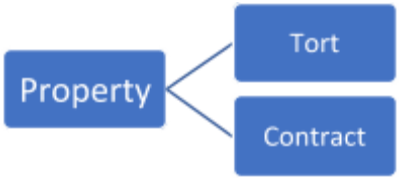
Introduction to Property Law

What is property law?

- Property law: can be defined as a provisional definition which refers to the rights (and duties) among persons in relation to things
    - What are things?
        - Things:
            - Land
            - Physical objects
            - Intangible creations (eg. Copyright, patents)
            - Etc
- Property law is something that most of us have applied in our daily lives every day; everyone living in organized society internalizes and applies on an everyday basis
    - Ex: Would you take you classmates pen? No, because its their property and you do not have the right to interfere with it
        - Basic knowledge of property rights is deeply embedded in our social norms, without some form of the government having to interfere and reiterate that
- Property law is pervasive
- Property law exists in the laws and formal legal authorities but as well as the customs, beliefs and attitudes of the people
- What is property
    - Two conceptions of property
        - 1. Property as a right to a thing good against the world
        - 2. Property as a collection of rights (bundle) with content that varies according to context and policy choices

Property and Private Law

- Private law governs relations among private parties
- Property law is one of 3 principal branches of private law: Property, Contract, Tort
- Property provides much of the underlying rights structure upon which tort and contract operate



    - Tort deals with infringements of rights among private properties (including property rights)
    - Contract deals in part with the consensual transfer of property interests
- **Property is in some ways foundational to other areas of law**; it does play to some extent influences public law
- Public law governs relations between citizen and the sovereign
    - Areas of public law include: Criminal law, Administrative law, and Constitutional law
- Much of public law is premised on property interests (e.g. criminal offences like theft; municipal zoning regulations; regulation of owners of goods)

Intentional Interference with real property:

- Trespass to Land
    - **o** Tort of trespass to land may be defined as the direct and intentional physical intrusion onto land in the possession of another

Entick v Carrington & "Trespass to Land"

- Plaintiff: Entick Defendant: Carrington
- **What court**? Court of Common Pleas, England and Wales – English Court
- **Facts:**
    - D broke into the P house under the purported instruction/authority from the Secretary of State and took papers/documents.
    - P sued D for trespass
        - trespass (a tort action based on violation of property rights) —> Every invasion of private property is a trespass
- **Holding**: D trespassed; upheld plaintiffs claim - an individual has the right to prevent access to his land unless the access is granted by law
- **Analysis**
    - If the D can't show justification (some valid authority) for his actions he has committed trespass on P
        - In the current case there was no legal basis for this search and seizure, so P succeeds with the trespass claim
    - ***Silence of the books*** – if no valid justification for trespass then the silence of the books is an authority against the D AND P will have judgement for trespass
    - By the laws of England, every invasion of private property (including by the state without justification), be it ever so minute (minor), is a trespass
        - If accused, must prove that some positive law forced the trespass (AKA justification)
        - Trespass doesn't require harm or damage to be done
    - Property rights are really important except where the public good (positive law) is concerned
- **Ratio**:
    - **Property rights are not absolute; can be restricted on the basis of what general good requires by law**
    - **Trespass refers to every invasion of private property no matter how minor (do not need harm/damage)**

Trespass: How the tort of trespass defined?

- There is a broad definition; an idea that there is a strong presumption in favour of trespass liability, but we accept and acknowledge exception to the trespass tort
    - **General law of trespass;**

- **There are certain exceptions to trespass, BUT trespass is not understood on the case by case basis**
    - see if it fits within the category

What is property?

- One conception of property as a right to a thing good against the world OR, another conception of property as a collection (bundle) of rights, with content that varies according to context and policy choices

Jacque v Steenberg Homes Inc.

- Plaintiff: Jacque Defendant: Steenberg Homes Inc.
- **Facts**:
    - P had lost land rights previously due to possession laws in Wisconsin (20 yrs ago) therefore he did not want people on his land ever again
        - D on numerous occasion asked to cut through the P's land as it was the easiest route to deliver but P said no. After another attempt to ask for access and P refused the D neglected the P instruction and plowed a path through P's snow covered land (property) in order to deliver a mobile home despite P adamant protests —> D told P that he was not allowed on his property. D proceed to cut across P's land despite being told no.
            - P sued D for intentional trespass
    - At trial Steenberg Homes conceded (admitted) the intentional trespass, but argued that no compensatory damages had been proved, and that punitive damages could not be awarded without compensatory damages. Although the jury awarded the Jacques $ 1 in nominal damages and $ 100,000 in punitive damages, the circuit court set aside the jury's award of $ 100,000. The court of appeals affirmed, reluctantly concluding that it could not reinstate the punitive damages because it was bound by precedent establishing that an award of nominal damages did not sustain a punitive damage award.
- **Issue**:
    - (1)Whether an award of nominal damages for intentional trespass to land may support a punitive award and, if so;
        - (2) Whether the law should apply to D or should only be applied prospectively and, if we apply the law to steenberg;
            - (3) Whether the $100,000 in punitive damages awarded by the jury is excessive?
- What kind of remedy can the court give in light of the situation?
    - 3 types of possible damages:
        - *Compensatory damages*: are to compensate for some actual loss suffered by P as a result of D conduct
            - Not available in this case because no tangible loss
        - *Nominal damages*: these are symbolic awards by the court when legal wrongdoing has occurred but where no actual financial loss as a result of D conduct
            - Given $1.00
        - *Punitive damages*: these are forms of damages that aren't designed to compensate for a loss but rather designed to punish the D for their conduct
            - Given $100,000
            - The punitive damages were set aside by the courts because of the rule that you can't have punitive damages without compensatory damages? So questioned if they should depart from this rule
- **Holding**:
    - **SC of Wisconsin judge reversed and reinstated punitive damages** that the circuit court judge had set aside
        - This was meant to set a precedent that companies/people cannot simply do what they want and infringe on private property without punishments
        - Punitive damages was awarded to P
            - The 100,000 in punitive damages awarded by the jury is NOT excessive - no punishment no lesson learned
    - **Right to exclusion** fundamental to private property
        - Highlighted the rights of individuals to exclude others from his or her own property
    - Being able to award both punitive and nominal damages part of Wisconsin law and not so relevant to our purposes
        - **Sense that law must provide what is best for society**
    - Why was the judgment questioned?
        - The idea is if the law does not provide an appropriate response people will not be stopped?
            - By not punishing the D then they are excluding the rights of individuals
- **Ratio**: **When nominal damages are awarded for intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded**
    - Direct and intentional intrusion
    - While there was no real damage/loss in this case, there could be in future cases, so establishing a precedent is important
    - Issue here is what kind of remedy is applicable
        - Damages:
            - Compensatory damages – compensate for an actual loss incurred (unavailable in this case)
            - Nominal damages – symbolic awards to signify that a right was violated ($1)
            - Punitive damages – intended as a method of punishment (seen to be exceptional in Canada) ($100,000 in this case)
    - Exclusion —> default presumptions that the owner has the right to exclude, and the outcome will be based on the owner giving the right to exclude

