deprives the holder *substantially* of the right of alienation.
    - Examples of restraints that are *invalid* are:
        - Prohibiting disposition except to one person.
        - Requiring the consent of the grantor or a third party before property can be disposed of.
    - Examples of restraints that *valid* are:
        - Prohibiting disposition to one person.

        - Prohibiting disposition for 5 years.
- Traditional objections to restraints on alienation are (*Trinity College*):
    - The make property unmarketable, preventing land from being put to its most valuable use.
    - They perpetuate the concentration of wealth in society.
    - They discourage improvements, as few would make improvements to land that they cannot sell.
        - It may also be hard to obtain financing to improve land if you cannot provide title as collateral.
- There remain large restrictions on Aboriginal title, which can only be surrendered to the Crown.
- There are also restrictions on alienation in the form of subdivision control.
    - e.g., if you have a quarter section, you can sell the whole but cannot sell part of it in many jurisdictions.
    - e.g., if you have an urban lot and you want to sell part of it, you have to get permission.

Trinity College School v Lyons, 1995 CarswellOnt 403 (Gen Div)

Facts:

- In 1963, the respondent husband and wife sold to TCS (the applicant) a parcel of farmland adjacent to TCS. The sale agreement contained a provision stating that the respondents would not dispose of their remaining farm property without first offering it to TCS at a price of $12,000. Two years later, the parties sign a second contract whereby the respondents gave TCS an option to purchase the farm upon their death for the sum of $9,375, assuming they have retained beneficial ownership, in consideration for TCS's promise to pay the property taxes. Later, the respondents conveyed to their three daughters, as a gift, the option lands without informing the applicant. When both respondents died, the applicant sought to exercise its option to purchase the remaining lands, but the daughters refused to sell. The applicant sought an order for specific performance of the option or, in the alternative, damages. By 1992, the market price of the property was $135,000.

Issue and holding:

- Is a term prohibiting the optionors from conveying the option lands without first offering them to the optionee void as an improper restraint on alienation of an estate in fee simple? **YES**

Analysis:

- The right of alienation is an inseparable incident of a fee simple estate; where there is a condition on a gift of land in fee simple which is an *absolute* restraint on alienation, it will be void as repugnant to that estate.
- However, an option to purchase is more acceptable as a right of pre-emption than as a restraint on alienation; e.g., giving TCS a right to be offered land before anyone else is different from requiring that the property be sold to TCS, or prohibiting its sale without TCS's consent.
    - A pre-emptive provision is valid if the optionee is required to meet any offer received by the optionor as a condition of exercising his option.
    - If, however, the optionee need pay only a fixed price or a percentage of any offered price, the provision is governed by the general rules as to restraints on alienation of fee simple estates.
        - If the right of pre-emption at a fixed price *substantially* deprives the person who granted it of his right of alienation (i.e., when there is a great discrepancy between the option price and the market price), then the right of pre-emption will not be valid.
        - In *Re Rocher* (1884), the testator devised property to his son, but provided that if his son desired to sell it during the lifetime of the testator's wife, then she should have the option to purchase it at a price of £3,000. The value of the property was £15,000 at the time of the testator's death.
            - Pearson J considered that to require the son, if he desired to sell, to do so at 1/5 of its value, was equivalent to an absolute restraint against sale during the life of the widow.

Rationale: (Sheard J)

- The right of option triggered by the death of the survivor is void as an unlawful restraint on alienation.

- The right of option specified a fixed price of no more than $9,375, substantially depriving the daughters of their right of alienation.
- The option was exercisable at the choice of TCS, whether the daughters were ready to sell or not.

Ratio:

- If a right of pre-emption at a fixed price or a percentage of any offered price creates a large discrepancy between the option price and the market price, then it will be an invalid restraint on alienation.

Notes:

- In the case *In re Macleay* (1875), the court held that a devise with a condition that the devisee never sell the land out of the family was held *not* to be void as an undue restraint on alienation.
  - Jessel MR held that you may restrict alienation by prohibiting a particular class of alienation, prohibiting a particular class of individuals, or restricting alienation to a particular time.
- In *Fuji Builders Ltd v Tresoor*, a detailed restrictive covenant contained a clause providing that any construction on the affected land had to be carried out by a designated builder. It was declared to be void because it created a substantial restraint on alienation by adversely affecting the marketability of the land.
- In *Blackburn v McCallum* (1903), Taschereau CJ said that an attempt to breach a prohibition on the transferring of a devised parcel of land will result in the complete nullity of any act done in contravention of the prohibition, but not forfeiture or nullity of the devise.

Perpetuities

- In feudal England, maintaining one's position in society meant maintaining control over the family landholdings.
- For reasons of public policy, the common law took the position that land must be more freely alienable and developed restraints on proprietary freedom that invalidated interests which vest too remote a time in the future.

Elements of the General Rule

- An interest is only good if it must vest, if it vests at all, not later than 21 years after the death of some life in being who was alive or *en ventre sa mere* at the creation of the interest. If no such life was in existence at the creation of the interest, then the term of 21 years only is allowed.
  - The rule against perpetuities sets a time limit for resolving contingent interests (determining who exactly the beneficiary or class of beneficiaries is); any interest that might vest "too late" is void at the outset.

1. The rule against perpetuities applies to continent remainders and executory interests, not vested interests.
   - Outside the rule's grasp in Canada is the possibility of reverter, which is regarded as vested.
   - e.g., “to John for life, remainder to Nora’s daughters”
     - The gift will become vested when Nora dies, because only then will we be able to identify with certainty the class of people to whom the gift is given.
2. The date of the creation of the interest is dependent upon the nature of the instrument containing the gift.
   - If the gift is contained in a will, the perpetuity period will begin to run from the testator’s death.
   - If the gift is contained in an instrument *inter vivos*, the perpetuity period will run from the date the instrument takes effect.
3. To constitute a life or lives in being, four conditions must be satisfied:
   a. The measuring life or lives must be human and can be designated expressly or implied in the instrument.
      - e.g., T bequeaths “to the Children’s Hospital, but only so long as it operates a hospital in Edmonton.”
        - T is dead, and the Children's Hospital Foundation is not a living person; there is therefore no life in being involved in this gift, and the perpetuities period is simply 21 years.

b. Such person or persons must be living at the date of the creation of the interest.
    - e.g., T devises "to Enid's first daughter"
        - Enid is the life in being and the contingency must be resolved within 21 years her death.

c. If a group of persons is used as the measuring lives, that group cannot be capable of increasing in number after the date of the creation of the interest.
    - e.g., X devises "to all my grandchildren."
        - X is not a life in being, but his kids are; we can identify who X's children are when X dies.
        - We will know who qualifies for the gift when the last of X's children (the lives in being) die, and the gift will thus vest within 21 years of the death of the lives in being.

d. If a group of persons is used as the measuring lives, that group must be ascertainable.
    - i.e., it must be possible to determine what members of the group were alive at the date of the creation of the interest so that it can be determined when the last survivor of that group dies.

4. If, at the commencement of the perpetuity period, it is theoretically possible to construct circumstances in which vesting would occur outside the period, then the rule against perpetuities is infringed.
    - This is true even if the circumstances are highly improbable and even if later events make them impossible.
        - There is a conclusive presumption of fertility; males are deemed capable of begetting children and females are deemed capable of giving birth regardless of their age.
    - The rule is concerned only with logical possibilities at the commencement of the period; it is not concerned with probabilities, or with actual later events.
        - The determination of whether there is a possibility that the interest will not vest within the perpetuity period must be made at the date of the creation of the interest (the *initial certainty rule*).

Reforming the Rule Against Perpetuities

- The Alberta *Perpetuities Act* currently governs interests which take effect on July 2, 1973 or later.
    - Except for this Act, the common law rule against perpetuities continues to apply [s. 2].
        - The starting point when approaching a perpetuities problem is checking to see if we have a violation of the common law rule; if we do, then we check whether the gift is saved by the Act.
    - According to s. 11, the remedial provisions of the Act shall be applied in the following order:
        - s. 9(1): It shall be presumed that a male is able to have a child at the age of 14 years or over, but not under that age, and that a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years, but in the case of a living person, evidence may be given to show that the person will or will not be able to have a child at the time in question.
        - s. 4(1): Every contingency is presumed valid until actual events establish that (1) remote vesting is impossible (in which case the interest is valid) or that (2) vesting within the perpetuity period is impossible (in which case the interest is invalid, unless ss. 6, 7, or 8 save the gift).
            - The "wait and see" period is 21 years plus any lives in being [s. 5]; only persons referred to in s. 5(2) may serve as lives in being (e.g., the grantor, the people in whose favour the gift was made, etc.), and if the lives in being are a group of persons, it must not be so large as to make it impractical to identify the last survivor.
        - s. 6: When an interest is contingent upon someone attaining some age over 21, and it becomes apparent that age will not be attained by the end of the perpetuity period, but that interest would not be void if the age requirement were 21, then the age requirement is reduced to the nearest age over 21 that will allow timely vesting.

        - s. 7(2): If a gift to a class of individuals is void only because, at the end of the wait and see period, one or more members of the class may still vest, then those members are excluded from the class, and the gift to those members who vested is valid.
    - A right of re-entry and possibility of reverter are subject to a 40-year wait-and-see perpetuity period [s. 19].
    - ss. 17, 18, and 19(5) deal with commercial interests that may or may not be exercised.
        - s. 19(5) holds that the 40-year wait-and-see period does not apply to mineral leases.
        - s. 18 holds that, for commercial transactions such as options, the perpetuity period is 80 years; if a contract stipulates a longer period, it is still only exercisable within 80 years.

Scurry-Rainbow Oil (Sask) Ltd v Taylor, 2001 CarswellSask 539 (CA)

Facts:

- In 1949, Harry Taylor granted a lease to Imperial Oil of all petroleum on a property for 10 years or as long after as substances were produced from the lands. In 1950, Taylor entered a top lease with the predecessor of Scurry-Rainbow for petroleum rights upon expiration of the lease with Imperial Oil. The top lease was to take effect "upon and in the event of the…expiration of the said drilling lease with Imperial Oil," but only should those events occur within 42 years from the execution of the top lease. There was no production and the lease expired after 10 years.

Issue and holding:

- Is the "top lease" rendered void by the rule against perpetuities? **NO**

Analysis:

- 21 years is the full extent of the perpetuity period in all cases where no life is indicated for the purpose, or where every life indicated has predeceased the testator.
- The rule against perpetuities is based upon considerations of public policy; it is meant to prevent the fettering of the marketability of property over long periods by indirect restraints upon its alienation, since the exclusion of property from commercial development for extended periods is perceived as a public evil.
- The common law must be able adapt to changing times; its basic principles were not meant to become rigid, inflexible, and resistant to developments in the commercial world.

Rationale: (Tallis JA)

- The top lease in this case does not offend the policy behind the rule against perpetuities.
    - Top leases are an accepted business practice in the oil industry for increasing drilling and competitiveness because oil companies whose leases have been "topped" have a greater incentive to drill on leased lands; if they do not, they stand to lose the lease and make way for someone else to drill.
- When the rule against perpetuities was created, top leases in the oil industry were not contemplated.
    - Since common law rules are judge-made rules, the Court can make exceptions to such rules when changing conditions so mandate.

Ratio:

- Courts retain discretion to reserve the application of the rule against perpetuities when using it would not prevent the exclusion of property from commercial development for extended periods.

Notes:

- Quesnel argues that the top lease in *Scurry-Rainbow* could have been characterized as a grant of a vested present interest, with possession postponed until termination of the prior particular estate.
- In *Symphony Space v Pergola Properties*, BRC sells a building to Symphony Space for $10,010 and leases back part of the building for $1 a year. BRC reserved an option to purchase back the building for $10,010 exercisable in the year 1987, 1993, 1998, or 2003. It was held that the option violated the rule against perpetuities.

SHARED OWNERSHIP

BASIC CONCEPTS

- Private ownership rights are shareable and infinitely divisible.
- G.S. Alexander distinguishes between two types of personal property, which are merely theoretical concepts:
    1. Exclusion property (EP), which consists of one owner with virtually all control over the asset.
    2. Governance property (GP), which is multiple-ownership property.
- The two main types of co-ownership are *joint tenancy* and *tenancy in common*.
    1. Joint tenancy is when two or more people together own the same interest; it has two main features:
        - The four unities, which describe the need for virtual equality between all of the joint tenants:
            a. Unity of possession; each joint tenant is entitled, concurrently with the other joint tenants, to possession of the whole of the land that is the subject of the joint tenancy.
            b. Unity of interest; the interests of each tenant are the same in extent, nature, and duration.
            c. Unity of title; each tenant's title must be derived from the same document or occurrence.
            d. Unity of time; each joint tenant's title must vest at the same time.
                - This is not required for a joint tenancy created by will or a conveyance employing a use (e.g., joint tenancy might be created by a gift by will to children born to A, even though the children's interests will each vest at the time of their respective births).
        - *Right of survivorship*: the right of the surviving joint tenants to take the interest of a pre-deceasing joint tenant.
            - Once a joint tenant dies, their interest is extinguished, increasing the holdings of the survivors; joint tenants are regarded as having one unified interest in the property.
            - Alberta's *Wills and Successions Act*, s. 5(2), specifies that if two or more joint tenants die at the same time or in circumstances rendering it uncertain which of them survived the other(s), then (unless the Court in interpreting a will or other instrument finds a contrary intention) they are deemed to have held the property as tenants in common.
    - Tenancy in common differs from joint tenancy in two ways:
        - The only unity that is required is unity of possession; thus, tenants in common still have equal rights of possession over the whole of the land regardless of their ownership share.
            - Tenants in common do not have to have one unified interest; they have distinct, separate interests.
        - Tenants in common do not have a right of survivorship.
            - When one tenant in common dies, their interest forms part of their estate.
            - It is conventional for partnership assets and condominium property to be held in common.

Methods of Creation

- At common law, there was a presumption of joint tenancy so that transfer of title to co-owners produced a joint tenancy if the four unities were satisfied and an intention to create a tenancy in common was not established.
    - However, in at least three sets of circumstances, equity presumed a tenancy in common:
        1. Where two or more persons advance money on a mortgage.
        2. For partnership property.
        3. Where the purchase price for property is provided unequally.

        - e.g., A pays 75% towards a property, B pays 25%, and the property is put in B's name; B is presumed to hold the property on a resulting trust for A and B as tenants in common with A having a 75% share and B having a 25% share.
    - Over time, the common law began to shift; courts adopted the view that the slightest indication that property was meant to be held in common could suffice to rebut the presumption of joint tenancy.
        - As such, *words of severance* like "equally amongst them," "equally to them," "equally," "share," "share alike," "respectively," "between," "amongst," "to each," and even "jointly" have been held to make the objects tenants in common.
        - This arose out of the concern that some joint owners might be unaware of the survivorship rule.
    - The *Law of Property Act*, s. 8, states that when an interest in land is granted, devised, etc. to two or more persons, other than as executors or trustees, those persons take as tenants in common unless an intention sufficiently appears on the face of the instrument that they should take as joint tenants.
        - This does not apply to conveyances of personalty, where the common law rule still governs.
        - The creation of a joint tenancy of land now generally requires the four unities and a sufficiently stated intention.
        - When the property is held by trustees or executors, it is unlikely to be the intention of the grantor that the property would pass to their heirs upon their death.

Re Bancroft Estate, [1936] 4 DLR 571 (NSSC)

Facts:

- Samuel Bancroft died in 1917. The residue of his estate was to be converted into money and split into two equal shares. One half was to be invested, and the annual income divided into four equal shares. Under cl. 6(b), one of those shares would go to Paul and Jean, Samuel's grandchildren. Up to the death of Paul, the trustee paid 1/4 of the income arising from the fund set up in para. 6(b) to Jean and Paul in equal shares. Paul died in 1933.

Issue and holding:

- Did Paul and Jean take as joint tenants or tenants in common? **Joint tenants**
    - Therefore, the share heretofore paid to Paul is payable to his surviving sister, Jean.

Analysis:

- A bequest to several persons without any accompanying explanatory words creates a joint tenancy.
- However, the courts have leaned strongly against joint tenancies, such that anything which indicates the slightest intention to divide property must be held to abrogate the idea of a joint tenancy and create a tenancy in common.
    - Such words as "equally to them" or "equally" have been held to make the objects tenants in common.

Rationale: (Ross J)

- This is a plain case of a bequest to a plurality of persons unaccompanied by any explanatory words; there is nothing in the will to indicate an intention to divide the income between Paul and Jean by creating a tenancy in common.

SEVERANCE OF JOINT TENANCIES

- **Severance**: the transformation of an existing joint tenancy into a tenancy in common.
- From *Williams v Hensman*, a joint tenancy may be severed in three ways:
    1. By one person unilaterally acting on his or her own share (at common law)
        - e.g., where A and B hold as joint tenants, and A conveys to C, the new co-ownership relationship between B and C must be a tenancy in common because the unities of title and time are now absent.

- e.g., where A, B, and C hold jointly, and C conveys to D, A and B continue to hold as joint tenants between themselves, but D holds a 1/3 interest as a solitary tenant in common. The interests of A and B will pass on survivorship, and the 1/3 portion owned by D will devolve to D's heirs.
- Conveyance to oneself produces a severance, because the new title resulting from this process is obtained at a different time and under a different document than that of the other joint owners.
- Partial alienation by one joint tenant, such as the granting of a life estate, should produce a severance, because this leaves the grantor with only a reversion, thus destroying unity of interest (but see *Sorensen*).
- A transfer of an equitable interest results in a severance of the equitable title.
- An attempted severance by will is ineffective; the right of survivorship trumps the co-owner's will and the rules for the devolution of property on intestacy.
- The granting of an easement or a rentcharge will not sever; these transactions do not destroy a unity, they merely encumber a tenant's interest with some additional right.
- Whether or not a mortgage by one joint tenant will produce a severance depends on whether the unities are affected.
    - When the mortgage involves the transfer of title to the lender, a severance results when one joint tenant mortgages his or her interest.
    - In Alberta, under the *Land Titles Act*, a mortgage is treated as creating a charge on the owner's title, so no severance results.
- An assignment or sublease of a leasehold joint tenancy leads to a severance of that interest, but the outcome when a lease is granted by a freeholder is more contentious.
    - It has been suggested that surrendering the immediate right of possession alters the interest of the lessor, who then has only a postponed right to possession.
    - An alternative view is that the freehold is merely encumbered with an additional interest.
    - Another view is that the interference with the right of survivorship is a basis for finding a severance; if so, then only when the lease endures beyond the life of the lessor will a severance result (see *Sorensen*).
- Proceeding to judgment in an action for a partition or sale of the joint property has been found to result in severance.
    - Partition involves the physical division of land between co-owners or the sale of the property and division of the proceeds among co-owners (*Law of Property Act*, s. 15).
    - However, no Canadian court has gone so far as to say that a clear unilateral *statement* should be enough to sever.

2. By mutual agreement among joint tenants (in equity).
3. By any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common (in equity).
    - It will not suffice to rely on an intention declared only behind the backs of the persons interested.
    - Some Canadian courts have held that even where negotiations between joint tenants do not lead to a binding contract concerning their property holdings (i.e., mutual agreement), the process of negotiation can constitute a course of dealing sufficient to sever the joint tenancy.
        - *Havlik v Whitehouse* suggests that courts may be willing to find that negotiations regarding severance sever the joint tenancy in the context of marriage breakdown.
            - In most cases of marital breakdown (especially those before the courts), it is reasonable to infer that the couple intends to sever their joint tenancies.
    - Where both joint tenants executed wills leaving the property in question to the other, this evidences a common intention to treat the property as severed (*Sorensen*).

- Severance may also occur on bankruptcy, by judicial sale, and probably by seizing the property.
- The murder of one joint tenant by the other produces what amount, functionally, to a severance in equity.
    - The victim's share is held on a constructive trust by the perpetrator for the benefit of the victim's heirs (*Schobelt v Barber*).
- The onus to demonstrate that there has been a severance lies on those who so contend (*Sorensen*).

Sorensen Estate v Sorensen, [1977] 2 WWR 438 (ABCA)

Facts:

- Marrian and Marshall Sorensen divorce in 1969. According to a settlement agreement, Marrian would retain possession of the former family home, registered in the name of both spouses as joint tenants. As such, the co-owners executed a lease to Marrian for her life. Marshall agreed to pay $100 per month to Marrian to look after their son, with the payments being secured against the husband's interest in the former family home. In 1974, Marrian got cancer, and executed a trust deed declaring that she held her interest in the land in trust for her son. In that deed, she declared that she was severing the joint tenancy, but this was not brought to the attention of Marshall. She then executed a will, giving all her property to her daughters as trustees to pay the income to her son during his life. She then brought a motion to partition the lots but died before it was heard. Marshall claimed a right of survivorship.

Issue and holding:

- Had there been a severance of the joint tenancy prior to Marrian's death? **YES**
    - The husband and son hold the beneficial interest in common.

Rationale: (McDermid JA)

- All that severed the tenancy was the gift to the son by declaration of trust of the wife of the beneficial interest.

Obiter dicta:

- The settlement agreement did not constitute a severance of the titles to the lots.
    - The conduct of the wife is against drawing any such inference, she thought she had to do something further to sever the title as shown by her executing the trust deed and commencing an action for partition.
- The granting of a lease during the lifetime of and by one tenant to the other does not sever the tenancy.
    - The interference with the right of survivorship is a basis for binding a severance; if so, then only when the lease endures beyond the life of the lessor will a severance result.
        - But upon the death of the wife, the lease would terminate, and upon the death of the husband, if the wife were still living, the lease would merge in the fee.
- The $100 monthly payment charged by way of security against the interest of Marshall in the matrimonial home did not sever the tenancy.
    - In Alberta, a mortgage does not result in any change in title; it merely results in a charge imprinted on the property to secure some debt or obligation.
- While Marrian declared that she was severing the joint tenancy in the deed, this was not brought to Marshall's attention; a declaration by one party uncommunicated to the other cannot operate as a severance.
- The bringing of an action alone for partition where the action is subsequently discontinued is not sufficient to constitute a severance.
    - The declaration by one party of an intention to sever alone without any other act with without acceptance by the other joint tenants does not sever the tenancy.
- The execution of a will cannot sever joint tenancy; the right of survivorship trumps the co-owner's will.
    - The property thus does not form part of Mrs. Sorensen's estate to be disposed of by will.

Law of Property Act, RSA 2000, c L-7

12(1) an interest in real or personal property may be validly conveyed

a. by a person to that person jointly with another person,
b. by 2 or more persons to one or more but not all of themselves,
c. by 2 or more persons to any one or more of themselves and some other person,
d. by a person who holds the property as a joint tenant to that person as a tenant in common,
e. by joint tenants to themselves as tenants in common, or
f. by tenants in common to themselves as joint tenants,

to the same extent and in the same manner as the interest might be conveyed to a third party.

(3) A transfer by a person as a joint tenant to that person under subsection (1)(d) has, on the registration of the transfer under the *Land Titles Act*, the same effect of severing the joint tenancy as a transfer to another person.

Land Titles Act, RSA 2000, c L-4

65 The Registrar shall not register a transfer that has the effect of severing a joint tenancy unless

a. the transfer is executed by all the joint tenants,
b. all the joint tenants, other than those executing the transfer, give their written consent to the transfer, or
c. the Registrar is provided with evidence satisfactory to the Registrar that all the joint tenants who have not executed the transfer or given their written consent to the transfer have…been given written notice of the intention to register the transfer.

- This section only deals with severance in law; it does not affect severance in equity (since equitable interests do not have to be registered).

CONCURRENT OWNERSHIP DISPUTES

Termination of Co-Ownership

- Courts are generally reluctant to police the co-owners' relationship.
- Sometimes, relations among co-owners become so difficult that they want out.
    - If they can co-operate enough to do so, and if the property can be divided without destroying its value, the co-owners could divide the co-owned whole into parcels that the former co-owners will own individually.
    - The co-owners could also sell the undivided property to someone else and divide the proceeds, or one or more of the co-owners could sell their interest to the remaining co-owners.
    - A co-owner can sell his or her interest in the undivided whole without offering it to the other co-owners first.
        - But depending on the nature of the property and the nature of the relations among the co-owners, buying into a co-ownership situation may not be attractive to a third party.
    - As a last resort, Part 3 of the *Law of Property Act* states that a co-owner may apply for partition or sale of the property (at which point co-ownership is ended), with or without an accounting between the parties.
        - When a co-owner applies for partition, the Court of Queen's Bench *must* provide a remedy [s. 15(2)].
            - The co-owned property may be physically divided up, with discrete portions of the fee granted exclusively to each co-owner [s. 15(2)(a)].
                - The portions of the fee are usually granted in accordance with the co-owners' proper co-ownership interests therein.
                - This does not work well with property that does not lend itself to physical partitioning (e.g., realty).

        - The court may order the co-owned property to be sold, with the net proceeds from the sale distributed amongst the co-owners [s. 15(2)(b)].
            - The proceeds are usually distributed to the co-owners in their proper proportions.
        - The court may direct the sale of all or part of one or more of the co-owners' interests in land to one or more of the other co-owners who are willing to purchase the interest [s. 15(2)(c)].
    - The Court may stay proceedings for partition pending the disposition of an application made under the *Family Property Act* [s. 21].
    - The Court may stay proceedings for partition pending subdivision approval [s. 26].
    - The Court may make an order terminating the co-ownership, notwithstanding an agreement between the co-owners, if the continuance of the co-ownership will cause undue hardship to one or more of the co-owners [s. 27].
    - While this sounds intuitively fair, the consequences from a forced sale are not always equitable.
        - In *Greenbanktree Power Corp v Coinamatic Canada Inc*, the court forced the sale of a property at the request of a minority co-owner even though it triggered a sizeable penalty payable to the fixed-term mortgagee for the majority co-owner.
            - The court held that it was not relevant that the majority co-owner held a much larger percentage than the minority co-owner.
            - The court also held that the additional costs to both co-owners were not, in and of themselves, a reason to take away the minority co-owner's *prima facie* right to force a sale; the minority co-owner's conduct had to amount to "malicious, oppressive, or vexatious" behaviour.
                - Sets a high bar for disqualifying partition so that they would not have to regularly consider and arbitrate petty disputes.
            - This decision, while offering protection to minority co-owners from oppressive majority co-owners, gives minority co-owners unanticipated negotiating leverage.
            - The later case law is, for the most part, consistent with *Greenbanktree*.
        - In *Gartree Investments Ltd v Cartree Enterprises Ltd*, 2002 CarswellOnt 733 (SCJ), the minority co-owners refused an offer from the majority co-owners to buy out their interest at 110% market value and then sought a forced sale.
            - The court ultimately refused to complete the minority co-owner's request and, somewhat extraordinarily, compelled her to sell out her minority share of the jointly held portfolio to the majority co-owners at 110% of fair market value.

Accounting Between Co-Owners

- Upon termination of co-ownership, the court can make all allowances that are just and fair in the circumstances.
    - Alberta's *Law of Property Act*, s. 17(2), codifies the common law rules that govern accounting on a partition or sale; it directs the court to consider whether:
        a. one co-owner has excluded another co-owner from the land;
            - If one co-owner is "ousted," the other co-owner may be charged with occupation rent.
            - Ouster includes actual expulsion (e.g., the locks are changed by another co-owner) and probably violent or threatening conduct that makes it intolerable for the other to remain.
            - Ouster may extend to cases where one party's egregious conduct (violent or non-violent) made conditions intolerable for the other.
        b. an occupying co-owner was tenant, bailiff or agent of another co-owner;

        - A requirement to account may arise when one owner acts as an agent or tenant of the other with responsibility to account to the latter for their share of the profits of the land.
    c. a co-owner has received from third parties more than the co-owner's just share of the rents from the land or profits from the reasonable removal of its natural resources;
        - This provision contains the just of the *Statute of Anne*, an English law passed in 1705.
        - The statute is relevant only if profits are actually reaped; the failure to capture a rent for the property does not trigger its application (*Osachuk v Osachuk*).
        - There is not a right of sharing profits derived from a business carried out on the land.
            - In *Henderson v Eason* (1851), one co-owner who farmed the property was not liable to account for the profits obtained.
    d. a co-owner has committed waste by an unreasonable use of the land;
        - Co-owners' enjoyment of land is not curtailed as stringently as it is for a life tenant, since co-owners have rights to simultaneous possession.
        - Malicious conduct would be included as "unreasonable," as would destroying the property (*Dougall v Foster*).
    e. a co-owner has made improvements or capital payments [e.g., payment of the mortgage principal] that have increased the realizable value of the land;
        - If one tenant has made improvements or capital payments which have increased the selling value of the property, the other tenant must submit to an allowance for the improvements.
    f. a co-owner should be compensated for non-capital expenses in respect of the land;
        - Includes taxes, insurance premiums, upkeep and repairs, expenses from litigation with a third party, and mortgage interest.
    g. an occupying co-owner claiming non-capital expenses in respect of the land should be required to pay a fair occupation rent;
        - When, on a partition or sale, the party in possession makes a claim for reimbursement based on the payment of current expenses, a counterclaim for occupation rent may be entertained.
- Co-owners may also agree to one having sole possession on the terms of making rental or other payments (like in *Sorensen*).

- Where the expense relates to a joint obligation of the parties, it appears that the right of reimbursement may be claimed only in proceedings for partition or analogous proceedings (i.e., relief is denied while co-ownership lasts).
    - The relationship of co-owners generates a number of complex cost allocation problems which ought to be resolved on mutual agreement or, failing that, on partition.

CO-OWNERSHIP AND FAMILY PROPERTY LAW

- Co-ownership is common among spouses, and much of the case law concerning accounting and termination has arisen in the context of marriage breakdown.
    - Today, these disputes often fall to be considered under family property legislation, which were introduced in the late 1970s and *provide a statutory right to division of property* upon the dissolution of a marriage or AIP.
- The *Family Property Act*, s. 7, treats property acquired by the parties *during* marriage or AIP as subject to division.
    - Anything acquired before the relationship of interdependence began is exempt, as well as inheritance, damages in tort, third party gifts, and proceeds from certain insurance policies unrelated to property.
        - However, any increase in the value of these items over the course of the relationship can be shared.
    - Given that separate property rights are preserved during the marriage, the general law of property must be invoked to determine who owns what before a court can divide the property to ensure equal sharing.

- Parties are entitled to walk away from the marriage with an equal share of their accumulated property unless one of them can establish that an equal division would not be just and equitable [s. 7(5)], having regard to the considerations under s. 8:
    - The contribution made by each partner to the marriage and to the welfare of the family.
    - The contribution made by each partner to the acquisition, improvement, operation, or management of a business owned or operated by one or both partners.
    - The contribution made by each partner to the acquisition, conservation, or improvement of the property.
    - The income, earning capacity, liabilities, obligations, property and other financial resources of each partner.
    - The duration of the relationship.
    - Whether the property was acquired when the partners were living separate and apart.
    - The terms of an oral or written agreement between the partners.
        - By means of an agreement, spouses or AIPs may choose a different family property regime or may exclude or include shareable property [ss. 37 and 38].
    - A tax liability that may be incurred by a partner as a result of the transfer or sale of property.
    - That a partner has dissipated property to the detriment of the other partner.
    - A previous distribution of property between the partners by gift, agreement, or [court] order.
    - Any fact or circumstance that is relevant.
- Despite the judicial discretion afforded under s. 7(5), it has been maintained that judges should be loath to deviate from the standard of equal distribution (*Bentley v Bentley*), because this would diminish the predictability of outcomes, increase transaction costs, and reduce the frequency of out-of-court settlements.
- ABQB has several options in crafting an award to effect a division, including ordering a partner to pay money or transfer an interest in property to the other, ordering that property be sold and that the proceeds be divided between the partners, or declaring that a partner has an interest in property [s. 9(2)].
    - The Court may also order an exclusive possession of the home and its contents [Part II].
    - To give effect to such an order, the Court may order a partner to pay money, give security for all or part of any payment, prescribe the terms of a sale, impose a trust, require a spouse to release dower rights, require a partner to surrender all claims to property in the name of the other, or sever joint tenancy [s. 9(3)].

- Alberta's *Dower Act*, s. 2(1), protects non-title-holding spouses from a unilateral disposition of the family home by a requirement for spousal consent to any disposition.

OWNERSHIP WITHIN CONDOMINIUMS

- Condominiums appeared in the 1960s as a creature of statute to provide an additional means of increasing the supply of privately owned dwelling units.
- Before these statutes, the combination of private parcels with common ownership of shared facilities in multi-unit buildings was difficult and uncertain.
    - It was possible at common law, but only covenants between holders of individual units established the rules, and this created difficulties when parties to the agreements transferred their interests or when the unit holders wanted to alter the arrangement (especially as the number of relevant stakeholders mounts).
        - The conventional law also lacks a suitable mechanism for resolving disputes among owners.
    - Leasehold and cooperative ownership could be used to effect a vertical subdivision of land, but short-term leases lacked the right to an increase in property value and security of tenure and even long-term leases were "a wasting asset" that would come to an end.