Dwyer v Staunton

- Plaintiff – is a farmer and rancher Defendant – is a farmer and rancher residing north of the plaintiff
- **Facts**:
    - P suing for trespassing and claiming $500 in damages to crops and $20 in damages to gates and fences as well as an injunction restraining the D from further trespass
    - Public highway blocked by snow
        - Oil company bulldozes path adjacent to road
    - Plaintiff eventually lets defendant pass through one way to town but says not to come back that direction
    - Defendant can't get home on road leaving town, and can't find another way home so returns through Plaintiff land despite being told not to
    - Defendant goes through fence because Plaintiff will not let him pass
- **Issue**:

- Is this a case of trespass?
  - **Public welfare and interest are seen to take priority over the private right of the owner**
    - Necessity = no other way to go about
  - Whether the defendant under the circumstances had the right to leave the highway and proceed over the land of the plaintiff?
  - Whether the defendant if he had such right caused any unnecessary damage to the plaintiff in exercising that right?
- **Holdings**:
  - Action of the plaintiff is dismissed
    - **Rights of the public are higher rights than private property rights - it was out of necessity that the D acted**
  - The damage observed cannot be linked to the defendant, as the bulldozer would have been more likely to cause any damage. It is also likely that the crop was winter-killed before the date of the incident
- **Ratio**:
  - Public welfare and necessity —> outweighs private interests as long as damage is not done

Jacque v Steenberg Homes Inc. vs Dwyer v Staunton

- Question?
  - Are there similarities or differences between the two cases?
    - Issue of necessity?
      - One is necessary (later) while one is not (former)
        - In Jacque there is an alternative where as in Dwyer there is no other choice
        - the former case had an alternative option so private property rights upheld but in the later case it was out of necessity that the D trespassed and thus Public welfare and interest took priority over private property rights
    - Between public and private roads
      - Reasoning adopted by the entick v carrington
        - In dwyer is was public road - by law it is instructed one can cross in necessity
        - In Jacquce is private road
- **We can default to a presumptive right to exclude.**
  - **Who has property right? They can choose to exclude.**
  - **However, there are exemptions that still apply: public necessity & welfare of public —> society needs outweigh those of the private**

Property Law: Properties of Property I

Key Ideas: Property as a contested concept, the importance of stability of property rights, and updating the common law to accommodate change.

MacPherson "The Meaning of Property"

- (1) Property is a right, not a thing - it is rights with regards to things not the thing itself
  - Property should be understood as having a right to ownership over everyone else in the world for a particular thing
  - It is thus a claim that is enforceable by social norms or by law
  - Property becomes a right as soon as any society makes a distinction between property and mere physical possession. Property is a claim that will be enforced by society and or the state by custom or convention or law
- (2) The role of the state is enforcing private rights
  - Private Property, State Property, Common Property
  - State will back claims – the idea that the case has a big role in enforcing the claims & likely if they get involved if issue with claims
  - If there is a violation state becomes involved
    - This is rare because people often respect property rights
  - Power of state in the background
- (3) Distinction between possession and ownership (property)
  - Possession = having the item own your person, physical control
  - Ownership = having a right to the item over everyone else
  - Property is distinct from Possession
    - Beyond something or occupying under your control an object – you can be seen to have a claim to something even if its not in your immediate possession
      - Claim on object
- (4) Macpherson claims that the rise of capitalism and a redefinition of property has created a one-to-one identity with owner and non-owner, an incorrect way of looking at it compared to individual rights
  - In the past people would not have confused property as a thing – there was a wide-spread understanding about property as a right in the past – but today there is a confusion that arises between property as a right and as a thing
  - Feudalism used to involve many people with many different rights to land/property.
  - Medieval open fields used to involve rights to agriculture (rights to individual strips at some point in the year, collective grazing at other times of the year)
    - Different times of year = different property rights
      - Exclusion of property – the idea you have the right to exclude
- Property gives rise to enforceable claim against 3rd parties
- Property is a relation among persons – the owner has a right in relation to the thing but also links to society as a whole
  - Rights can involve a large and indefinite class of individuals
    - Apply **in-rem**: "in a thing" – right applies against the whole world
      - Duty on the part of the whole world not to touch/take/effect the right of one
- **THE PROBLEM OF CHANGE**: The meaning of property is not constant
- Private property vs common property vs state property
  - **Private property**
    - Interest/rights is held by a **private party**
    - Property is created by the guarantee that an individual can exclude other from use or benefit of something

        - Property of an individual – exclusive individual rights
            - In rem rights: a relation involving people and a thing. An exclusionary right against all others
        - Property is not a thing
            - It's a legal concept, an <u>enforceable right</u> – distinction drawn between the possession of an object and actual it having a right in it. It means that we are all under a duty to not interfere with someone's right
    - **Common property**
        - Interest/Rights held by the **public at large**
        - Property is created by the guarantee to each individual that they will not be excluded from the use or benefit of something
        - Rights held by some subset of the public
            - example: a common pasture —> farmers would have a collective right to exclude certain individuals in the village
        - ***Open access*** -rights held non-exclusively by the public at large
        - ***Communal property*** – rights held by some sub-group or community
        - Ex) public roads
        - Ex) Common pasture – residence to a particular village has a right to graze their animals there
            - Its open to a specific group, in turn having the right to exclude
    - **Note: private and common property are individual rights**
        - <u>Private and common property the state creates the rights, the individuals have the rights!</u>
    - **State property**
        - Interest/right held **by the state** as an organized entity, which make the decision about use and exclusion
            - State can be restrictive of who cones & goes onto the property
        - <u>State has created the right and state has the rights;</u> not individuals
        - Example: Prime Minister office building —> isn't a right of access to the general public
- THE NEED FOR JUSTIFICATORY THEORIES: Property is always thought to need justification theory by some more basic human or social purpose
    - Property is not thought to be a right because its enforceable claim; it is an enforceable claim because it is thought to be a human right (enforceability depends on society's belief that it's a moral right)

Merrill "Three Schools of Thought on Property"

- Property is concerned with the 'rights' and not the 'things' themselves, Property designates rights to both tangibles and intangibles. Property (ownership) rights are distinct from, and trump, possessory (control) rights. Property rights require the enforcement of an institutional structure (i.e., state)
- Despite the common agreement regarding what property is, **there is contention and no definite idea as to what property is** there for we have different theories of property
    - No single definition of property
- **Rights need to be enforceable to call it property**, not necessarily by the state but by social sanctions
- Argued **rights to exclude** is the fundamental to the concept of property
- POINT OF CONSENSUS: see pages 7-8 text
- Descriptive theories of property – three schools of thought regarding right to exclude
    - **Single variable essentialism:** <u>necessary and sufficient condition for property is the right to exclude others.</u> Does not allow for common property to be considered property, because none of us have the right to exclude
        - "…that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individuals in the universe
        - "To the world: keep off X unless you have my permission, which I may grant or withhold Signed: private citizen; Endorsed: the state"
            - Reinforces the idea that in the background the state will enforce and support an individuals right to the claim
    - **Multi-variable Essentialism:** <u>right to exclude is necessary, but not sufficient condition</u>. There are other core elements to defining property. Right to possess, right to use, to manage, income, etc. No single make or break element.
        - Possession, use and disposition
        - Honore's incident of ownership
            - *o* The right to possess, use, manage, the income, the capital, security,
            - *o* The incident of transmissibility, of absence of term
            - *o* The duty to prevent harm
            - *o* Liability to execution
            - *o* The incident or residuarity
    - **Nominalism:** <u>property has no essence but is conventional</u>
        - No essential character, it is content dependent.
        - *Bundle of rights* – can take some sticks out, put others in. Can refer to different bundles of legal relations among persons. No necessary content & the meaning of <u>property is conventional</u>. **Society can redefine as needed**
            - Bundle of sticks -Identify the persons property not with the thing itself but with the collection of rights in relation to that asset which highlights the importance of context and reveal how the general view of ownership is helpful
        - Jural relations (Hohfeld)
            - o Right – duty
            - o Privilege – No right
            - o Power – liability
            - o Immunity – disability
        - The details to jural relations are not important, then concept is

Yanner v Eaton

- Appellant: Yanner Respondent: Eaton
- "property" in the relevant statute is used in a limited sense that does *not* grant an exclusive interest
- **Fact**
    - Yanner was an aboriginal person that killed & hunted two juvenile crocodiles with a harpoon for private, non-commercial purposes ; hunts fauna outside of the open season
    - Eaton charged Yanner for apparent violation of the fauna act
        - This is against the Fauna Act which declares that all fauna, except those taken during open season, are property of the State.

- Yanner argues he killed the crocodiles under the Native Title Act, which provides protection for native rights based on the cultural significance of the practice and whether it was traditionally engaged in by the group
  - Yanner claims aboriginal heritage allows him to hunt whenever
    - Eaton argued that the right was extinguished because the only native title rights that survive are those that have not been extinguished by valid legislation

- **Issue**
  - Does the crown have legal ownership over animals? Does the Fauna Act extinguish the Aboriginal right? What is the meaning of the term property as used in a particular statute? What does it mean to have full, beneficial, absolute, ownership of an animal?
- **Holding:** Native rights were not extinguished by act. Appeal allowed
  - Yanners right prevailed because the court decided that the crown was not entitled to have this exclusive right
    - Yanner is acquitted —> had an ongoing right under the Native title Act because the Fauna Conservation Act did not extinguish Yanners Aboriginal right
  - Yanner wins. Property in the relevant statute is used in limited sense that does not grant an exclusive interest
- **Analysis**
  - The argument is that the native title right is inconsistent with the fauna act. Which puts all fauna as the property of the crown outside of hunting season
    - Under Australian law, where inconsistent right has been granted, that explicitly extinguishes the Aboriginal right
      - So, this would be an inconsistent right if the crown's property right over fauna includes the right to exclude
  - Majority (Nominalist view)
    - Property is contested (nominalist perception of property)
      - Difficulty identifying what fauna is owned by Crown; cannot determine what this right would mean, if it existed. No absolute ownership in wild animals in common law, only tame animals born on individuals land, and animals can only be hunted on the owner's land exclusively
    - **Property being used in a very limited sense that is not incompatible with Native Rights**
      - it could not be concluded that the statute granted full beneficial ownership or a possessory right over fauna to the Crown when it referred to 'property'
    - Australian legal system is being applied (not indigenous law) – imperial successor; British Crown asserted sovereignty over indigenous legal traditions
      - Pointing to kind of power we might want to constrain – a single line in an act could take away indigenous rights and redefine property interests
        - Legislature had the power to take away property rights without giving any compensation – dangerous
    - It can sometimes be the case that legal reasoning seems better in a reasoning that leads to an unjust outcome (e.g. the dissent in this case)
    - Wouldn't need to talk about the right to forfeit if the crown had full ownership – sections of the act proved inconsistencies
    - Aspects of act suggest unique understanding of property, less than absolute ownership
      - Difficult to equate crowns interest with individuals' interest in domestic animal
      - Crown's interest comes/goes with open/closed seasons
      - Crown as per act as no responsibility to this property
    - Crowns right is a public property interest
      - Imperium not dominium
      - Property owned by state in trust for people NOT private ownership
      - "res communie" and "Res nullius" is only sort of guardian hip for social purposes
        - Therefore, NOT absolute/full beneficial
  - Dissent
    - Single-variable essentialism
      - At common law, you had an exclusive right to hunt animals that came onto their land, that would be inconsistent with aboriginal rights to hunt it – so passion of that statue would have extinguished the aboriginal land right to hunt
    - Said the crown had an exclusive right to fauna, does not see any ambiguity
- **Ratio**: **When property in a relevant statute is used in limited sense then it does not grant an exclusive inter**est