    - Beginning in the late 19th century, a corporation would be created that owned a building and the land on which it stood, and then the shares in that corporation would be divided among the "owners" of the units.
        - But mortgage financing was difficult because only the corporation held title to the land; many lenders were not prepared to take shares and the lease agreement as security for a loan.
- The statutes that introduced condominiums in the 1960s simplified the stacking of fee simple interests in land in a vertical column; there are four core elements of the condominium concept as understood in Canada:
    - Individual titles are held by unit holders.
        - The units may devolve or be transferred, leased, mortgaged, or otherwise dealt with in the same manner and form as any land.
    - Common areas are collectively held by unit holders as tenants in common.
        - Alberta's *Condominium Property Act* defines common property as so much of the parcel as is not comprised in a unit shown in a condominium plan.
    - Owners are entitled to participate in the governance of the condominium.
        - The condominium creates a structure of government that can enact and enforce a type of local law regulating the use of the private and common property, provided that the rules are promulgated in conformity with both the general law and the enabling condominium statute.
        - Rules are determined by the membership acting through the corporate structure.
            - Members may choose to delegate certain responsibilities to a management board.
            - Issues governing day-to-day life are typically resolved by a simple majority of owners, with more significant issues often requiring a super-majority (e.g., 75% approval).
        - Participation in a condominium entails the surrender of some degree of proprietary independence.
    - Owners are obligated to contribute to the maintenance of the common property.
        - Unit entitlement is divided equally or in weighted amounts (usually in relation to the relative values of the lots) and they determine the proportion of expenses (such as building expenses and insurance) that each owner would pay.
- The conversion of rental apartments to condominiums, coupled in many cases with a renovation of those spaces, has displaced tenants, pushing out those who might rent in older buildings but not purchase the renovated units.

Metropolitan Toronto Condominium Corporation No 747 v Korolekh, 2010 ONSC 4448

Facts:

- The respondent condo owner physically assaulted other unit holders, committed acts of mischief against their property, hurled racist and homophobic slurs and threats towards other unit holders, played loud music at night, used her large and aggressive dog to intimidate other unit holders, and failed to clean up the dog's feces. Her broad array of conduct was carried out in a devious, persistent, and vindictive manner. The courtyard of the relatively small condo was a vibrant communal centre prior to the respondent's arrival, and she has effectively destroyed its utility. Korolekh was ordered to cease her misconduct in 2009 but she ignored it and continues to acknowledge any wrongdoing.
- s. 117 of the *Condominium Act* prohibits conduct that is "likely to damage the property or cause injury to an individual," and s. 134 enact a broad remedial power to enforce compliance with the Act.

Issue and holding:

- Should the respondent be ordered to vacate her unit? **YES**

Analysis:

- People join condominium corporations voluntarily on the basis that they agree to share certain collective property and to abide by a set of rules and obligations to protect the collectivity.
    - There is no right to continue membership in this corporation of this community once a clear intention to harm it and a persistent refusal to abide by its rules have been exhibited in extreme ways.

Rationale:

- An order requiring Ms. Korolekh to sell her unit and vacate within three months is justified in the unusual circumstances of this case.
    - Her misconduct is serious, persistent, and unmanageable and its impact on a small community has been exceptional.
    - It would be unwise to try to reintegrate Ms. Korolekh into a community that fears her and that she has persistently tried to intimidate; the other condominium owners are entitled to security.

Notes:

- This order was made in the absence of an explicit statutory power to evict Ms. Korolekh; the court relied on its general power to enforce the condominium governance rules or the statute.
- This case shows that, in extreme cases of unsafe and flagrant misconduct, a condominium title contains a limit that sets it apart from a typical fee simple homeowner, in which case no comparable remedy would have been available.

LEASES, LICENSES, AND BAILMENTS

LEASES

- The lease likely arose as security for a loan; when the landowner wished to borrow money, they would convey legal title to the lender as collateral.
    - Later on, a new writ was created called a "writ of ejectment" that allowed the person in occupation to assert rights good against the world, creating a new interest in land classified as a "chattel real."

Nature of the Lease

- A lease is a "demise" of land under which exclusive occupation is conferred by a landlord on a tenant; it creates an estate in land which delimits the duration of the tenant's holdings.
    - The lessor remains seised of the land, and the interest they hold is a "reversion," which can be transferred.
        - A buyer of the land takes it subject to the outstanding the lease and cannot displace the tenant.
    - The right to exclusive possession is enforceable against the world, even the reversioner.
        - At common law, a right of the lessor to enter the premises must be negotiated with the lessee.
    - Leases are a hybrid creature; they are usually created by contract but are themselves estates in land.
- The law of leases is bifurcated; commercial leases are governed entirely by the common law while residential tenancies have undergone a far greater degree of statutory reconfiguration to offer more protection to leaseholders.
    - This is largely because of the power imbalance typically found between landlords and residential tenants and because of the dire consequences of eviction for many residential tenants.
- There are four kinds of leases recognized by the common law:
    - *Fixed term*, also known as a "term of years."
        - A tenancy for a fixed term must have a certain or ascertainable starting date and its maximum duration must be certain or ascertainable at the commencement of the term.
        - You can make a leasehold interest subject to a condition subsequent.
    - *Periodic lease* (e.g., month-to-month)
        - Possession is enjoyed for a period that is renewed unless it is terminated by notice.
            - Unless altered by statute, the notice required is equivalent to the length of the tenancy period, although in the case of a yearly tenancy, a 6-month notice is required.
    - Tenancy at will (has no set term and may be terminated at any time by the landlord or tenant by notice)

        - Creation may be implied, as when a tenant remains on the premises after the expiration of a previous tenancy with the landlord's consent, in which case the terms of the original lease apply.
    - Tenancy at sufferance (which arises when a tenant overholds after the expiration of a term without the consent or dissent of the landlord)
- The elements of a lease are: (1) identification of the parties, (2) description of the demised premises, (3) term, (4) date of commencement (5) rent, if any (not an essential element), and (6) written requirements.
    - The *Statute of Frauds* requires that leases must be in writing, otherwise a tenancy at will is created.
        - The *Land Titles Act*, s. 95, stipulates that when land is intended to be leased for a life or lives or for a term of *more than 3 years*, the owner shall execute a lease in the prescribed form.

Fatac Ltd (in liquidation) v Commissioner of Inland Revenue, [2002] NZCA 269

Facts:

- Puhinui granted Atlas the right to operate a quarry on his land for a period of 12 years. In 1996, Puhinui agreed to sell the entire property to Mt Wellington, but a dispute arose over who was liable to pay GST. The answer to this question depended on whether the lands were "tenanted property."

Issue and holding:

- Does Atlas have a leasehold interest or merely a license to be on the premises? **License**

Analysis:

- A tenancy is an interest in land conferring the right to possess it for a limited period; a licence is a mere permission to be on the land, with or without additional permission to perform specified acts there.
- The test for a leasehold interest is *the right to exclusive possession*, which allows the occupier to use and enjoy the property to the exclusion of others (even the reversioner).
    - Because the tenancy/licence distinction turns on the substantive rights granted to the occupier, it is unaffected by the label which the parties choose to place upon their transaction.
        - The intention of the parties matters only as it relates to whether the occupier would have the right to exclusive possession, not as it relates to legal classification.
    - A necessary incident of a lease is a defined term, fixed or periodic, and an intention to be legally bound.
        - Possession that is terminable at will by the owner would not be exclusive.
        - Rent is relevant to the presence of intention to be legally bound but is not a precondition for a lease.
    - Limitations upon the purposes to which the occupier can put the land do not negate a tenancy.
    - An express right to enter and inspect can imply exclusive possession to which exceptions must be stated but a requirement that the occupier not impede the owner's possession tends to negate exclusive possession.
- A tenancy will not be recognized where:
    - The owner is prevented by statute from granting a tenancy.
    - The landlord's right of entry to provide services is inconsistent with exclusive possession.
    - The right to exclusive possession can be terminated for reasons extraneous to the landlord-tenant relationship (i.e., reasons other than the non-payment of rent or breach of a covenant relating land use).
        - e.g., where an employee occupies an employer's premises to perform the employee's duties.
    - Exclusive occupation of an area that is small in proportion to the total area affected by the agreement.

Rationale: (Fisher J)

- The arrangement with Atlas was a licence, not a tenancy.
    - The lack of provision for rent does not preclude a tenancy.
    - The parties clearly intended to be legally bound.
    - The use of the word "licence" in both documents is irrelevant, as is the purported "right of re-entry."
    - Atlas's right of occupation was far from exclusive.

        - Puhinui had a right of access to the land so long as they did not obstruct Atlas' activities.
        - A 1996 letter reserved to Mt Wellington the right to set up a screening plant in the quarrying area, so long as this did not impede Atlas's quarrying operations.
    - There was never any clearly defined area of which Atlas would have the exclusive use.

Notes:

- In *Metro-Matic Services Ltd v Hulmann*, the court held that the effect of the words "demise" and "lease" and a covenant for quiet enjoyment in a lease agreement were, absent a clear statement of a contrary intention, conclusive of the intention to grant a lease of the land in question with exclusive possession and control thereof.
    - While the grant specified that the premises should only be used for the purpose of carrying out the business of a laundromat and that the tenant's access to the building is restricted to "reasonable hours," the court held that these covenants would not make possession any less exclusive.
- Even if the words "the tenant shall not have exclusive possession" are used, this is not determinative; we would have to look elsewhere for additional evidence of intention.

Assignment and Sub-Lease

- The leasehold can be transferred in two ways: the tenant may transfer the remainder of the term (an assignment) or some smaller portion (a sub-lease).
    - When an assignment is made, the assignee will be placed in a direct tenurial relationship with the landlord.
        - There is no privity of contract between these two people, but there is "privity of estate."
    - In the case of a sub-lease, the original tenant retains an interest in the lease and now wears two hats: as tenant under the "head" lease and as sub-landlord to the sub-tenant.
        - There is no direct legal relationship between the landlord under the head lease and the sub-tenant.
    - A lease might specify that the term may not be transferred at all, or only on the consent of the lessor (with or without a proviso that the landlord's consent will not be unreasonably withheld).
    - It does not matter what two parties term their transaction; what matters is the extent of the rights granted.
- The distinction between assignment and sub-leasing can be significant.
    - An assignee's liability as against the landlord is controlled by the *privity of estate* that exists between them; there is a direct legal relationship between the landlord and the assignee.
        - According to the *Law of Property Act*, s. 65(1), an assignee or a person who acquires a reversionary interest has all the same rights and obligations as their predecessors that are based on the *real covenants* relating to the tenancy.
            - "Real covenants" are those that touch and concern the leased property (e.g., a duty to repair the premises, an obligation to pay rent, a restriction on the right to alienate, etc.).
    - On the other hand, since there is no privity of contract or estate between the landlord and a sub-tenant, a default by a sub-tenant gives the landlord no direct recourse against the sub-tenant, but the landlord pursue a remedy against the head tenant.
        - e.g., if a sub-tenant defaults on rent, the landlord can terminate the head lease, which would cause the sub-lease to crumble as well.

Merger Restaurants v DME Foods Ltd (1990), 71 DLR (4th) 356 (MBCA)

Facts:

- Merger, which operates a restaurant on Lot 2, is the assignee of a lease made with Brousseau Bros. DME Foods operates Bonanza Restaurant on Lot 5. Both properties are owned by the defendant landlord Lakeview (which bought the reversion from Brousseau Bros). In 1987, Lakeview built an addition on Lot 5, resulting in a reduction in parking.

Lakeview agreed with Bonanza Restaurant that its patrons are entitled to park on Lot 2. Merger claimed that under its lease it was granted the right to exclusive parking on the Lot 2 parking area, along with the other tenants on Lot 2.

Issues and holding:

- Is the provision in the Merger lease granting common area rights to Merger a covenant running with the land, and consequently binding upon Lakeview as the successor in title to the lessor, Brousseau Bros? **YES**

Analysis:

- The test for a covenant to run with the land is that is must "touch or concern" the subject matter of the lease (*Spencer's case*); that is, it must affect the nature, quality, or value of the land demised.

Rationale: (Philp JA)

- The extent and availability of parking spaces in a shopping plaza will directly affect the nature and value of the land; as such, Merger's common area rights cannot be considered merely collateral to the demise.

Notes:

- In *P & A Swift Investments v Combined English Stores Group Plc*, the HL outlined three tests for determining whether a covenant touches and concerns the land:
    1. Does it affect the lessor and lessee as their capacities as landlord and tenant or in their personal capacities?
    2. Does it covenant affect the nature, quality, or value of the land or the use to which it may be put?
    3. Would it have independent value or lose its value if it were severed from the leasehold?
- Covenants to repair and pay rent, and restrictions on assignment and sublease run with the land.
    - An undertaking by the landlord to purchase the tenant's chattels at the end of the lease will not run.
    - While a promise by a lessee to buy products from the landlord has been held to run with the land, a covenant by the landlord not to establish a competing business within a specified radius has been held not to.
    - An option to renew the lease has been held to run but a right to purchase the reversion has been held not to.

Sundance Investment Corp v Richfield Properties Ltd, [1983] 2 WWR 493 (ABCA)

Facts:

- Sundance leased premises in Richfield's plaza. Under the terms of the head lease, Sundance may not assign or sublease the premises without the prior consent of the lessor. This consent is not to be "arbitrarily or unreasonably withheld" with the further qualification that a withholding of consent is not unreasonable if the "other major tenant" objects to the "nature of the business" to be carried on by the subtenant. The "other major tenant" is Beaver Lumber.
- The appellant wanted to sublease some of its premises for the operation of a Swiss Chalet, but Beaver Lumber objected on the grounds that it would take up a lot of its parking space with "static" parking. This would drive Beaver Lumber's customers away, as the business sells a lot of bulky items which makes close parking a big convenience. Sundance held that this objection did not relate to the "nature" of the proposed use of the premises.
- Richfield also held that its refusal was reasonable because the operation of the proposed sublessee would jeopardize the business of Beaver Lumber, which would have financial repercussions for Richfield because it collects rent from Beaver Lumber calculated as a percentage of their sales.

Issue and holding:

- Did Richfield unreasonably withhold its consent to the proposed sublease by Sundance? **NO**

Analysis:

- A landlord is not bound to give any reason for refusing consent to an assignment or sublease; the burden of proof is on the tenant to show that the landlord has unreasonably withheld this consent.
- Consent is not unreasonably withheld if the landlord's own financial interest will be adversely affected.
    - It is immaterial whether the adverse effect to the landlord's financial interest results from competition in sales or from other causes like congested parking; parking is not an extraneous matter.

Rationale: (Belzil JA)

- Beaver Lumber's objection to a large sit-down restaurant generating a lot of "static" parking is an objection to the nature of the business to be conducted by the proposed sublessee within the meaning of the lease.
    - The restaurant which had formerly occupied the premises was smaller and was accessed only though the appellant's premises, which meant that it took up much less parking space outside Beaver Lumber's entrance.
- Even if the special feature of the lease recognizing the other major tenant's right to object were not considered, the withholding of consent was still not unreasonable, as Richfield reasonably believes that the congestion resulting from the proposed Swiss Chalet would seriously and adversely affect Beaver's sales and the rents payable by it to Richfield.

Dissent: (Harradence JA)

- The term "nature of the business" cannot be extended to include parking, something inherent in every business.
    - Beaver Lumber's objection is not to the nature of the proposed sublessee, but to its success and location.
        - Beaver could accommodate an unsuccessful neighbour, no matter what kind of business it was.
        - Beaver would not object if the sublessee's entrance was positioned at the other end of the mall; the position of the entrance is not related to the nature of the business.
    - The manner of parking is not clearly within the meaning of the provision, and there are good reasons for restricting the phrase to a narrow compass.
        - The lease provides for the how parking regulations may be made, and it should not be open to Richfield to use the sublease and assignment clause to accomplish that end.
        - Since a right of refusal creates a potential clog on alienability, such terms are to be construed strictly.
- To hold that consent is not unreasonably withheld if the landlord's own financial interest will be adversely affected would, in effect, re-write the lease to include the condition that a proposed assignee or sub-tenant must guarantee the same or greater revenue to the landlord, which may render assignment or subleasing impossible.

1455202 Ontario Inc v Welbow Holdings Ltd, 2003 CanLII 10572 (ONSC)

Analysis: (Cullity J)

- The Canadian law on point can be summarized in this way:
    1. In determining the reasonableness of a refusal to consent, what is material is the information available to and the reasons given by the landlord at the time of the refusal.
    2. The question must be considered in the light of the existing provisions of the lease.
        - A refusal will be unreasonable *if it was designed to achieve a collateral benefit to the landlord wholly unconnected with the bargain between the landlord and tenant* reflected in the terms of the lease.
        - Generally, a landlord may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion.
    3. The financial position of the assignee is a relevant consideration, as is the probability that the proposed assignee will default in its obligations under the lease.
    4. The question of reasonableness is one of fact that must be determined in the circumstances, and not based on decisions in other cases.

Termination and Remedies

- A lease is a mix of contract and property law; it creates an estate in land but is usually created by contract.
    - The terms of the lease are referred to as "covenants"; generally, the breach of a covenant does not entitle the other party to terminate the lease and relieve themselves of their obligations.
        - Covenants can be incorporated expressly (e.g., a covenant for quiet enjoyment) or implicitly given the purpose or nature of the lease (e.g., obligation to supply heat and running water).
        - Covenants can also be supplied in short form (e.g., *LTA*, s. 99)

- However, if a term in the lease is framed as a *condition*, its breach will entitle the aggrieved party to terminate the lease (in addition to damages).
    - e.g., "Provided that if the tenant…" as opposed to "The tenant covenants…"
    - If a tenant breaches a condition of the lease, the landlord may elect to: re-enter the premises and terminate the estate, enforce the lease and sue for any damages, or levy distraint.
- At common law, nothing short of eviction will free the tenant from having to pay rent.

- Tenancies may be terminated in several ways:
    - A lease for a set term will expire once the terminating date has been reached.
    - Periodic leases can be ended by either party giving the appropriate notice.
    - A lease will end when the same person holds the leaseholds and the freehold, which would merge into one.
    - A lease can be terminated by the doctrine of frustration, where applicable.
    - The landlord may re-enter the land in consequence of a breach of a condition.
    - The landlord may reacquire the property where the tenant repudiates the lease, if the surrender is accepted by the landlord explicitly or implicitly (see *Highway Properties*).
        - In a typical scenario, the tenant repudiates by vacating the premises and failing to pay rent.
        - The landlord's response will determine whether the lease has been surrendered (since unilateral surrender is not recognized) and what remedies will be available to the landlord.
            - A landlord might impliedly accept repudiation by entering the premises, changing the locks, putting a "For Lease" sign out front, etc.
            - From *Goldhar*, signing a new lease is indicative that the old lease was terminated.

Highway Properties Ltd v Kelly, Douglas & Co Ltd, [1971] SCR 562

Facts:

- In 1960, the appellant landlord leased premises in its shopping centre to the respondent for use as a supermarket. Clause 9 of the lease said that the respondent was to carry on its business on the premises continuously and install and maintain fixtures on the premises. However, in 1962, the respondent closed the supermarket. This adversely affected the other tenants, some of whom moved out. The appellant treated the lease as repudiated, took possession of the supermarket premises, and rented it to other lessees. The appellant sought damages for loss resulting from the respondent's failure to carry on in the shopping centre for the full term of the lease.

Issue and holding:

- Can the tenant be held liable for damages suffered by the landlord as a result of its repudiation of the lease, including future rent due after the Landlord retook possession of the premises? **YES**

Analysis:

- Termination occurs when, upon the material breach or repudiation of a lease, the innocent party does an act inconsistent with the continued existence of that lease.
- From *Goldhar v Universal Sections*, when a tenant repudiates a lease by, for example, abandoning the leased premises, the landlord had available to it three mutually exclusive courses of action:
    1. Refuse to accept the repudiation and insist upon performance of the terms of the lease on the basis that the lease continues to subsist and sue the tenant for money owed from time to time.
        - *Note*: landlords do not have a duty to mitigate losses, though commercial landlords usually will.
        - *Note*: this avenue does not allow the landlord to recover for anticipatory breach.
    2. Accept the repudiation and terminate the lease, re-enter the premises, and sue for rent accrued.
        - *Note*: could be risky if, upon termination, the new tenant agrees to pay less rent than the old one.
    3. Advise the tenant that it refuses to accept the repudiation but propose to sub-lease or assign the premises on behalf of the tenant, re-enter the premises for that purpose, and sue for any shortfall in rent.

- The three remedies in *Goldhar* are governed by property law principles; they do not entitle a non-breaching landlord to sue for prospective damages like the non-payment of rent for the remainder of the term.
    - Conversely, in contract law, an innocent party's termination does not preclude damages for prospective loss.

Rationale: (Laskin J)

- In addition to the remedies from *Goldhar*, a landlord may terminate the lease with notice to the defaulting tenant that damages will be claimed for losing the benefit of the lease over its unexpired term.
    - A landlord choosing this fourth remedy is thus entitled to damages for:
        1. The rent in arrears to the date of termination.
        2. The present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period.
        3. Compensation for provable loss resulting from breach of a continuous operating covenant.
    - It is not sensible to pretend that a commercial lease is simply a conveyance and not also a contract, and to deny resort to all the remedies ordinarily available to redress repudiation of covenants.

Notes:

- In this case, the tenant was the anchor tenant in the shopping plaza who covenanted to operate during certain business hours, and when they vacated, it dragged down the whole plaza.
    - In another case where there is no such covenant for continuous operation by an anchor tenant, that case may be legitimately distinguished from the facts of *Highway Properties*.
- Many have called for the demise of the first remedy, and that a landlord should have an obligation to mitigate losses where the tenant has purported to repudiate its lease.
    - The status quo was almost upset by *Unisys Canada Inc v York Three Associates Inc*, where the trial judge held that a landlord had a duty to mitigate not only by terminating and seeking a replacement tenant, but by renegotiating with the repudiating tenant itself.
        - The ONCA held that the trial judge should not have penalized the landlord for its failure to mitigate.
- The BCCA in *Evergreen Building Ltd v IBI Leaseholds Ltd* allowed the doctrine of efficient breach with respect to lease agreements. It held that if the landlord can pay damages and breach, they will be permitted to do so since, at the end of the day, the tenant is not worse off and the landlord is better off.
    - In *TNG Acquisition Inc (Re)*, the ONCA disagreed, saying that the lease is an estate in land, and that a landlord therefore cannot unilaterally deprive a tenant of possession simply by agreeing to pay damages.

Hudson's Bay Company ULC v Pensionfund Investment Ltd, 2020 BCSC 1959

Facts:

- HBC is the tenant of Pensionfund in the Coquitlam Centre Mall. In March 2020, HBC closed its store in response to COVID-19. In May 2020, HBC re-opened, but they experienced substantially reduced foot traffic. In April 2020, HBC stopped paying rent. Pensionfund delivered written notices to HBC indicating that if the arrears were not paid, it would terminate the lease. HBC did not pay the arrears. On November 21, 2020, Pensionfund took steps to re-enter and lock-up the premises. HBC sought an interlocutory injunction to immediately provide access to the premises pending a determination of the issues.

Issue and holding:

- Should the interim injunction be granted as sought by HBC? **YES**
- What are the conditions of the granting of interim relief?

Analysis:

- The test for granting interlocutory injunctions requires that:
    1. There is a serious question to be tried;
    2. There be irreparable harm to the applicant if relief is not granted;

3. The balance of convenience favours granting the injunction.

- Relief from forfeiture (the power of the court to protect a person against loss of an interest because of a failure to perform a covenant or condition) is an equitable remedy and is purely discretionary.
    - Factors to be considered in the exercise of discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property and the damage caused by the breach.
    - The pandemic is an extraordinary factor to be considered in the exercise of discretion.

Rationale: (The Court)

- The interim injunction should be granted as sought by HBC; HBC has established a serious question to be tried and a disruption to HBC's store operations is harmful in terms of its revenue, reputation, and employees.
    - Pensionfund will immediately provide HBC unencumbered access to the Premises so that it may commence operations. Pensionfund is enjoined from taking further steps to terminate the tenancy.
- The conditions of the granting of interim relief are as follows: HBC will pay 50% of the arrears owed and 50% of the ongoing rent amounts when due and will deposit the remaining arrears and future rent amounts into a trust account.
- The interim order will expire on January 22, 2021, unless HBC secures a renewal of this order or as may be agreed between the parties, while the parties get organized to prepare for a more fulsome hearing.
    - This breathing room is partly to allow HBC some breathing room over the critical Christmas season.

LICENSES

- A licence is a mere permission to be on land, with or without additional permission to perform specified acts there (*Fatac*); it is not an interest in land.
    - A license may be express (e.g., where someone buys a ticket to see a theatre show) or implied (e.g., when a shop is open for business to the public at large).
    - A license is a kind of *personal* property; depending on the terms of the license, its benefit may be assigned.
- Several forms of licenses exist:
    - A bare license is one unsupported by a contract that can be revoked at any time (giving the licensee a reasonable time to leave).
    - A contractual license is revocable only on the terms of the contract when it expressly or impliedly precludes or limits revocation.
    - An irrevocable license is one that cannot be revoked.
        - That said, even an irrevocable license is generally still not an interest in land, since it would not bind a purchaser of the land, but it can evolve into an interest in land in equity under estoppel (see *Stiles*).
- The differences between leases and licenses include: a license is not an interest in land, a license is not binding on the successors of the landowner (even if they take with notice), and a licensee cannot sue to recover possession.

Davidson v Toronto Blue Jays Baseball Ltd (1999), 170 DLR (4th) 559 (Ont Gen Div)

Facts:

- Davidson refused to show his ticket when requested to do so by staff at the Skydome in Toronto during a baseball game. Following this refusal, Davidson was escorted from the stadium. The notice on the back of the ticket said:

    This ticket is a personal, revocable licence…Holder further agrees to observe all…regulations and by-laws, and may be refused admission, or may be removed from the premises for failure to do so without compensation.

- Davidson did not breach any law prior to his arrest. There was nothing in the rules of fan conduct stipulating that fans must present their tickets upon demand once on the premises. Davidson sued for false arrest.

Issue and holding:

- Was Blue Jays management able to revoke Davidson's license at will and treat him as a trespasser? **NO**

Rationale: (Wilson J)

- The purchaser of a ticket has an enforceable right to enter and remain on the licensor's premises for the entire event (and a reasonable time thereafter to leave) and to not be deprived of that right arbitrarily during the event.
    - The right to remain is subject to the implied contractual condition that the patron behaves properly and complies with the rules of management.

Notes:

- Where a ticket is silent on when a license is revocable, it likely cannot be revoked if the fan behaves properly.

Stiles v Tod Mountain Development Ltd, 1992 CarswellBC 50 (SC)

Facts:

- In 1970, Highland Development acquired land on Tod Mountain. Pending government approval of its subdivision plan, Highland allowed Stiles to select Lot 7, an unregistered lot in the plan, on payment of $1000. Then it conveyed title to Tod Valley Holdings, a wholly-owned subsidiary. Each prospective lot owner became a shareholder in Holdings (subject to paying $3000), and each was granted a right to improve and occupy their selected lot. Stiles, encouraged by Cummings, built a house on Lot 7. After the government denied approval of the subdivision plan, Tod Mountain Development purchased the property. In 1988, Development told Stiles that he had to move his house.
- Stiles argued that he relied on the assurances he received. He sought a declaration of the right to occupy Lot 7. Alternatively, he sought damages measured by the cost of the lot in 1971 plus interest. Development sought an order that Stiles remove his improvements from the property.

Issues and holding:

- Does Stiles have an irrevocable license to occupy and use Lot 7? **YES**
- If yes, what is the appropriate remedy?

Analysis:

- Where a party expends money on the land of another under an expectation created by the owner, or even where the landowner merely stands silent, the courts have broad discretion to give the other party such a remedy as equity demands, which is enforceable against a successor in title who takes *with notice*.

Rationale: (Huddart J)

- Pending subdivision approval and transfer of the title to Stiles, Highland gave Stiles license to occupy Lot 7; this license became irrevocable when Cummings encouraged Stiles to build a cabin on Lot 7
- That irrevocable license became enforceable against Development when Development took title *with notice* of Stiles' equity; Stiles is thus entitled to enforce his equity against Development indefinitely.
- If Development wishes to terminate Stiles' license, it may do so by conveying clear title to a lot on Tod Mountain acceptable to Stiles; if it does so, Stiles is to move his improvements from Lot 7 to that lot.
    - Stiles would retain essentially that for which he bargained originally and Development would obtain possession of Lot 7 and be able to proceed with its development of the mountain.
        - It would be unfair to Development to allow Stiles to remain in occupation of Lot 7, which result could block or at least hinder development of the mountain as a whole.
    - Because Stiles has only a personal right to occupy Lot 7, it would be reasonable that he should have to bear the cost of moving his improvements to the new lot.
    - If the parties cannot agree on a suitable lot, Development must contribute to the cost of another lot of Stiles' choosing in an amount equivalent to the current appraised value of the average lot for sale on Tod Mountain.

Notes:

- From *Cowper-Smith v Morgan*, an equity capable of protection by proprietary estoppel can arise where there is:
    1. A representation on the basis of which the claimant expects to enjoy a right or benefit over the property.
    2. Reasonable reliance on that expectation.
    3. Detriment resulting from the reliance such that it would be unfair or unjust for the property owner to renege.
- Huddart J declined to provide Stiles with a remedy by way of constructive trust. It has been held that a constructive trust will be imposed in defined circumstances against a new owner of land affected by an existing license. In *Lloyd v Dugdale*, the court described the guiding principles under English law:
    1. The court will not impose a constructive trust unless the conscience of the owner is affected so that it would be inequitable to allow him to deny the claimant an interest in the property.
    2. In deciding whether the conscience of the new estate owner is affected, the question is whether he has undertaken a new obligation to give effect to the relevant encumbrance or prior interest.
        - May be shown by proof that the purchase price by a transferee has been reduced upon the footing that he would give effect to the prior interest.
        - It is not desirable that constructive trusts be imposed in reliance on "slender materials."

BAILMENTS

- A bailment is a temporary transfer of personalty created by the voluntary taking into custody of goods which are the property of another.
- Differences between leases and bailments include:
    - Leases can be for real property interests, whereas bailments can only be for personal property.
    - With bailments, the bailor determines the use of the property and the bailee does not necessarily acquire the exclusive right to enjoy the item.
    - While there is no direct legal relationship between a head landlord and a sub-tenant, that is not true under the law of bailment (see *Punch v Savoy*).
- Licence agreements and bailment arrangements differ because licencees do not possess nor take responsibility for the property transferred between the parties.
- Bailments are typically either for a fixed term (e.g., a long-term lease of machinery) or at will (e.g., a gratuitous loan).
    - When there is a fixed term, supported by consideration, the bailor's right of possession is postponed until the term has ended, provided that the bailee has not committed a serious breach.
    - When a bailment is at will, the bailor may, in theory, demand the article back at any time.

Mercer v Craven Grain Storage Ltd, [1993] EWJ No 736 (CA)

Facts:

- The defendant Craven provided storage and drying facilities for grain. The plaintiffs were farmers who deposited milling wheat with the defendants, which was then mixed with other product from other farmers. The plaintiffs told the general manager of Craven that they were not prepared to sell their wheat for less than £160 per tonne. Contrary to those instructions, all but a very small amount of grain was removed from the defendant's premises and sold. A price of £160 was never achieved, and the plaintiffs were never paid. The plaintiffs sued for grain lost.
- Clause 8 of the storage agreement held that the grain shall remain the property of the grower, that it should remain deposited until the plaintiff's orders its release, and that the risk of loss or damage to the grain shall be on the bailee.

Issue and holding:

- Was the plaintiffs' delivery of their wheat to the defendant a bailment or a sale? **Bailment**

- Therefore, the plaintiffs did not surrender ownership to their grain.

Analysis:

- Bailed goods should be returned to the bailee or applied in accordance with his instructions when the bailment ends.
  - The goods need not be in their precise original form; what is necessary is that the goods, whether in altered or original form, should be returnable and not merely some other goods of equivalent character or value.
- According to *South Australian Insurance Co Ltd v Randell*, where wheat is delivered by their owners for a process of treatment which involves intermingling with similar goods belonging to others, this dealing gives rise to a sale of such consignments (not a bailment) subject to the seller's right to re-purchase an equivalent quantity at a future time.

Rationale: (Brown and Russell LJJ)

- Unlike in the present case, the bailees in *Randell* had no discretion as to how they were to deal with the wheat deposited with them, and there was nothing equivalent to cl. 8 which retained property in the bailor.
- The storage agreement should be given effect according to its plain intention by making the plaintiffs owners in common of the whole grain in storage to the proportion of grain deposited by them.
  - Therefore, the plaintiffs were entitled to delivery of their share of the grain and because the defendants were unable to deliver they are liable in conversion in disposing of the plaintiffs' share of the mass.

Ratio:

- A bailment exists even in the case of commingled goods if those goods are transferred under circumstances in which the bailor controls their ultimate fate.

Notes:

- This arrangement was classified as a bailment even though the bailors did not retain the right to receive every grain they deposited, so long as the bailors were entitled to grain of the same quantity and quality as they put in.
- In *Crawford v Kingston*, Murray agreed to keep and take care of Crawford's cows for three years. Murray could sell and replace any of the cows so long as the same number of cattle were returned to Crawford. The ONCA held that the transaction was a sale.
  - If the transaction does not require the party receiving the chattel to return it in its original or an altered form but permits the possessor to return another chattel of equal value or to pay the money value thereof, the relation of vendor and purchaser is created and the title to the property passes to him and is in him.
  - Even if there were one or more of the original cattle in Murray's herd there would be no difference; beneficial ownership does not depend on the actual exercise of dominion, but upon the fact of having such dominion that he could exercise.
  - This case could be distinguished from *Mercer* in that, in *Mercer*, cl. 8 of the storage agreement specified that the grain shall remain the property of the grower, which the court wanted to give effect to. Plus, cows are not as fungible as grain.
- A bailment may exist even if the articles are dramatically transformed.
  - In *Pangallo Estate Pyt Ltd v Killara 10 Pty Ltd*, the court held that if grapes are delivered to a winemaker with the intention that the wine produced is to be given back, a bailment is created rather than a sale of grapes to one party and a subsequent sale of wine to the other.