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Property Law: Properties of Property II

Key Ideas: Property as a contested concept, the importance of stability of property rights, and updating the common law to accommodate change.

Harrison v Carswell (1976)

- *SCC - court*
- Appellant: Harrison Respondent: Carswell
- **Facts**:
  - Shopping center plaza - Harrison owns the plaza
  - Carswell is picketing on a sidewalk outside of a shopping mall operated by Harrison. The sidewalk is private and owned by the shopping mall. She started picketing on a city sidewalk, but it was too far from the store so she moved to the mall property. Harrison asked her to leave (x times), but she came back several times. Harrison charged Carswell under *The Petty Trespasses Act of Manitoba* for trespass despite the fact that the strike itself was a legal action.
  - Question of is it possible to have actionable trespass even with no harm caused?
  - **History (traveling through the courts)**
    - 1. Charged & dismissed by provincial court
    - 2. County court ordered a trial de novo and heard evidence (did not just review the provincial court's decision) and Carswell was convicted
    - 3. Manitoba Court of Appeal set conviction aside / appeal dropped the charges
    - 4. Harrison Appeals to Supreme Court of Canada & the SCC re-instated the conviction of the country court
- **Issue:**

- Did the learned judges in appeal err in law in determining that the owner of the property had sufficient possession of the shopping plaza sidewalk to be capable of availing itself of the remedy for trespass under Petty Trespass Act, section 1(1)?
  - Does a shopping centre owner have sufficient possession of a private sidewalk in the centre so as to invoke a trespass statute (Petty Trespass act, section 1(1) against an employee peacefully picketing her employer who is a tenant of the owner?
- Is the mall truly private property after it has been opened to the general public?

- **Decision**:
  - Appeal affirmed. Conviction entered by the county court was restored by SCC; ruled in favour of harrison, **private property rights were infringed with Carswells actions**
- **Ratio:**
  - **A shopping mall retains a discretionary right to exclude even in "quasi-public" areas to which it has invited the general public**
    - common law always protects private property unless there is an applying statute that takes away one's property rights
- **Analysis:**
  - **The common law protects private property rights unconditionally without overriding statute**
    - **There is no such statute in this case, and thus the case must be found on the common law Bill of Rights: which states that private property is the most important thing to be protected at common law.**
  - Majority (Dickson J.)
    - Starting point --> **Star decisis** (cases with similar scenarios and facts are approached in the same way)
      - Notes that the court had just dealt with a similar case, which they quickly dismissed with very short reasons (*Peters v R*)
      - Relies on *Peters v The Queen*: in legal terms the mall owner owns the property
        - In *Peters v The Queen* the SCC found that Peters had the right to invoke trespass on property owned by the mall, therefore the precedent has been set by this (since the cases are indistinguishable)
          - Notes that the property owner has a **right to exclude**" in this case the owner extends a revocable license **—>** Ms. Caswell's invitation to come onto the premise was revoked and the mall owner exercises its rights to exclude
    - Does the mall owner have sufficient possessory interest to common areas, to restrict public invitation? **Yes -** Precedent confirms this in *Peters v The Queen*
      - **There is a prima face invitation to the public to come to the mall but permission can be revoked pursuant to the right to exclude**
        - **The mall owner extends a general invitation to public at large, doesn't mean they lose the right to eject! The permission on the premise can be revoked**
    - **Not the court's job in this context to innovate** -->Legislator's job to undergo policy making
      - Argues institutional competence, that this is the kind of thing the legislatures should do, not the courts. Dixon says there have been statutory exemptions applying to picketers before. If there is something that should happen based on the value of picketing the legislature can do it
    - Speaks to the importance of stability – one of the ways that stability is achieved in our society is through precedent.
      - Property owners need to be able to have stability in order to weight their affairs.
  - Dissent (Laskin J.)
    - Why cant the court weigh the value of the picketer's rights against the right to exclude?
      - Look into the reasons of why you are actually excluding this person --> new scenario
      - Weighs interests
        - Interests of pickets in expressing herself with whatever interest the mall owner might have in excluding her
          - Finds that the picketer's interest in free expression prevails or at least shouldn't be completely disregarded as the traditional right to exclude would interest
    - Why can't the court innovate? It's a new scenario
      - Argued that times are changing, this is not the kind of property that the courts were talking about when developing this statute
      - Argued that the precedent was not far reaching
        - Says yes, we have precedent, but that the court should innovate and weight these value of the mall owner's right with the value of the picketer's activity
          - Says that they are not bound by precedent because while mall owners do have a right to exclude in every scenario, it can be very limited right
            - Refers to the shopping mall as a quasi-public space
            - The **significant grievance criteria** is absent, therefore Carswell should not be persecuted.
              - **Significant Grievance Criteria:**
                - Members of the public are privileged visitors whose privilege is revocable only upon misbehaviour or by reason of unlawful activity
      - SCC should innovate and understand this is as new scenario in the benefit of the public interest.
        - *Dickson (**majority** opinion) disagrees because he argues this should be left to the legislature (if property rights are going to be so significantly altered as to question right to exclude it should not be up to the judges, but rather elected officials to legislate this)*
    - Takes humans rights angle (should have a good and fair reason to exclude);
      - but, point he's trying to make is that **right to exclude** is already qualified by humans rights legislation, so its not such a big deal to take a new approach at this scenario and weigh the social and economic factors in it for the betterment of society
        - Laskin wants to change the law to qualify right to exclude
  - **Problems in dissent? No right to exclude could hamper the interests of a business owner. Places too much ambiguity for who is responsible for determining "weighted interests", the legislature or courts?**

Petty Trespass Act - SMS: P.175

- Section 2(1) Every person who (a) without the permission of the owner or occupier of the land enters on land when entry is prohibited under section 2.1 or (b) does not leave land immediately after he/she is directed to do so by the owner or occupier of the land or a person authorized by the owner or occupier is guilty of an offence
- Section 2(2) Any person who is guilty of an offence under section 2(1) whether or not any damage is caused by the contravention is liable
- Section 2(4) EXCEPTION: there is a presumption that access for lawful purposes to the door of a building on land by pathway apparently provided for the purpose of access is not trespass

Trespass to Premises Act - SMS: P.176

- Section 2(1) No person shall trespass on premises with respect to which that person has had notice not to trespass (notice defined in section 2(2)
- Section 3 A trespasser, whether or not any damage is caused by the trespass, is guilty of an offence and is liable
- Section 8 - EXCEPTION - Nothing in this Act extends to a case where trespasser acted under a fair and reasonable supposition that the trespasser had a right to do the act complained of

Alberta Human Rights Act ss. 4, 4.1 - SMS: P.116

- Section 4 No person shall (a) deny to any person or class of person any good, services, accommodation or facilities that are customarily available to the public or (b) discriminate against any person or class of persons with respect to any goods, services, accommodation for facilities that are customarily available to the public because of race, religious beliefs, colour, gender, gender identiy, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, etc.
- Section 4.1 as it relates to age does not apply with respect to the conferring of a benefit on (a) minors or any age-based class of minors or (c) individuals who have reached a specified age not less than 55

Justification for private property

	Happiness/Utility	***Wealth/Efficiency***	***Personal Development***	***Virtue and Societal Flourishing***	***Autonomy and Freedom***	***Justice and Desert***
Fundamental Value	*Achieve greatest happiness for greatest number*	*Efficiency in relation to subjective preferences; wealth maximization*	*Personal development*	*Human virtue and societal flourishing*	*Individual liberty, freedom, and autonomy*	*Justice and desert (what parties deserve)*
How Property Serves that Value	*(i)Security of holdings encourages production of material wealth (ii)Redistribution of wealth undermines security and blunt incentives to produce*	*(i)Exclusivity, transferability (ii)Creating incentives to produce and not overuse resources (iii)Property interests well-defined, form basis for credit markets*	*(i)Projecting one's will onto physical object is important for human individuality (ii)Some items can be constitutive of personal identity and worth protection*	*(i)Property ownership promotes individual virtues (ii)Property ownership promotes a flourishing society*	*(i)Creating a sphere of non-interference in relation to persons things (negative liberty) (ii) Enhances capacity of individual to make important choices in relation to things (positive liberty)*	*(i)Individuals have a claim in objects that they have acquired through just rules of acquisition or transfer (ii)In particular, individuals deserve to keep products of labour (iii)Mixing one's labour is way to justifiably acquire entitlements*
Proponent(s)	*Jeremy Bentham*	*Richard Posner Hernando de Soto*	*GWF Hegel Margaret Radin*	*Aristotle Eric Claeys Nestor Davidson*	*John Locke Robert Nozick Aruthur Ripstein*	*John Locke Robert Nozick*

Why do we have a law that allows for private ownership and private property? •

- Claim 1: <u>Private property promotes human happiness</u>
  - Bentham and the concept of utilitarianism
  - How do you measure happiness? What metrics are used?

- Claim 2: Property is necessary for optimal human development/flourishing/personhood
    - People develop attachment to things which allows them to thrive
    - People individuate from their possessions. Their things are representative of themselves.
- Claim 3: Property facilitates freedom
    - Freedom has to 2 dimensions. Freedom from and Freedom to.
    - Property gives you the power to control your own life
    - For some and not others
- Claim 4: Private property enhances material wealth
    - Posner's 3 touchstones
    - Exclusivity: A system that protects individual entitlements. Respect and enforce entitlements.
    - Universality: As many things as possible should be amenable to private ownership.
    - Transferability: As few impediments as possible. The lawful transfer of property.
    - Posner tells us these are things we should strive for an economic efficient property system.
    - What does the tragedy of the commons teach us: Everyone keeps acting in their own best interest until the tragedy occurs, where everyone is harmed.
    - It teaches us that private property internalizes the costs of production.
- Claim 5: Private property is just, or at least legitimate
    - John Locke: private property is a theory of natural law.
- Claim 6: All of these arguments taken together support private property, albeit imperfectly

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Novel Claims I: Novel Claims & Restrictions on New Property Interests

- **Strong presumption against the judicial recognition novel property interests** (unprecedented claims), but can be overruled. Considerations:
    - Property in what? Property as a dynamic concept
    - Allocating by whom? Legislatures, courts, and markets
    - Allocating to whom? Occupancy and first possession, just deserts and the economic efficiency
- Depends on whether law will recognize and enforce entitlements
- **Numerus Clausis Concept:** in general, there are a limited number of judiciary recognized rights and courts are reluctant to recognize new proprietary claims
    - This reduces information costs (easier to determine potential claims), and helps minimize anti commons problems (prevents needless fracturing of property law)
    - Also serves precautionary function; introducing new property rights is extremely hard to reverse given role of precedent, which would serve to undermine investment-backed expectations
        - Once property rights are granted or recognized, it is complicated to take those tights back, This is something better left to legislature

Fundamental question: What sort of property rights should be recognized?