Letourneau v Otto Mobiles Edmonton (1984) Ltd, [2003] 3 WWR 389 (ABQB)

Facts:

- In June 1998, the plaintiffs had their trailer serviced at Otto Mobiles Edmonton (the defendant), and at that time, they signed a work order containing a waiver of liability clause. These repairs were unsatisfactory, and they arranged with Otto Mobiles to have their trailer serviced again in July 1998. Since the plaintiffs were unable to bring the trailer to Otto Mobiles during regular business hours, they were told to park the trailer after hours in the lot of an adjacent

business so it could be picked up the following morning. However, by that morning the trailer was stolen. They had not signed a waiver of liability clause for the July repairs.

Issues and holding:

1. Did the relationship of bailor-bailee exist between the plaintiffs and defendant? **YES**
2. If so, did the Defendant fail to meet the standard of care owed to the plaintiffs? **YES**
3. If so, was the plaintiffs' loss caused by the defendant's failure to meet this standard of care? **YES**
4. Did the plaintiffs' negligence contribute to their own loss? **NO**

Analysis:

- A bailment refers to the delivery of chattels on trust, usually on contract, express or implied, that the trust shall be executed and the chattels returned in either their original or an altered form when the bailment has elapsed.
    - A bailment can exist independently of a contract; it is created by the voluntary taking into custody of goods which are the property of another.
    - An essential element of a bailment is the transfer of possession (not title) of the chattel to a bailee.
- When bailment is established, and the bailed goods are lost or stolen while in the possession of the bailee, the burden shifts to the defendant to prove on a balance of probabilities that:
    1. It exercised due care for the safety of the article entrusted to him by taking such care of the goods as would a prudent owner, acting reasonably, might be expected to take of their own possessions, or
        - The test for what is reasonable will depend on all the circumstances, including the value and nature of the bailed item and the cause of the damage or loss.
        - It makes little difference whether bailment is gratuitous or for reward; the obligation of a bailee in either case is to take care of the goods received as a prudent owner.
        - A bailee may limit or relieve himself of liability by contractual conditions, but such conditions will be strictly construed and will be held not to exempt the bailee from responsibility for losses due to his negligence unless the words used are *clear* and adequate for that purpose.
    2. Its failure to take reasonable care did not cause the plaintiff's loss.
- For contributory negligence to succeed as a defence, the defendant must prove that the plaintiff was negligent and that it caused their own loss; the test is reasonable foreseeability of probable or possible risks.
    - Contributory negligence is rarely found in bailment cases.

Rationale: (Johnstone J)

1. The plaintiffs never physically delivered possession of the trailer, but they complied with the instructions of the service manager regarding drop-off of the trailer in the neighbouring lot, which was a customary practice.
    - The fact that the trailer was not left on the defendant's property does not preclude bailment.
2. The defendant has not established that the conduct of its employees was consistent with the standard of care that a prudent owner, acting reasonably, might be expected to take of his or her own chattels.
    - The defendant did not provide a safe location for storage of the trailer.
    - The waiver of liability clause appearing in the previous work order must be strictly construed and confined only to the work conducted in June 1998 and not to the July 1998 oral agreements.
3. The defendant's failure to properly secure the vehicle resulted in the plaintiff's loss.
4. The plaintiffs were not contributorily negligent.
    - They pad-locked the hitch and put the key in a locked compartment at the request of the defendant.
    - They dropped the trailer off during daylight hours and did not notice whether there was sufficient lighting.
    - They were comfortable leaving the trailer at the Intuit lot based on the representations by Otto Mobiles.
    - Otto Mobiles never indicated that the plaintiffs were parking in the Intuit lot at their own risk.

Ratio:

- When bailed goods are lost, damaged, or stolen, the bailee bears the burden of proving (1) that it took such care of the goods as would a reasonable, prudent owner or (2) that their failure to take reasonable care did not cause the plaintiff's loss.
- One of the essential elements of bailment—transfer of possession—may be satisfied where a constructive act of delivery, as opposed to a physical act of delivery, occurred.

Notes:

- The existence of a contract is not essential to a bailment; the bailment action in this case is tortious in nature.
    - When a bailment exists, the bailee owes a duty to exercise due care for the safety of the article entrusted.
- For centuries, the law categorized bailments by reference to whom them benefitted: the bailee (e.g., A borrows B's casebook to prepare for class) or the bailor (e.g., goods are stored as a favour).
    - However, courts (like the ABQB in *Letourneau*) appear to be moving towards a more flexible standard.
        - That said, it is generally recognized that finders and involuntary bailees are Good Samaritans in the eyes of the law, which severely reduces their bailment duties; it may simply be that an involuntary bailee do what is "right and reasonable" under all the circumstances.
- The burden of proof was not reversed in *National Trust Co v Wong Aviation Ltd* because the bailee died in the plane crash with respect to which the bailors were claiming damage; thus, the bailee was not available to account for what had transpired, which negates the whole purpose for the reverse onus.
- A bailee's liability is not restricted to negligent acts. Bailed goods cannot be dealt with in a manner that falls outside of the terms, express or implied, of the bailment. If they are, a deviation from those terms give rise to strict liability.
- A contract of bailment may set out the level of care required in the care and possession of bailed items; if not, the law will imply the level of responsibility outlined in this case.
- Is a bailee liable for loss, theft, or damage to goods that they were not aware they had custody of?
    - In *Minichiello v Devonshire Hotel*, the bailor was told to park his car in the bailee's lot and leave the keys in the ignition. The bailor had valuables in the trunk and notified the bailee to that effect. The car was stolen.
        - The court held that both the car *and* the valuables had been bailed, suggesting that the bailment would cover the contents one would reasonably expect to be in the car and the contents which one might not reasonably expect to be in the car but of which the bailee has knowledge.
    - In *Hadley v Baxendale*, says that a breaching party is liable for all foreseeable losses, but is not liable for any losses that they could not have foreseen on the information available to them.
    - In *Vosburg v Putney*, the court held that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not be have been foreseen by him.
- A bailee is estopped from denying title of the bailor unless a person with a better right to the bailed goods intervenes.

Punch v Savoy's Jewellers Ltd (1986), 54 OR (2d) 383 (CA)

Facts:

- Lenore Punch took an $11,000 antique ring to Savoy Jewellers for repairs. Savoy was unable to carry out the repairs so it sent the ring to Harry Walker Jewellery Manufacturers by mail. This was a practice that Savoy had done for 25 years without loss. Walker carried out the repairs, but a postal strike precluded it from sending the ring by mail. Savoy and Walker agreed to have it sent instead by CN Rapidex. The Rapidex form limited liability to $50 or the value declared by the shipper on the shipping contract (which, in this case, was $100). Up to these amounts, the contract made the carrier liable for any damage with respect to any shipment. The ring was never delivered to Savoy, an outcome for which CN had no explanation.

Issues and holding:

1. Did the transfer of the ring to Savoy, Walker, and CN fall within the definition of bailment? **YES**
2. Did Savoy and Walker breach their duties of care to Punch as a bailee? **YES**

3. Did CN breach its duty of care to Punch as a bailee? **YES**
4. Does the limitation of liability clause limit CN's liability to Punch to $50 or, alternatively, $100? **NO**
5. Does the limitation of liability clause limit CN's liability to Savoy for any loss that they must make good to Punch to $50 or, alternatively, $100? **NO**
6. Does the limitation of liability clause limit CN's liability to Walker for any loss that they must make good to Punch to $50 or, alternatively, $100? **NO**

Analysis:

- A bailee is liable for the loss of goods arising out of his servant's theft on the grounds that he is responsible for the way his servant carries out his duty.
- The relationship of bailment combines elements of both contract and tort.
    - If a sub-bailee carrier is aware when it enters a contract of the existence of an owner who is not a party to the contract, it would owe a duty of care to such an owner to account for damage or loss.
    - A bailor is only bound by the conditions of a sub-bailment if they *expressly or impliedly consented to the bailee making a sub-bailment containing those conditions*.
        - *Note*: this is only fair, since, because the bailor can move against the sub-bailee on the terms of the sub-bailment, those terms should also be potentially binding on the bailor.

Rationale: (Cory JA)

1. Savoy was a bailee and Walker and CN were sub-bailees; the transfer of the ring to each of these entities fell within the definition of "bailment."
2. Savoy and Walker did not take care of the valuable ring as a reasonable and prudent owner would have.
    - They did not obtain instructions from the owner as to the means of carriage in light of the postal strike.
    - They failed to give a proper evaluation of the ring to the carrier.
    - They failed to insure the full value of the ring, whereas a prudent owner would have made certain that insurance coverage was available for its true value, especially when employing an untried carrier.
3. CN was negligent in its unexplained failure to deliver the ring to Savoy.
4. CN is liable to Lenore Punch the full value of her ring; Punch is not bound by the limitation of liability clause.
    - Lenore Punch knew nothing about the limitation of liability clause and thus did not consent to it.
    - Clause 1(b) of CN's contract of carriage contemplates the possibility of someone claiming through Savoy; it says that the limitation of liability is binding upon *all persons* claiming a right to ownership of the shipment.
5. *S*avoy is not bound by the limitation of liability clause because Savoy and Walker never discussed the terms of carriage, so Savoy did not consent expressly or impliedly to the sub-bailment on the terms agreed to by Walker.
6. The limitation of liability clause does not limit CN's liability to Walker $50 or $100 in the case of an unexplained loss that might well have been occasioned by theft of an employee.
    - The principle that a bailee is liable if goods bailed to him are stolen by his employees should be extended to the facts of this case; where there is an unexplained loss of goods which may have been occasioned by theft by an employee, the bailee should be liable unless the bailment contract contained a clause clearly exempting the bailee from loss occasioned by the theft of an employee.
        - That said, the contract does not refer to loss occasioned by theft by an employee; it is true that the term "or otherwise" is an apparently broad one, but clear and precise words should be demanded to exclude liability for theft by an employee.
            - It is the employer who hires and has some basis for knowing his employees; his customers bailors cannot be expected to know anything about those employees.
            - The bailor-customer should be aware of such a term so he can make an informed decision as to whether to deal with a bailee on those terms.

Ratio:

- A bailor is only bound by the conditions of a sub-bailment if they expressly or impliedly consented to the bailee making a sub-bailment containing those conditions.

Notes:

- This case shows that a bailor-bailee relationship can exist without communication or agreement of any kind.

The Pioneer Container, [1994] 2 AC 324 (PC)

Facts:

- The plaintiffs shipped goods with different companies who then subcontracted their carriage to the defendant's (who thereby became a sub-bailee). The goods were lost when the defendant's vessel sank. The plaintiffs claimed for loss of the goods. The defendants applied for a stay of proceedings, arguing that the exclusive jurisdiction clause in the relevant bills of lading mandated that disputes would be settled in Taiwan under Chinese law.

Issue and holding:

- Are the plaintiffs bound by the exclusive jurisdiction clause despite the absence of a direct contractual relationship with the defendant? **YES**

Rationale:

- The bills of lading issued by the *initial* carriers each contained a similar clause as follows: "The Carrier shall be *entitled to sub-contract* on *any* terms the whole or any part of [the carriage]."
    - Therefore, the bailors generally authorized a sub-bailment that would include an exclusive jurisdiction clause.

Ratio:

- A bailor is bound by the conditions of a sub-bailment if they consented to the bailee making a sub-bailment containing those conditions.

SERVITUDES

- The possessory entitlements of an owner of a freehold or leasehold estate can be burdened with non-possessory rights or "servitudes," which are like metaphysical fixtures that can be attached to, and pass with, a transfer of realty.
    - Easements, *profits à prendre*, restrictive covenants, and rent-charges exemplify this type of holding.

EASEMENTS

- **Easement**: a non-possessory right, annexed to land, to utilize that land in a particular manner (not including the removal of natural produce from the land) or prevent another owner from utilizing his land in a particular manner.
- *Re Ellenborough Park* described easements as comprising four characteristics:
    1. There must be a dominant tenement (land which enjoys the benefit of the easement) and a servient tenement (land which is burdened by the easement) to which it is connected.
        - Thus, an easement cannot exist independently of a benefitted piece of land (“in gross”).
        - Several arguments are advanced to explain this requirement:
            - Since easements can inhibit the productive use of servient lands, the burdening of one property is permitted only if some reciprocal benefit is conferred elsewhere.
            - It assuages information concerns by allowing buyers of land to identify those persons who hold easements over the property (though land registries assuages this concern).
            - It limits the number of parcels that can enjoy an easement, making re-negotiation easier.
        - There are statutory exceptions to this rule.

        - The *Land Titles Act*, s. 69, allows the Crown and utility companies to grant themselves rights of way in gross for installing transmission lines and pipelines, directing water or sewage, or building and maintaining a public work, railway, or roadway.
        - Conservation legislation permits qualified organizations to hold conservation easements notwithstanding the absence of a dominant tenement.
    2. An easement must "accommodate" the dominant tenement.
        - The easement must confer a benefit on the dominant tenement, making it a better, more convenient property; it must not merely confer some personal advantage on the owner of the tenement.
            - An easement must relate to an attribute of ownership that is normally associated with land.
        - Suggests that there must be a reasonable proximity, but not necessarily contiguity, between them.
        - In *Hill v Tupper* (1863), a canal owner leased property on a canal to Hill. The lease agreement gave Hill an exclusive right to rent out leisure boats on the canal. Later, the successor in title of the canal owner let someone else rent out boats on the canal. Hill tried to enjoin them from doing so. The court held that Hill did not have an easement, for three reasons:
            - *Numerus clausus*; an exclusive right to engage in economic activity is a novel property right; private parties cannot themselves create new modes of holding land.
            - There can be no easement in respect of rights unconnected to the use and enjoyment of land; while the rights asserted by Hill related to his business, they did not make the dominant tenement more convenient.
            - The law should strive to promote competition, not restrict it.
    3. Dominant and servient owners must be different persons.
        - Generally, to have an easement over one's own land is nonsensical.
        - However, an easement may be given in favour of a tenant over lands retained by the landlord, since while the freehold title to the dominant and servient tenements remains with the landlord, possession is divided.
        - However, the *Land Titles Act*, s. 68, specifies that an owner may grant themselves an easement or restrictive covenant for the benefit of their land.
    4. A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.
        - There must be a capable grantor and grantee.
        - An easement must be sufficiently certain to be recognized as a property right (and not too vague).
        - An easement cannot substantially deprive the owner of the servient tenement of possession.
            - In *Shelf Holdings Ltd v Husky Oil Operations Ltd*, the plaintiff argued that an underground pipeline right-of-way could not amount to an easement because it amounted to a grant of a possessory interest.
                - The ABCA recognized that Shelf's right to use the servient lands was curtailed to some extent by prohibiting it from interfering with the subsoil or to erect works on the strip comprising the right of way but held that the pipeline easement in that case reserved to the servient tenement a high degree of possession and control.
        - The courts maintain control over the rights which will be allowed recognition as easements.
- A license is a personal right (a defence against trespass) that does not travel with the land; however, an easement is a property right that *does* travel with the land.
- There are two main categories of easements that have received recognition:
    1. *Positive easements*, which give an owner a right to do something on or to his neighbour's land (e.g., a right of way, the right to park, the right to discharge water, the right to run a powerline or pipeline).
    2. *Negative easements*, which give an owner a right to stop their neighbour from doing something on his neighbours' land (e.g., a right to light through a particular window)).