Misappropriation Doctrine: That a quasi-property right" may be created against others by one's investment of effort and money in an intangible thing, such as information or a design

Key ideas: labour; exchange value; social utility; property a product of positive law vs underlying normative arguments; adherence to precedent; judicial role

International News Service v Associated Press

- Plaintiff: AP Defendant: INS
- **Facts:**
    - Summary: AP and INS operate series of newspapers across the US. INS takes stories printed by AP (Misappropriation Doctrine) on the East Coast, and sends them out west, printing them off before AP. AP has expended significant resources for these stories, and argues INS is interfering with their profit stream. INS argues that once news is made public, it becomes common property that anyone may obtain.
    - Background: INS was unable to report on war in Europe due to prohibitions by foreign governments – International news was of strong interest
        - Consequently, INS pirated the AP newspaper by:
            - Bribing the respondent's employees to furnish AP news before publication
            - Inducing the AP member to violate by-law and permit the appellant to get news prior to publication
            - Copying news bulletin boards and early editions of the respondents newspapers
        - The associated press was gathering news, which is an expensive activity. The wire service exists to allow the news to be pooled among different providers. The news gets transferred by a telegraph (at this time a new technology) and is susceptible to being copied by people not paying to receive information from the associated press.
            - The reason why this news is susceptible to being copied is that it comes out first in New York on the East Coast, at which time the INS can quickly acquire the information and put it in their own newspapers to come out later in Western areas. In Western areas,the AP and INS could then release newspapers at the same time
            - INS members would rewrite the news and publish it as their own, without attribution to AP
                - Although INS newspapers had to wait for AP to post news before going to press, INS newspapers in the West had no such disadvantage relative to their AP counterparts
    - Claim: The AP brought an action seeking to enjoin INS from copying AP-gathered news(Misappropriation Doctrine)
        - A copyright claim can't succeed because that doctrine doesn't apply here: copyright is laid out in statute where the underlying subject matter has to be something that has been created. In this case, the AP did not create the news, they are just sharing it.
            - Additionally, the INS is not copying new stories verbatim and taking them in express form, they are just taking the substance of what has happened and sharing it in their own interest
                - This is why the issue exists about recognizing a novel copyright interest
        - **The AP is seeking an injunction from the INS, at least for a reasonable amount of time after news has published**

- They have a property interest in the news which INS is copying
    - INS's practices amount to unfair competition (less important)
        - Unfair competition – AP Argues that trade secrets are being distributed here and it is not fair since INS and AP are in direct competition
- There is some kind of property interest in the news they are putting out. The INS is also in the same business so within the context of the business model, the delivery of the news means there is a property interest
    - There is something inherently tricky here because the AP doesn't want to claim that ordinary readers cannot pass in the news to friends, it wants a specific right given to those who distribute the news for profit (a right to exclude those people)
        - This is sometimes referred to as a **quasi-property interest** because it only applies to some people. It has not yet been recognized by the court at this time, but this is what the INS would like recognized

- **Appellate court upheld an injunction against the appellant on the ground that the appellant's actions constituted unfair competition in trade**

- **Issue**:
    - Whether the D may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of its members or newspapers published by them and selling it to D clients
    - Is there property in news?
    - Does published news become common property when published
- **Ratio**
    - **A wire services has a time-limited "quasi-property" interest in hot news that can ground a claim against other commercial parties who seek to copy the substance from their reports**
        - **Quasi'-property: He who fairly paid the price should have beneficial use of the property.**
            - There is quasi-property to the extent necessary to prevent unfair competition
                - Rare case because they recognize a novel property interest
- **Holding**:
    - Injunction granted for limited amount of time —> News is most valuable when it is new, and a short period of time is sufficient for the newspapers to benefit from this. If no one can copy it for an indefinite period of time, it goes against the interest of public
        - In the present case there is unfair competition by the Defendants, as two competing parties are endeavoring to make money and Defendants are misappropriating Plaintiffs **quasi property interest** in the news it collected and misrepresenting it as their own.
- **Analysis**
    - Majority (Justice Pitney)
        - AP succeeds —> Injunction upheld
        - Pitney holds that the AP does hold **Quasi-property interest** in the news given the economic value —> because the two businesses are both competing in a commercial business and to disallow this property would result in the whole trade being profitless
            - This idea is also present that if something is not done to prevent this sharing of info, no one would be willing to undertake the valuable service of providing the news because there would be no incentive to do so
            - Largely economic, centered around need to sustain incentives to engage in news-making
            - Created ***Quasi-property*** because it only granted AP the power to exclude their competitors for a limited amount of time from the substance of their articles. Cannot exclude the general public under quasi-property
                - Prevent competitors from reaping of the fruits
        - **Exchange value**
            - What the AP does is create the product of news and that has an exchange values. There is something about creating something of value that ought to demand protection under the law
                - We ought to protect interests to improve social welfare and protect the value that these interests bring to society
            - This valuable services might not continue if we don't do something
                - There would be no incentive to do it anymore, it would become profitless (economic argument)
        - **labour theory justification**
            - AP's labour a valuable commodity and INS benefitting from it for free (misappropriation doctrine)
                - Each party has a duty to conduct its own business so as to not unnecessarily or unfairly inure that of the other party
            - Create something of value ought to warrant a property right
                - reaping where it has not sewn - depend on misrepresentation theory
        - **Unfair competitio**n claim also succeeds
            - The court relies on principles of equity and extends liability on the basis of unfair competitive practices
                - The injunction is only granted for a few hours because there is a balancing of interests taking place. This is a common them throughout intellectual property law, where when a copyright is granted or a patent is given for an invention, the rights that are given are time limited. The statute only grants a monopoly over the product of your creative labour for a limited amount of time. This is because they are balancing the rights of the public that relies on that source material with the rights of the creator
            - The court, in this case is trying to do the same balancing of rights that legislators do
                - This also goes to the definition of the right that the courts think should be protected. This is not an exclusive right to describe the news forever, but the value that the AP creates is linked to the freshness and the infrastructure that is created to get the news to individuals faster than it would have by word of mouth
    - Notes:
        - Two important arguments:
            - Justify recognition of property because it is the *product of peoples labour*
            - Justify recognition of property interest because there is s*ome useful public interest*
    - ***Dissent (****Holmes J. and Brandeis J.)*
        - Property is a creation of the law and this type of property sought here does not exist

- I.e. – one party could harm someone else business by competing vigorously with that party. You own a Mr. Sub and a subway opens next to you and you become deprived of the labour you have put in. However, no legal rights are violated
    - INS is competing vigorously and depriving AP of value <u>but not in a way that violates any legally recognized rights</u>
        - Just because someone laboured on it , it does not mean it is labour rights
- Holmes
    - Property does not arise from value
        - Makes it clear that in opinion, property doesn't come from labor or exchange value, it comes from law. Property is a creature of the law and something that the institution of the state say they will protect
    - The fact that there is labour and that the information being shared is valuable commodity is irrelevant for Holmes and does not justify finding a property interest when there is no such interest in existing law
    - INS should not copy AP without proper acknowledgment;
        - disagree with misrepresentation theory - thinks there should be time delay unless give credit to AP
- Brandeis: Congress should be the ones to protect this interest, not the courts
    - Legislature should be responsible
        - Parliaments should be looking at this issue, instead of courts determining "profits" on a case by case basis. Defining characteristic of property is right to exclude, and once news is released, its free for common use.
    - When something is voluntarily communicated it is free
    - There is a degree of circularity in saying that what the AP has created is valuable – maybe it is only valuable if the law protects it
    - Disagreed with the quasi-property creation
        - Denied that reaping where you have not swen is an actionable tort - Rejects the idea of fruit of your labour theory
            - Says it as passing off
    - Failure of the dissent is that it is at last possible for judges to change the law in the copyright system and they have to look somewhere other than the statute book

Victoria Park Racing and Recreations Grounds Ltd. V Taylor

- Do not recognize novel property interest
- **Fact**:
    - Plaintiff: VPR Defendant: Taylor
    - Taylor has built a platform on his own land (next to VPR) to look into VPR and is commenting and broadcasting the races to listener
        - Victoria park racing and recreation grounds owns a race horsing business and makes money on admission. D owns a property nearby. D built a platform up on his property so that he can see very clearly what is going on in Victoria Park's race track, including being able to read what appears on the notice boards. D uses the phone and calls a radio station and vividly describes what is going on in the races. The radio station (Commonwealth Broadcasting Corporation) is properly licensed. Victoria Park wants the broadcasting stopped because it stops people from going and paying for the races when they can just hear them over the radio. Evidence shows some people like hearing about the races more than they like seeing them, so wouldn't go to see them anyways. Victoria Park says they are losing enough money for there to be a cause of action
    - <u>VPR wants to put an end to this and seeks an injunction</u>
        - VPR wants to seek a ***Quasi-property*** interest in the spectacle
        - VPR wants to seek a tort of nuisance
    - Plaintiffs' claims
        - Taylor is interfering with their property right by broadcasting; they are referring to novel or quasi property right
            - They seek to have interest in the quasi property right, otherwise known as interest in the spectacle that the horse racing is creating
- **Issue**: is spectacle property?
- **Holding**
    - Dismisses the appeal —> spectacle cannot be owned, no general right to privacy in Canada
- **Analysis**
    - Majority: Does not allow the appeal
        - The majority says that **there is no property right in a spectacle,** and that the rights in question do not exist here and thus cannot be violated
            - Looks at recognized property interests in land and notes that that there is no property in spectacle
                - Spectacle cannot be owned and there is no general right to privacy —> no previous court in the common law has stated this
        - **Notes that at common law, owning land doesn't give you the right to exclude others from seeing what happens on your land**
            - You have the right to build a fence, but the defendant also has the right to build structures of their land
        - Lantham: (Page 46): at the bottom of the page Latham argues that by the expenditure of money, the plaintiff has created a spectacle
            - Says that the vagueness of this proposition is apparent upon its face
                - Indicates that there is no authority in English law
                - Chief Justice Latham is really <u>focused on the physical acts</u> that have taken place and not on the abstract idea of creating a profitable entity. Says that what you have is a property interest in land, and that has not been violated
            - cannot find any harm/wrongdoing done to the plaintiff. If the plaintiff didnt want people looking build a bigger fence
            - Also addresses these <u>nuisance claims</u>, and says that both parties can use the land how they want. He returns similar to the first opinion, that you have rights to do physical things with your land and not some abstract conception of profitable activity.
                - Says that <u>interfering with the profitable nature of an activity is not nuisance</u>

- Reminds us that you could do other things that would interfere with the profitable nature of an activity, such as opening a competing business next door, which would destroy the value that one's neighbor has created

- Dixion
  - The question, according to Dixon, is what is physically going on
    - Nuisance is traditionally smoke, smells, noise, or vibrations that are recognized to interfere with the property rights of the plaintiffs.
    - The underlying rights dictate the result, it doesn't matter if it is profitable or not
    - **Just because something is valuable does not mean that it automatically becomes a property right**
      - **This path has primarily been taken by Canadian courts**
        - The US idea of quasi property was for the most part not recognized in Canada, and you see in the materials that there is a strong presumption against the recognition of novel property interests.
        - This does not mean that said recognition cannot happen; Many of our existing property interests are the product of the common law evolution, but the courts do not like making new property rights
        - Property rights to intangible things or concepts in Canada tend to be protected under statutory law. Copyright, etc. is all statute based
- Of the rights that do exist – none of them have been violated
  - VPR does own the race track BUT owning land doesn't exclude the right from other viewing your land (you can build walls and so forth to block it) it also does not stop others from building on their own land
- No sense that they wanted to create a new property interest
  - Court do not like making new property rights given the nature of them (forever binding)