Creation of Easements

- Easements may be created in multiple ways:
    1. Expressly
        - In an express grant, A, the owner or occupier of what will become the servient tenement, may *give* B, the owner of what will become the dominant tenement, a non-possessory right to make use of A's land for the purpose identified in the easement.
        - In an express grant, A, the owner of which will become the servient tenement, may clearly *reserve* from a grant to B a right of way over B's land for the benefit of A's remaining land.
        - An easement can also be granted independently of a grant of property.
        - A well-drafted easement will identify the dominant tenement, the servient tenement, the nature and scope of the easement, the time for which the easement continues, and any rights and responsibilities of either party with respect to the easement.
    2. By implication
        - Occupiers of the putative dominant tenement may establish rights to an easement by implication from a grant to them or their predecessors in title.
        - Generally, the grantor has more difficulty in establishing this basis for an easement by implication than does the grantee, as they were the one who drafted the grant.
        - While property was a single parcel, the owner or occupier may have established access lanes across various parts of the property; these are described as *quasi-easements*, and can be included as actual easements by implication in the grant if they meet three criteria set out in *Wheeldon v Burrows*:
            1. It must have been used by the occupiers of the whole property at the time of the grant for the benefit of the part to be granted.
            2. Its existence must have been "continuous" and "apparent"; i.e., there must be some observable physical evidence of its existence.
            3. It must be necessary to the reasonable enjoyment of the property granted.
            4. Does not permit a grantor to claim an easement through an implied reservation.
        - Grantors or grantees may acquire an easement by establishing that it was necessary to give effect to the common intentions of the parties at the time that one granted the property at issue to the other.
            - In *Wong v Beaumont*, Wong acquired a lease of a cellar and covenanted to use it as a restaurant and eliminate all smells caused by the use of the premises as such. Public health codes also required the cellar to have adequate ventilation. However, the cellar's ventilation was inadequate, and the landlord refused consent to install a duct in the building.
                - Lord Denning MR held that an easement was necessary given the purpose of the lease. It arose from the implied intentions of the parties.
        - It is also possible for grantors or grantees to acquire an easement of necessity; the requirements for establishing it are more stringent than for other types of easements:
            1. The easement must be necessary for the enjoyment of the alleged dominant tenement, not merely one that would make the use of the property more convenient or efficient.
                - A classic concern is that land would become landlocked without an easement.
            2. The owner of the alleged dominant tenement must be able to trace the title to the property back to a grant whereby an owner subdivided the parcel but failed to include an easement in the grant.
    3. By statute
        - Legislation may provide a basis for acquiring an easement (e.g., the *Condominium Property Act*).
    4. By proprietary estoppel

- Proprietary estoppel protects a person who acts to their detriment in expending money on land that they occupy but do not own under the expectation, created by the landowner, that the occupier will be able to remain there.
- To establish a right of way by proprietary estoppel, the claimants would have to establish that there was something in their use of their neighbour's land for access to their own that would make it unconscionable for their neighbour to now insist on his or her legal right to deny that access.
    - Perhaps they spent money on their neighbour's land to gain access to their property or on their own land because they were relying on continued access across their neighbour's land.

5. By prescription
    - The *Law of Property Act*, s. 69(3), says that no easement shall be acquired by prescription, and no such right is deemed to have ever existed.
    - For an easement to be created this way, the use of the alleged servient tenement must be "as of right," that is, without force, without secrecy, and without permission.

Nelson v 1153696 Alberta Ltd, 2011 ABCA 203

Facts:

- In 1985, the plaintiff Nelson bought property on the north boundary of the properties owned by the Stelter brothers which was accessible only by using a private road over Dale Stelter's land. Nelson built a home, a waterski lake, and other facilities on the land. Nelson was not able to obtain an easement from Stelter for use of the road. In 2005, a company owned by Robert Proznik purchased Dale Stelter's lands and attempted to bar Nelson and his guests, staff, and family from using the road. Nelson sued for a declaration that the road had been dedicated to public use or that he had gained an implied easement over the land owned by the Company by way of, among others, necessity.
- Nelson's lands, the Proznik's lands, and Don Stelter's lands were all held by the Crown in the early 1890s. Don Stelter's quarter was granted in 1895. Title to Proznik's lands was severed in 1897, making Nelson's lands completely landlocked when they were sold in 1901. Since Don Stelter's lands were already in private hands, it would have been necessary to imply an easement over Proznik's lands to ensure that Nelson's lands remained usable.

Issues and holding:

- Did the trial judge err in declining to grant an easement over the Stelter Lands? **NO**

Analysis: (Paperny JA)

- A right of way by necessity is presumed to have been made whenever land has been sold which is inaccessible except by passing over the adjoining land of the grantor or by committing a trespass upon the land of a stranger, or when an owner of the land sells a portion and reserves a part which is inaccessible except by passing over the land sold.
    - Easements of necessity are among the exceptions to the principle of indefeasibility of title in the *Land Titles Act* and are therefore binding on a subsequent purchaser even if they did not appear on the registered title.
    - A way by necessity depends on the principle that when a grant is made, every right is also presumed to have been granted without which the subject of the grant would be useless.
        - Therefore, for a way of necessity to be implied, the necessity must have existed *at the time of the severance of title* of the servient and dominant tenements.
    - The land granted (or retained) must be absolutely inaccessible or useless before a right of way of necessity will be implied; mere inconvenience is not sufficient.
    - A way by necessity can arise to the benefit of either the land sold or the land retained by the grantor.

Rationale: (McDonald and Verville JJA)

- The court cannot determine on a balance of probabilities whether an easement of necessity exists.

- The absence of the 1897 Crown grant of Don Stelter's lands from evidence prevents us from determining the precise date at which it came into private hands, and therefore from determining which of Don Stelter's and Proznik's quarter-sections would be the servient tenement.
    - The Crown grant should not be entered into evidence based on the doctrine of judicial knowledge, and Nelson's application to admit fresh evidence should be rejected.
- Since an easement of necessity represents an exception to the principle of indefeasibility, a court must be very careful before it concludes that a proper case for an easement of necessity has been established.
- Nelson is entirely the author of his own misfortune in this matter; he did no due diligence prior to acquiring his lands in 1985, apparently assuming that the road was a county road accessible to the public at large.

Dissent: (Paperny JA)

- The missing grant should have been considered as the sort of incontrovertible historical evidence that the court is entitled to consider pursuant to the concept of judicial knowledge. Alternatively, the grant should be admitted as fresh evidence because of the public interest in having the matter settled.
    - Had the trial judge had the benefit of having the Crown grant for Don Stelter's quarter-section, it is clear from her reasons that she would have found an easement of necessity over the Company's lands in favour of Nelson's lands; there is no reason to interfere with her findings in that regard.

Notes:

- The court in this case held that water access did not negate the existence of an easement of necessity; the court noted that the North Saskatchewan River is not a navigable body of water in the winter.
- In *Nickerson v Barraclough*, Brightman LJ held that the doctrine of way of necessity if not founded on public policy but on an implication from the circumstances.
    - If this is the proper interpretation, then an easement of necessity yields to any contrary intention.
- In contrast, in *Frederick v Consolidated Waste Services Inc*, an American case, Clifford J held that a way of necessity is implied as a matter of law irrespective of the true intent of the common grantor.

Land Titles Act, RSA 2000, c L-4

Party wall agreement

71(2) A party wall agreement entered into by persons who are registered owners of adjoining parcels of land

a. declaring certain existing walls or walls that are to be constructed on those parcels to be party walls, and
b. setting out the rights, privileges, easements and covenants that exist in respect of the party walls,

may be registered.

(3) A person who is the registered owner of adjoining parcels of land may register a declaration

a. declaring certain existing walls or walls that are to be constructed on those parcels to be party walls, and
b. setting out the rights, privileges, easements and covenants that exist in respect of the party walls.

(4) When land under this Act is subject to…a party wall agreement…[it is] deemed to run with the land.

Encroachment agreement

72(1) An encroachment agreement executed by the registered owner of a parcel of land to permit the encroachment of improvements made on an adjoining parcel of land

a. may be registered against the parcels of land affected by that agreement, and
b. after registration shall be binding on and [takes effect] to the benefit of all persons subsequently acquiring interests in the parcels of land affected by that agreement to the same extent as if it were an easement.

- Allows one party to trespass upon the property of a neighbour while preventing the possibility of adverse possession.

Municipal Government Act, RSA 2000, c M-26

Encroachment agreements

651.2(1) …"encroachment agreement" means an agreement under which a municipality permits the encroachment onto a road that is under the…control…of the municipality of improvements made on land that is adjoining that road.

(2) …a municipality may register a caveat under the *Land Titles Act* in respect of any encroachment agreement entered into by the municipality with the registered owner of a parcel of land that adjoins a road that is under the direction, control and management of the municipality.

Scope and Location of Easements

- The ambit of an easement, governing who may use it, where, how, and for how long, is a matter of intention.
    - When an easement is created by an express grant, one examines the wording of the document.
        - A grant of "uninterrupted use" invites a broad reading.
    - A prime consideration in construing the breadth of an easement is the purpose for which it exists.
        - The grant of an easement will normally be taken to include such ancillary rights as are necessary for the enjoyment of the right conferred.
    - Other relevant considerations include the physical nature of the servient lands, the past use of the area, and the extent to which giving an expansive scope to an easement might harm activity on the servient tenement.
        - If the deed does not specify the place where the right is to be enjoyed, the owner of the servient tenement may be unable to alter the route that has been selected and used.
- The grantee of an easement cannot increase the burden on the servient lands beyond the rights initially conveyed.
    - However, it may have been contemplated or taken as implied that the easement's use would change over time; if so, an apparent increase in the burden can be a valid use of the initial right (see *Laurie v Winch*).
- When an easement is implied, the right granted should not be any greater than necessary to give effect to the implied intentions of the parties.
- The servient owner is not obliged to maintain the easement area by default, but this can be abridged by agreement.

Laurie v Winch, [1953] 1 SCR 49

Facts:

- A large parcel was owned by Sheppard. He registered Plan 103 in 1910 and rented the land to the east of it to Smith for agricultural use. The farm was separated from Plan 103 by a wire fence. There was a gate on both sides of Lot 17: where a farm lane entered Lot 17 from Lot 33, and where the lane exited Lot 17. Occupants of the Smith farm used the farm lane to reach Lake Shore Road. In 1917, Smith purchased the farm from Sheppard. He subsequently purchased Lot 17 from a successor in title to Sheppard. In 1925, in a separate transaction, Smith acquired a perpetual right of way over Lot 33. No dominant tenement was named, there was no indication of whether the right-of-way was to be granted over the entirety of Lot 33 or some lesser part of it, and there was no express restriction on use. In 1944, the predecessor in title to the respondent Winch purchased title to the Smith lands, as well as Lot 17, Plan 103, and the perpetual right of way over Lot 33. Winch registered Plan 320 in 1946, and lots on it were sold with a right of way over Lot 17 and Lot 33.



- The appellant Laurie owns Lot 33. She brought an action against the respondent Winch and other owners of lots on Plan 320 to restrain them from using Lot 33 as a right of way to Lot 17 and thence out to the lake.
- The appellant maintained that the conveyance of 1925 was a personal license only, as there is no dominant tenement named. In the alternative, she sought a declaration that the right-of-way granted to Smith was limited to the purposes for which the lane was at that time used.

Issues and holding:

- Was the easement an easement in gross? **NO**
- What was the location of the right of way? **Farm lane**
- Was the right-of-way limited to the purposes for which it was used at the time it was granted? **NO**

Analysis:

- Where the words in the grant of the right-of-way are unclear, the historic use and circumstances surrounding the use of the property subject to the easement are relevant to understanding the nature and extent of the rights conveyed.
    - Therefore, a grantee of an easement may be entitled to use it for any purpose so long as there is no limitation to be implied from the nature of the land and the situation of the parties.

Rationale: (Kellock J)

- The dominant tenement intended by the parties to the deed of 1925 was the farm and not Lot 17.
    - It could not have been intended that the easement was intended to be appurtenant to a lot which was, at that time, sterile so far as building upon it was concerned (since Lot 17 itself was subject to a right-of-way).
- The existence of the farm lane over part of lot 33 between the gates and the omission to use any other part of lot 33 indicates that the way granted was over the site of the existing farm lane.
- Nothing in the circumstances restricts the plain words of the grant to the use made of the farm lane at that time.
    - While the Smith lands were, at the date of the grant, used as a farm, there was no reason why they might not subsequently be subdivided into building lots as had been the case with the lands consisting of Plan 103.
        - It cannot be said that it was within the contemplation of the parties to the conveyance of 1925 that the farm would always remain a farm.

Ratio:

- When a dominant tenement is not identified in a grant of an easement, it can be implied through extrinsic evidence.
- If it is contemplated or taken as implied that an easement's use would change over time, an apparent increase in the burden on the easement can be a valid use of the initial right.

Note:

- This case shows that if a dominant tenement is subdivided, each of the new parcels carved from it can have an easement over the servient tenement.

Malden Farms Ltd v Nicholson, [1956] OR 415 (CA)

Facts:

- In 1916, Ledyard, Bulkley, and Chappus obtained a right of way from Charles Barron which gave them a "free, uninterrupted right of way" of entry and exit over a strip of land running toward the lake along the easterly boundary of Barron's land. The owners of the servient tenement were also granted the right to maintain a gate at each end of the way. At that time, Ledyard, Bulkley, and Chappus used the dominant tenement for duck-hunting for themselves and paying guests. Barron sold land on the servient tenement on both sides of the right of way to predecessors in title of the defendant Nicholson together with a right of way over the right of way already granted to Ledyard, Bulkley, and Chappus. The rest of Barron's lands, including the land subject to the right of way, were eventually acquired by Malden Farms. Beginning in 1952, Nicholson's predecessor in title and later Nicholson used part of the right of way as a beach resort and attracted large numbers of patrons for the purposes of picnicking and camping. The travelled portion of the right of way was widened by 18 feet and turned into a gravel road.

- Malden Farms sued, claiming that Nicholson was making excessive use of the right of way as a beach resort contrary to the terms of the easement granted to his predecessors in title.

Issue and holding:

- Can Nicholson be restrained from continuing the use of the right of way as a beach resort? **YES**

Analysis:

- The grantee of a right of way may be entitled to increase the inconvenience imposed on the servient tenement, depending on the intention of the parties at the time when the right was created.

Rationale: (Aylesworth JA)

- The language of the easement together with the surrounding circumstances establish that Nicholson's present use constitutes an unauthorized enlargement and alteration in the character, nature, and extent of the easement.
    - At the time Nicholson's predecessor in title acquired the beach with a right-of-way, the marsh lands were carefully preserved and strictly controlled against trespass (as shown by the gates).
- Malden Farms is entitled to an order restraining Nicholson from using the right of way as a means for members of the public to have access to his lands as a beach resort.

Notes:

- Chappus owned an easement over a portion of the land that he purchased from Barron. With that purchase, the lesser interest would have merged in the greater, thereby extinguishing the easement for the benefit of his lands.
- In *Harris v Flower* (1904), the court held that an easement for the benefit of a designated dominant tenement cannot be used in a colourable way to benefit some other property. However, some mere ancillary use of the easement for the benefit of the other property is tolerable.
    - Use may be deemed merely "ancillary" if the extent of the use for the benefit of the non-dominant land is insubstantial or if it involves no exploitation of the easement in such a way that a financial profit can be derived from use of the non-dominant land.

Termination of Easements

- An easement can be terminated in several ways:
    - Where there is a temporal restriction set out in the grant, it will come to an end when it runs its course.
    - Where an easement is subject to a condition subsequent or determinable limitation, it will end on the happening of the stated stipulation.
    - An easement may be expressly released by agreement.
    - An easement may be released by implication (i.e., abandonment) where there is an intention to abandon and a sufficient manifestation of relinquishment before the right is considered lost.
        - Intention can be inferred from a change in the nature of the dominant or servient lands that renders the easement useless.
        - Non-use of an easement alone may not be enough to constitute evidence of abandonment; owners are not normally taken to have cavalierly discarded an entitlement.
    - An easement can be terminated by estoppel if the owner of the dominant tenement makes a representation to the owner of the servient tenement that they will not enforce their rights and the owner of the servient tenements relies on this representation to their detriment such that it would be unconscionable to insist on the easement being continued.
    - An easement can be terminated where there is a radical change in the use of the dominant lands that produces a substantial increase or alteration in the burden on the servient lands.
    - An easement will cease to exist where any of its required elements cease to exist.
        - e.g., through a unity of ownership and occupation of both tenements.

- It is not certain whether an easement of necessity ceases to exist when the easement is no longer necessary for the enjoyment of the dominant tenement.

PROFITS À PRENDRE

- A *profit à prendre* is an interest in land; it consists in the right to remove natural resources (e.g., timber, crops, minerals, soil grass, animals, etc.) from the land of another.
    - The interest is not in the natural resources of the land, but in the right to come and remove it; whatever is removed becomes the personal property of the holder of the profit.
    - A profit may be appurtenant to a dominant tenement or may exist in gross.
        - A profit appurtenant to a dominant tenement will run with the dominant lands, provided that the principles necessary for the creation of an easement are met.
            - Such a profit cannot confer an unlimited right to take from the servient parcel; there must either be a prescribed limit or a limit by reference to the needs of the dominant property.
- At common law, a *profit à prendre* includes the right to access the land to remove the natural resources, even if the grant of the profit is silent on this point.
    - But in Alberta, if the profit is in a mineral estate, it does not come with surface access. s. 12 of the *Surface Rights Act* requires the holder of the profit to negotiate with the surface owner for access. If negotiations are not fruitful, the holder of the profit may obtain an order of entry from the Surface Rights Board.
- If a landowner has mineral rights, they can profit off of them in two main ways:
    - Convey the interest in the minerals to an oil and gas company.
    - Give an oil and gas company a "working interest" (a right to extract the minerals from the land); this is known colloquially as a "mineral lease" (even though it is a *profit à prendre*).
- If a *profit à prendre* is not registered on the title of the servient tenement, then a purchaser of the servient tenement would take it free and clear of the profit.

R v Tener, [1985] 1 SCR 533

Analysis: (Wilson J)

- A *profit à prendre* carries with it the right of entry and the right to take from the land the designated products or profit and also includes the right to use such of the surface as is necessary and convenient for exercise of the profit.
    - Unlike an easement, it is not necessarily appurtenant to a dominant tenement but may be held in gross.
    - May be assigned and dealt with as a valuable interest according to the ordinary rules of property.
    - The holder of the profit does not own the minerals *in situ*; what he owns are mineral claims and the right to exploit them through the process of severance.
- *Profits à prendre* in gross are extinguished when if the holder of the profit either:
    1. Releases it in favour of the owner of the land in which the profit subsists, or
    2. Becomes the owner of the land in which the profit subsists, in which case the profit merges in the fee.

Bank of Montreal v Dynex Petroleum Ltd, 2002 SCC 7

Facts:

- The owner of minerals *in situ* will lease to a potential producer the right to extract such minerals, called a "working interest" (which is an incorporeal hereditament). A "royalty" is a share in the gross production of such a working

interest. A lessor's royalty is a royalty reserved by the initial lessor. An "overriding royalty" is a royalty granted by the owner of a working interest to a third party in exchange for consideration (e.g., drilling or geological surveying).

- BMO was a creditor of Dynex Petroleum, a corporation in liquidation. The respondents Enchant and Willness claimed an interest in Dynex's working interest because of services performed for Dynex. The respondents claimed their royalty rights comprised interests in land and claimed priority over BMO. BMO submitted that at common law an interest in land could not arise from an incorporeal hereditament and therefore the respondents' overriding royalties did not rank higher in priority than the appellant's security interest.

Issue and holding:

- Can an overriding royalty issued from a working interest (an incorporeal hereditament) be an interest in land? **YES**

Analysis:

- At common law, an interest in land can issue from a corporeal hereditament but not an incorporeal hereditament.
    - A corporeal hereditament encompasses material objects (e.g., land, buildings, minerals, trees, fixtures, etc.).
    - An incorporeal hereditament is a right in land, which is not tangible and can be inherited, and includes such things as rent charges, annuities, easements, *profits à prendre*, etc.
        - In *Berkheiser v Berkheiser*, Rand J affirmed that an oil and gas lease, the interest from which an overriding royalty is created, can be a *profit à prendre*, an interest in land.
- In *Saskatchewan Minerals v Keyes*, Laskin J held that an overriding royalty could be an interest in land; the intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only.
    - In *Vandergrift v Coseka Resources Ltd*, an overriding royalty interest can be an interest in land if:
        1. The language describing the interest shows that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the minerals recovered, and
        2. The interest out of which the royalty is carved is itself an interest in land (including a profit).

Rationale: (Major J)

- Given the custom in the oil industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land.
    - BMO could not offer any convincing reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles.

Notes:

- Whether a royalty interest constitutes an interest in land has significant implications because, if it is, it *runs with the land* and is not merely a contractual right between two parties to a portion of the substances removed from the land.
    - If Dynex's obligation to the respondents was merely contractual, then the respondents would not be able to benefit from it after Dynex went under.
- This case provides a rare exception to the *numerus clausus* principle; it allows two parties to decide for themselves that they are going to create an interest in land that is binding not just on the parties but on the rest of the world.
    - In contrast, courts had previously rejected the idea that whether a right was a personal license or a leasehold interest did not depend on the parties' intentions, but on the nature of the right granted.

RESTRICTIVE COVENANTS

Basic Concepts

- Covenants over land can be used to create rights enforceable by one landowner against another in the absence of both privity of contract and privity of estate between the parties.

    - The general properties animating this area of the law are balancing economic efficiency with proprietary freedom while considering other social values like equality and human dignity.
- Covenants arose to facilitate land development before the state had assumed the power to regulate land use.
    - Rapid industrialization increased the demand for land, but had negative consequences on neighbouring properties; thus, landowners conveying parts of their land wished to ensure that the grantee and his successors would not use it in a manner that would jeopardize their remaining landholdings.
        - Granting land subject to a determinable limitation or condition subsequent would not work, because rights of re-entry and possibilities of reverter cannot be transferred.
- The *covenantor* originally makes the promise; the *covenantee* is the one to whom the promise is originally made.
- To determine whether the covenant is enforceable on successors in title to a covenantor or covenantee, we need to determine whether the covenant runs with the land.
    - The *benefit* of a covenant can run at law and in equity.
    - The *burden* of a (restrictive) covenant can run in equity, but never at law.

Covenants at Law

- The burden of a covenant never runs at law, which means that only the original covenantor can be sued on the covenant at law (*Keppell v Bailey*); permitting otherwise would:
    - Create new modes of occupying and enjoying land (contrary to *numerus clauses*); in essence, it would create a fee simple estate that comes with restrictions not normally part of the estate.
        - Generally, parties cannot, by contract, create new interests in land.
    - Overburden land and make it unmarketable.
    - Make it difficult for buyers to ascertain their rights and obligations.
- The running of a benefit with the land is permitted at law.
    - The benefit of a contract is a chose in action that, because of legislation, is assignable if express notice in writing of the assignment is given to the covenantor (*Judicature Act*, s. 20), the promise is not personal to the covenantee, the covenantee has not bargained away the right to assign the benefit, etc.
    - The benefit of a covenant (and the right to sue for breach) may run as an incident to the transfer of land at common law, absent any express contractual assignment, if the following conditions were met:
        1. The successor holds the same legal estate as the original covenantee (i.e., a privity of estate),
        2. The benefit was intended to run with the land (i.e., distinguished from a personal covenant), and
        3. The covenant touches and concerns the land.
        - e.g., in *Smith v River Douglas Catchment Board*, various landowners agreed to make an initial contribution towards riverbank work if the catchment board agreed to maintain the riverbank afterwards. The maintenance was not done properly, and when the bank of the river burst, the plaintiff (a successor of one of the original landowners) sued on the covenant. The court held that the benefit of the covenant could run.
- Covenants at law are relatively unimportant because (1) a covenant is enforceable at law only against the original covenantor (under contract law, a burden is incapable of assignment) and (2) the remedy available at law for breach of a covenant is damages, but a covenantee and their successors will most often want to enforce a covenant by way of injunction (an equitable remedy).

Covenants in Equity

Benefits in Equity

- There are three ways that the benefit of a covenant can run with the land in equity:
    1. Annexation to the covenantee's lands; this requires that three requirements be satisfied:
        a. The covenant must touch and concern the dominant lands.
        b. It must be shown that it was intended that the benefit should run with the land.
            - Inclusion of the term "annexation" would show such intention, as would language indicating that a covenant will be is made with the covenantee's heirs and assigns.
        c. The land to be benefitted must be clearly ascertainable from the document.
        - It is not necessary that the transferee of the benefitted lands have notice of the benefit to acquire it through annexation.
        - Canadian law does not allow for implied annexation when the initial document does not expressly provide that the benefit is to run with specified lands.
            - Allows the holder of the burden to know who it is that might seek to enforce the promise.
    2. Assignment of the benefit
        - Equity permits a benefit under a contract to be assigned as an equitable chose in action; therefore, absent transmission by annexation, the benefit of a restrictive covenant can be expressly assigned.
            - Allows the grantee to maintain an action against the original covenantor when (1) the covenant touches and concerns the land, (2) assignment occurs contemporaneously with the transfer of the dominant land, and (3) that land is ascertainable, at least by extrinsic evidence.
        - Express assignment is only needed when express annexation has not occurred (so not often).
    3. Building schemes
        - Provides a reciprocal set of rights and obligations; it creates, in effect, a "local law" under which each property owner is subject to the burdens and is entitled to the benefits of the relevant covenants.
        - Under a building scheme, the owner of each lot in the scheme can enforce the covenant.
        - Assuming the relevant covenants touch and concern the land, four additional prerequisites are needed to establish a building scheme:
            a) Titles to the properties in issue must have been derived from a common vendor.
            b) That vendor must have laid out the relevant parcels subject to restrictions that could only be consistent with a general scheme of development.
                - The restrictions must not be arbitrary or unreasonable (e.g., “all owners must not build a fence except with the following materials…”).
            c) The restrictions must be intended to be for the benefit of all the parcels within the scheme.
            d) The affected parcels must have been purchased on the understanding that the restrictions would enure for the benefit of all the other parcels, the area of which must be identifiable.
        - Positive covenants are not enforceable under a building scheme, the rules governing notice remain relevant, and the requirement that the dominant lands be properly described in the document remains applicable.
        - The main advantage of a building scheme is that it provides a simple way to ensure that both the benefits and burdens attach more or less equally to all parcels within the designated area.

Burdens in Equity

Tulk v Moxhay (1848), 41 ER 1143 (Ch)

Facts:

- In 1908, the plaintiff sold a piece of land in Leicester Square described as a garden and pleasure ground to Elms. The deed contained a covenant by Elms and his heirs with the plaintiff and his heirs that "Elms…would… keep and maintain the said piece of ground…as a…garden and pleasure-ground…uncovered with any buildings." The piece of land was further conveyed to the defendant. His purchase contained no similar covenant with the vendor, but he admitted that he had purchased with notice of the covenant in the deed of 1908. The defendant sought to build upon the land, but the plaintiff, who still owned several houses in the Square, filed for an injunction.

Issue and holding:

- Can Moxhay use the land in a manner inconsistent with the contract entered by his vendor, and with notice of which he purchased? **NO**

Rationale: (Cottenham LC)

- A covenant between vendor and purchaser that the purchaser and his assigns shall use or abstain from using land in a particular way will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon a subsequent purchaser at law.

Notes:

- In other words, under law the burden of a covenant will not run with the land, but in equity it can.
- This decision did not lay down the prerequisites for the running of burdens; now, there are four principal requirements for the burden of a covenant to run with the land in equity:
    1. The covenant must be negative in substance; only *restrictive* covenants will be enforced.
        - A covenant is considered negative when compliance is possible by the obliged party doing nothing.
        - e.g., "any dwelling built on the land shall have an area of at least 2,000 square feet"; this covenant does not require the landowner to develop the land, so compliance is possible through inaction.
        - e.g., a promise "not to use the land for any purpose other than as a golf course" is positive.
        - e.g., a covenant "not to let trees on the property grow taller than 20 feet" would only be a negative covenant if there were no trees planted on the property.
    2. It must have been intended that the burden was to run with the servient land, which must be sufficiently identified in the document.
        - i.e., the promise given must not be a personal one intended to apply only to the covenantor.
    3. The covenant must be taken for the benefit of dominant lands, which must be sufficiently identified in the document.
        - i.e., the covenant must not have been intended to benefit the covenantee in a personal capacity.
        - Considered alongside the last requirement, this means that there must be a dominant tenement (the property to be benefitted) and a servient tenement (the burdened property).
            - As with easements, apart from statute, there cannot be a restrictive covenant in gross.
            - The dominant tenement need not be a freehold; a lease can support a restrictive covenant.
            - It is not essential that the two properties be contiguous, though proximity is required.
        - In *Galbraith v Madawaska Club Ltd*, the SCC held that the dominant lands must be "easily ascertainable from the deed containing the covenant"; extrinsic evidence alone will not suffice as a means of locating the property to be benefitted.
            - The rationale is that a person is entitled to know who may enforce the covenant.
            - This is unlike with an easement, where the dominant tenement can be inferred.
        - The covenant must "touch and concern" the dominant lands; it must affect (1) the mode of occupation of the land, or (2) directly, not from collateral circumstances, affect the value of the land.
            - Restricting the property to residential uses is acceptable but seeking to restrict the class of acceptable purchasers has been held not to meet the touch and concern requirement.
            - Covenants that endeavour to preserve land for the use of certain amenities (e.g., parking) can run as can restrictions on uses that would produce a noxious physical environment.

        - There can be covenants aimed at restricting competition if there is some overlap of competitive zones between the dominant and servient tenements and the servient lands can appropriate some of the commercial advantages enjoyed by the dominant lands.
            - When a substantial part of the commercial advantages of the dominant tenement would also enure to a servient tenement (e.g., parking space), a non-compete restriction may confer a sufficient benefit on the dominant property.
            - When there are abundant sites for a competitor business within the competition zone, or where the zone is already saturated with competitors, the effect of a non-competition covenant would be trivial and undeserving of enforcement.
            - Courts favour competition among those in commerce as well as alienability of property and may strictly construe covenants purporting to restrict either.
    - This requirement demands that there be a good reason to enforce a burden on a successor to the original covenantee and can serve as a hedge against overburdening the servient lands.
4. Equity must otherwise be prepared to enforce the covenant.
    - The covenantee must have clean hands, bring their action with haste, etc.
    - The covenant is not enforceable against a *bona fide* purchaser of the legal estate who had no notice of the prior equitable right.
        - But under the *Land Titles Act*, s. 48, restrictive covenants may be registered as annexed to land, and if it is, every person deriving title from the original covenantor is deemed to have notice of the covenant and will be bound by it if it is of such nature as to run with the land.

Galbraith v Madawaska Club Ltd, [1961] SCR 639

Facts:

- The plaintiff acquired land that was part of "Island No. 122." The land was subject to a restrictive covenant that the grantee and her heirs would not transfer the land to any person not a member of the Madawaska Club and that no dwelling or premises shall be occupied by a non-member of the Madawaska Club except by special permission of the Club. The plaintiff conveyed the land to himself and his wife as joint tenants, the deed for which not containing the covenant. The plaintiff sought a declaration that the covenant did not run with the land.

Issue and holding:

- Did the restrictive covenant run with the land? **NO**
    - The covenant is personal and collateral to the conveyance as for the benefit of the covenantee alone.

Analysis:

- If the plaintiff, as assignee of the servient land taking with notice, is to be bound by this covenant, certain essential requirements must be satisfied, including:
    - The covenant must touch and concern the dominant land.
        - The covenant must either affect the land as regards mode of occupation or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land.
    - The covenantee must retain land capable of being benefited by the covenant, and there must be express annexation of the covenant to the dominant land.

Rationale: (Judson J)

- The covenant has nothing to do with the use to which the land may be put but relates only to the kind of person who may be given occupation; it is imposed by the vendor for its own benefit as a club.
- The conveyance to the plaintiff's predecessor in title does not annex the benefit of the covenant to any land retained by the Club, nor is there evidence to indicate whether the Club had any such land capable of being benefited.

- In *Noble and Wolf v Alley*, the covenant in that case covered occupation as well as alienation in the following terms: "The lands and premises herein described shall never be sold…to, and shall never be occupied…by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood…" This covenant did not touch or concern the land.

Ratio:

- A restrictive covenant contained in an agreement which omits all reference to any dominant land is unenforceable by the covenantee against a successor in title of the covenantor.
- A covenant that restricts the class of potential purchasers does not touch and concern the land.

Re Sekretov and City of Toronto (1973), 33 DLR (3d) 257

Facts:

- The municipality conveyed land to the Oinas subject to a covenant that the transferee and their successors in title shall not use the lands for any other purpose than that provided by resolution of the Municipal Council. The Oinas subsequently sold the land to the respondent Sekretov.

Issue and holding:

- Did the restrictive covenant run with the land? **NO**

Analysis:

- The dominant land must be ascertainable from the deed itself; otherwise, it is a personal promise for the benefit of the covenantee alone and not enforceable against a successor in title to the purchaser (*Galbraith*).
    - *Galbraith* excludes any notion of annexation to dominant land by implication based on extrinsic evidence.
    - The purchaser of land needs to know, before he decides whether to breach a covenant or to purchase property burdened with it, who will seek to enforce it and what parcel enjoys the benefit of the covenant.
- Restrictive covenants must be precise, and if they are vague and indefinite in meaning they will not be enforced.

Rationale: (Schroeder JA)

- The covenantee did not specify in the covenant with which the servient land was intended to be burdened the dominant land to be benefited thereby.
- The covenant is too vague and indefinite to be enforceable against a successor in title to the purchaser of the lands.
    - There is nothing more uncertain than such a provision that reserves the Council the right to dictate and control by resolution the uses which could be made of the subject land.

Notes:

- There is an argument that this covenant also violates public policy; it allows the municipal council to sidestep all the procedural requirements required to pass a bylaw regulating land use.

Enforcement and Termination

- A covenant may be framed to last for a stated or ascertainable period, or indefinitely.
    - Generally, unification of ownership and occupation in one person will terminate the covenant.
    - The benefitted owner may agree to terminate the covenants.
    - A covenant may be void for uncertainty because it imposes an unacceptable restraint on alienation, or by virtue of it being contrary to public policy or human rights protections.

Amar Developments Ltd v Jaswal, 2016 ABQB 636

Facts:

- Amar Development developed the residential neighbourhood of Cambridge Park, where the respondents own properties. In 2010, Amar registered a restrictive covenant against the properties. The covenant discourages

undesirable characteristics such as large driveways, over paved lots, and improper grading. It also mandated that lot owners would submit plans to the developer, who had unfettered discretion to waive or relax the guidelines. Amar also registered a drainage easement against the properties in 2010, which required the properties to adhere to an overland drainage plan. The respondents purchased the properties from Monarch Homes, the builder of the houses, in 2013. The properties did not comply with the approved plot plans and grading slips and were therefore in breach of the restrictive covenant and the drainage easement.

Issue and holding:

1. Are the restrictive covenant and the drainage easement enforceable? **YES**
2. What is the appropriate remedy in this case? **Injunction**

Analysis:

1.
    - Equitable remedies to enforce a covenant may be refused when it has ceased to fulfill a useful function.
        - From *Potts v McCann*, an otherwise valid restrictive covenant could become unenforceable if the character of the neighbourhood changes significantly after the imposition of the covenant.
        - Equity may preclude enforcement of a covenant when a dominant owner has acquiesced in numerous, serious violations of the covenant.
            - That said, violations by a few owners is not sufficient to undermine the covenant.
        - A restrictive covenant might become spent, obsolete, or unworkable.
    - A court might decline to enforce a restrictive covenant if enforcement is vexatious.
2.
    - The value of a covenant affecting land lies in its continued observance rather than in monetary compensation for a breach; therefore, the *prima facie* remedy for a breach of a restrictive covenant is an injunction.
    - An injunction is a discretionary equitable remedy and may be refused if it would be inequitable.
        - The exercise of discretion may involve weighing the burden that the injunction would inflict on the respondent and the benefit that it would confer on the applicant.
        - A court is less likely to award an injunction where substantial construction is complete and cannot easily be undone or when the applicant has acted unfairly.

Rationale: (Bensler JA)

1.
    - There is no evidence before the court that the character of the neighbourhood has changed.
        - Only 8 properties out of 150 in the neighbourhood had large driveways without approval; this is insufficient to find that the character of the neighbourhood has changed.
        - The evidence of other non-compliant properties is limited to the issue of the front driveway paving and does not address the other paving breaches on the respondents' properties.
    - There is no evidence that the instruments are spent, obsolete, or unworkable.
    - The enforcement of the restrictive covenant and the drainage easement is not vexatious.
        - Compliance with the Guidelines is not only aesthetic, but also to prevent flooding issues; this is a legitimate concern for the land developer.
    - There is no evidence that the Applicant is abusing or misusing the legal process.
2. The respondents have failed to demonstrate any reason why an injunction would not be appropriate.

Szymanski v Excel Resources Society, 2004 ABQB 89

Facts:

- Excel built and operated a group home on the lot for the purpose of providing room and board for adults with physical and mental disabilities. There is a covenant that appears on the title of the lot.

    - Clause 1 says that "only one private dwelling house" would be erected on the lot, and that "any building constructed to accommodate more than one household shall not be deemed a private dwelling house."
    - Clause 7 says that "no building erected on any of the said lots shall be used for any purpose other than that of or connected with a private dwelling house."
    - Clause 8 prohibits "business…which is not desirable in a restricted residential district of this class."
- A neighbour sought to enjoin Excel from using the residence as a group home.

Issue and holding:

- Has Excel infringed the provisions of the HBC restrictive covenant by constructing or operating the group home? **NO**

Analysis:

- The objective in interpreting covenants is to determine the intention of the parties in accordance with the plain or ordinary meaning of the words used by them.

Rationale: (Marceau J)

- Clause 1 restricts the type of building that may be erected on lots subject to the caveat and does not refer to the use of the building.
    - That said, the group home is structurally a private dwelling house within the meaning of the covenant, as it is not open to the public and was not constructed to accommodate more than one household (it has one kitchen and one dining room).
- Clause 7 and 8, when read together, suggest that in placing the covenant on the lots, the HBC intended to create a residential neighbourhood of a certain class.
    - That said, the activity carried on by Excel is essentially a residential one and does not include business or commercial activity; thus, it is consistent with the HBC's intended use of the land.

Notes:

- At some point, an increase in the number of residents, an increase in the size of the building, a change in design of the building, or a change in the degree of care provided would cause the building to contravene the covenant.
- Restrictive covenants really proliferated in the early 20th century when the car was invented. The car made it so that you no longer had to live close to where you work, allowing people to construct upscale suburban neighbourhoods. This necessitated restrictive covenants to keep undesirable people and land uses out.
- In contrast to the private law response of restrictive covenants, zoning bylaws are the *public* response to the need to regulate the use of land and maintain neighbourhood amenities, character, and stability.
    - The benefit of zoning bylaws is that they can change and respond to new circumstances, whereas restrictive covenants cannot do so quite so easily.
        - In addition, there are restrictions on the use of covenants in maintaining neighbourhood character because they, unlike zoning bylaws, require the agreement of many neighbours.
    - When private owners start to feel as though municipal authorities are not serving them, the popularity of covenants rises.

Taylor v Northam (Virginia)

Facts:

- In 1887, William C. Allen conveyed a circle of land at an intersection to the Lee Monument Association. The Association prepared the site and erected a monument before gifting the land to the state of Virginia in 1890. The deed said that the state would hold the land as the site of a Confederate monument and would faithfully guard and protect it. In 2020, Virginia's governor announced the state would remove the monument.

Issue and holding:

- Is the restrictive covenant enforceable? **NO**

Analysis:

- To enforce restrictive covenants, such enforcement must not be contrary to public policy, and the conditions must not have changed so radically as to practically destroy the original purposes of the covenant.
    - Courts are averse to voiding contracts on the ground of public policy unless their illegality is clear and certain.
    - The best indications of public policy are to be found in the enactments of the legislature.

Rationale: (Marchant J)

- The state of Virginia has put forward clear and certain evidence that enforcement of the covenant would be against public policy and that conditions have changed so radically that enforcement would no longer accord with the law.
    - Expert witnesses testified that the purpose of the monument was to vindicate their former Confederacy (including slavery) and act as a statement by the white citizenry that they unapologetically believed in the honour of the Confederate cause.
    - Expert witnesses also testified that the monument stands as a contradiction to present societal values.
        - This is reinforced by the bill authorizing the removal of the monument, which was an act of the General Assembly establishing public policy in the state.

Land Titles Act, RSA 2000, c L-4

- Covenants can be very durable, as those who benefit from covenants may not be willing to part with the benefit at the price offered; for this reason, Alberta legislation permits a party to apply to remove or alter a covenant.

Registration of restrictive covenant

48(1) There may be registered as annexed to any land…[a] covenant that the land…is to be or not to be used in a particular manner…

(4) The first owner…and every other person deriving title from the first owner…is deemed to be affected with notice of the…covenant, and to be bound by it *if it is of such nature as to run with the land*, but **any such…covenant may be modified or discharged by order of the court, on proof…that the modification will be beneficial to the persons principally interested** in the enforcement of the…covenant **or that the…covenant conflicts with the provisions of a land use bylaw or statutory plan**…, **and the modification or discharge is in the public interest**.

- With respect to the requirement that the modification be beneficial to the persons principally interested, it has been said that the courts should not paternalistically decide what is in the best interests of owners.
    - Nonetheless, if unanimity among the holders of the benefit is required to obtain an order, then this ground would serve no purpose. Obviously, then, the section is meant to thwart unreasonable holdouts.

Positive Covenants

- A positive covenant compels the covenantor to spend money or perform an active obligation.
- The traditional position is that the burden of a positive covenant will not run with the land at law (like all burdens) nor in equity; this is known as the rule from *Austerberry v Oldham Corp* (1882).
    - Therefore, with freehold land, a positive covenant can be enforced only against the original covenantor; the enforcing party may be either the original covenantee or an assignee of the benefit, at law or in equity.
- The *Austerberry* rule has been criticized extensively, with some saying that there is no principled reason to maintain the distinction between a positive and negative covenant where the purchaser had clear notice of the covenant.
    - There have thus been judicial attempts to carve out exceptions to the *Austerberry* rule.
        - In *Halsall v Brizell*, the developer of a gated community retained title to amenities (roads, sewers, etc.) and the buyers were granted easements to use them in exchange for covenanting to pay maintenance fees. The deed clearly tethered use of the amenities with the payment of the fees. An owner who was a successor to a covenantor disputed the fees but wished to use the amenities.

        - The court held while a current owner could not be bound by the positive burden, they would not be entitled to the benefit of the deed without also assuming the burden.
    - In *Tito v Waddell (No 2)*, a company was granted mining rights in Banaba Island. In the same instrument, the company covenanted to replant the worked lands and return them to the islanders. That obligation was not tethered to the grant of the mining rights but appeared in a separate clause. The company's rights were then assigned to the British Phosphates Commissioners, which refused to replant the island.
        - Megarry VC distinguished "conditional benefits" and "independent obligations."
            - Conditional benefits confer a benefit but subject to a corresponding condition, which satisfy the criteria in *Halsall v Brizell* for running with the land.
            - Independent obligations where X grants a right to Y and in the same instrument Y independently covenants with X to do some act; they do not meet the criteria from *Halsall v Brizell* for positive covenants that run with the land.
                - However, Megarry VC held that independent obligations can run with the land under the equitable principle of pure benefit and burden, which states that one should not take the benefit of a grant without taking the burden.
        - As a matter of construction, Megarry VC concluded that the mining rights were not granted conditional on replanting. However, under the principle of pure benefit and burden, the Commissioners were bound by the burden of the grant having received the benefit.
    - In *Rhone v Stephens*, a roof covered both Walford House and part of Walford Cottage. The owner of both properties sold the cottage and covenanted to keep the roof in repair in exchange for an easement in respect of the cottage's vertical supports. Both properties changed hands, and the roof fell into disrepair. The cottage owner sued on the covenant for damage caused by the leaky roof.
        - *Halsall v Brizell* did not apply, because the benefit and the burden were not linked in the grant, and the buyer of Walford House could not reject the benefit and the burden.
        - Lord Templeman rejected the principle of pure benefit and burden, declining to recognize that a party deriving a benefit from a conveyance must accept any burden in the same conveyance. The positive burden has to be relevant to the burden being claimed.
            - To him, the right of support was not related to the duty to repair the roof.
        - This holding has been affirmed in subsequent English cases.
- In sum, the English position on positive obligations is that they will only run with the land if:
    1. The adoption of a benefit must have been made conditional on assuming a positive obligation.
    2. The positive obligation must be relevant to the enjoyment of the benefit.
        - Framing the agreement so one promise is given in consideration of another is not sufficient.
    3. A subsequent owner will be bound by the burden only if they can, in theory, accept or reject the benefit.
    4. The benefit must exercisable as of right under the agreement.
- I agree with the English position; these are good reasons for reforming our position on positive covenants:
    - Prohibiting the running of the burden of positive covenants defeat parties' legitimate expectations.
    - The touch and concern requirement would prevent unreasonable burdens from encumbering lands.
    - As long as there is notice, and assuming the covenant does not violate public policy, the owner who takes land subject to a burden can hardly complain.

Amberwood Investments Ltd v Durham Condominium Corp No 123 (2002), 211 DLR (4th) 1 (ONCA)

Facts:

- WHDC Harbour Development Corp intended to build two condominiums on the land, in two phases. The first phase was completed, and as a result DCC 123 was registered and the land divided into two parcels. WHDC then started to build phase 2 and put in a foundation. WHDC and DCC 123 signed a Reciprocal Agreement giving each phase easements over the other parcel for support and access and providing for the sharing of the cost of maintaining certain shared services and facilities. This agreement was registered on the title of both parcels, and expressly stated an intention that the agreement was to run with the properties. Amberwood assumed ownership of the WHDC lands and refused to continue payments. DCC 123 issued notice of sale proceedings in accordance with the Agreement.

Issue and holding:

- Is a covenant to pay certain interim expenses contained in a reciprocal easement and cost sharing agreement between owners of adjoining parcels enforceable against the successor in title to the covenantor? **NO**

Analysis:

- The rule that positive covenants do not run with freehold land has been clearly adopted in Canada.
- DCC 123 relies on an exception to the *Austerberry* rule in *Halsall v Brizell*, where the court held that a person who claims the benefit of a deed must also take it subject to its burdens.
    - But, as confirmed in *Rhone v Stephens*, it does not follow that any condition can be rendered enforceable by attaching it to a right; the condition must be relevant to the exercise of the right.
        - The benefit and burden must have been annexed to each other so that the benefit is conditional; this contrasts with situations where X grants a right to Y, and by the same instrument Y independently covenants with X to do some act.
- DCC 123 relies on an "exception" to the *Austerberry* rule known as the "conditional grant," which holds that if the granting of a benefit or easement was conditional on assuming the positive obligation, then the obligation is binding.
    - But this is not out of step with *Austerberry*; if a grant of benefit or easement is framed as conditional upon the performance of a positive obligation (i.e., subject to a condition subsequent or determinable limitation), the positive obligation may be enforceable, not because it would run with the land, but because it would serve to limit the scope of the grant itself.

Rationale: (Charron JA)

- Amberwood is not bound by the positive covenant to pay the interim expenses under the Reciprocal Agreement solely by virtue of having acquired the phase 2 lands with notice of its terms.
    - Per the *Austerberry* rule, positive covenants do not run with the land; there is not a statutory exception to that rule in this case nor is there an unbroken chain of covenants maintaining privity of contract.
    - Modifying the *Austerberry* rule would create several difficulties and uncertainties and would best be undertaken by the legislature with a careful consideration of the consequences.
        - For this reason, the rule from *Halsall v Brizell* should not be accepted by the court.
            - Even if it were, it would not apply to this case; DCC 123 has not established any correlation between the easements over Phase 1 and the burden of the positive covenant.
                - While DCC 123 would resolve this issue by adopting an all-or-nothing approach that binds Amberwood to all the terms of the Reciprocal Agreement, whether or not there is a direct link to the enjoyment of the intended benefits, this would in effect abolish the *Austerberry* rule (which only the legislature should be able to do).
        - Also for this reason, the grants of easements contained in the Reciprocal Agreement should not be considered conditional upon the continuing performance of a positive obligation.
            - The Agreement is too general to create a conditional grant; if it created an exception to the *Austerberry* rule, it would be open to anyone to abolish the rule by making a general statement that the continuing right to enjoy all the benefits in an agreement was conditional upon acceptance of the burden (and only the legislature can abolish the *Austerberry* rule).

Dissent: (MacPherson JA)

- The benefit/burden and conditional grant exceptions to the in rule should be adopted in Ontario; this would be an incremental change in the law that would mitigate hardships or wrongs in appropriate cases.
- The benefit/burden exception applies in the present case.
    - Since Amberwood had notice of the burdens, the benefits are "real and substantial", and Amberwood elected to accept them, it must also accept the burden of paying its share of the interim costs.
- The conditional grant exception also applies in this case.
    - It is clear from a reading of the entire agreement that there is a direct and intentional linkage between the benefits of the easements and the burden of the interim costs.
- Amberwood chose, with full knowledge of the terms of the original agreement, to accept its benefits. It would be unjust to permit Amberwood to ignore the reciprocal burdens which the agreement so clearly imposes on it.

Notes:

- There are no other Canadian authorities on positive covenants in Canada, but law reforms commissions have repeatedly suggested that we need to move away from the *Austerberry* rule.

Situations Where Positive Obligations May Run

- Positive covenants that touch and concern the leasehold routinely bind assignees.
- Positive obligations arise from statute.
    - Alberta's *Condominium Property Act* provides that a purchaser of a condo is liable to pay condo fees.
    - The *Municipal Government Act* says that an agreement in respect of subdivision, wherein the municipality grants subdivision approval in exchange for infrastructure, will bind the developer's successors in title.
- Positive obligations can be enforced by way of a chain of covenants, which maintain privity of contract.
    - Under this approach, when a party purchasing property agrees to positive duties, that party might also promise to (1) remain liable for breaches even when they occur after they sell the land, (2) extract similar promises from parties who later acquire the property, and (3) sue the party in the event of default.
        - Each subsequent owner is motivated to abide by the terms and to extend them to the next owner.
    - However, a chain is only as strong as its weakest link; all it takes is for one buyer to go bankrupt, flee to Belize, etc. for the whole thing to collapse.
- If *Amberwood* is overruled in Ontario or is rejected in some other Canadian jurisdiction, there may be some potential for the rule from *Halsall v Brizell* to be adopted.
- Positive obligations may be enforceable if a benefit is truly conditional, in the sense that the continued existence of the benefit is predicated on the continuing observance of the burden, such that a failure to abide by the burden leads to the termination of the benefit (i.e., the benefit is subject to a condition subsequent or determinable limitation).
    - The court in *Amberwood* said that a conditional grant could be validly deployed.
    - If a grant is made conditional on performing a positive obligation, then default may entitle the enforcing party to terminate the benefit under the grant, but not to sue for damages or seek an injunction.
    - If this is the law in Alberta, the condition subsequent or determinable limitation would be subject to a 40-year wait-and-see perpetuity period [*Perpetuities Act*, s. 19].
- A rentcharge (an incorporeal hereditament) is a periodic payment that can be annexed to a freehold estate which is enforceable against the subsequent purchasers of the land even though it imposes a positive obligation.
    - The amount of the obligation may be variable, so long as it is capable of being ascertained (e.g., a rentcharge based on a percentage of the rateable value of the lands).
    - Failure to pay gives rise to an action in debt for the monies owing and a right to levy distress.