- **Dissent**: (Rich)
  - Nuisance was committed
    - Dissent argues that nuisance is what appears to be an unreasonable interference with the use and enjoyment of land, and that is what has taken place
      - Unreasonable interferes with the use of the plaintiff's land as a profitable enterprise
    - *Majority argues against by saying: interfering with someone's profit is not enough to make a nuisance.*
      - *If you extend nuisance liability to interference with property activities to say that unreasonable interference with your land is interfering with your profit, you redefine the interest of reasonable use and profit*
    - Not just a case of simply opening eyes and describing what happens
      - The defendant has gone to great lengths to undermine the activities of the plaintiff. Justice Rich says the tort of nuisance is broad enough to encompass these activities

- **Ratio**
  - **A racing track does not have a property interest in the spectacle it creates. The tort of nuisance does not protect against broadcasting the events from a platform on adjoining land**

Novel Claims I: Novel Claims & Restrictions on New Property Interests (CONTINUED)

Key ideas: social utility (hindering valuable research); patient autonomy; the judicial role; the nature of property; human dignity and self-ownership

Moore v Regents of the University of California

- Plaintiff: John Moore Defendant: Doctor golde
- **Facts**:
  - Court occurred in California SC
  - John Moore is the patient diagnosed with a rare form of Leukemia (both spleen and blood), his doctor found that his cells (both from his blood and spleen) were peculiar and important research (used to create the Mo Cell line). After removing M's spleen (with consent for his safety), D began conducting research on the spleen, with no knowledge from P. D continued treating P and removing samples, and applied for patent for cell line- Mo Cell line. P now sues for profit from this line.
    - The doctor was using the his cells extracted from him without patient's knowledge and using these cells the doctor created a patent with the cells and made money off of it
    - P was not informed that this was occurring
  - Claims:
    - Raw materials from Moore were used to create a cell line that is callable for medical research because they continually reproduce (is valuable for medical resources); moore's blood and spleen were the raw material in which the cell line was developed under which UCLA ended up with a patent for this cell line, his third claim is based on the tort of conversion
      - In order to claim conversion needs to prove he has a possessory interest in the cells that exited his body
    - 1) informed consent
    - 2) breach of fiduciary duty
    - 3) Property - tort of conversion (D interferes with P ownership over property)
      - It is possible to patent certain biological materials when they are the product of invention
  - Tort of conversion:
    - One of the primary torts that protects property interests in personal property; Protects personal property from one wrongfully taking possession of it (It allows the plaintiff express rights from someone unlawfully taking possession of what they have property rights for)
    - Makes a claim on the basis of the **tort of conversion**
      - In order for the claim to succeed, they need to establish property interest in tissues after they have come out of his body

- Essentially, the property has been misappropriated therefore he ought to have an ownership in the property that his property was used to create
    - The property was derived from raw biological material that came out of Moore's body
- The reading touched on the idea that the main obstacle to the conversion claim Is the question of whether there is an underlying proprietary interest (If blood and spleen tissue remain property of Moore in a manner that is sufficient to ground the tort of conversion)

- **Issue:**
    - Does Moore have a property right in his removed cells?
- **Holding:**
    - The California Supreme Court ruled that a hospital's patients discarded blood and tissue samples are not his personal property and that individuals do not have rights to a share in the profits earned from commercial products or research derived from their cells
- **Ratio: A patient does not have a property interest in blood and tissue removed from the body which would ground a claim in conversion for cell lines developed from the blood and tissue**
- **Analysis**
    - Majority (Panelli)
        - Panelli confirms that existing law does not recognize a property interest —> no case law applying tort of conversion to human cells; no statutes saying there is a right or non-right to human issues
            - No case law – is it the role of the court to recognize this property interested?
                - There is a public health statute that requires human cells to be destroyed with exceptions made for research
                    - He holds this statute as inconsistent with an ongoing property interest
                    - Statute law severely limits rights over excised cells -
            - What is being patented is something entirely distinct from the raw material —> it is merely incidental
                - Patented cells and products are not moore's
                    - **He claims that the cell line was a product of human invention, and that the raw line on which it was based is incidental in this cell**
                    - patent is for the composition of the cell line (expresses certain proteins), the technique to produce it, not a patent on Moore's specific genes, cells, or the substance in which they manufacture because it is a naturally occurring chemical
        - Impediment on potentially useful medical research – deterrence if all might be liable to patient from whom cell is harvested (social welfare and public interest)
            - potentially more social benefit from allowing research
            - Policy factors weigh against extension of tort- implication of future research limitations; destroys economic incentive to conduct research
                - Policy consideration weigh against it - lawsuit lottery - researchers will always be looking over their shoulder for someone to claim the banked cells
        - Grounds of action
            - So there is no way to ground the action on existing law. He goes further than other judges who have rejected novel claims, because Holmes & others have just said they do not have the authority to recognize it
                - This judge says that the California Supreme Court has the authority to create such liability but has chosen not to in this case **—> Problem best suited to leg solution**
                - This is because patents are created for invention. The cell line is something different from the underlying tissue. Even if you did have an interest, an interest alone is not enough.
                    - There was some aspect of strict liability that was brought up as well. *The majority was worried about causing a lot of problems for future researchers in a public interest way, where allowing that kind of conversion tort would put liability on any researcher that handles this (Bottom of page 57*
                    - **Policy factors are also weighed against the novel interest**
                    - The patients rights to autonomous medical decision making is considered
                        - Based on what was allegedly happening to him was not right
                        - *There is another policy factor that wasn't hindering socially useful factors like medical research. If you granted this you would possibly place medical researchers under uncertain liability and hinder research*
                    - Argues that with all of this accounted for, these claims are better left to the legislature
            - Relies on the fact that the court is allowing the claims based on informed consent and fiduciary duty to go ahead, and thus argues that it is not necessary to recognize conversion in order to serve the purpose of protecting the patients interest. Because of this, other factors like not hindering medical research should prevail in this case
            - **Should not extend conversion liability:**
                - would put liability on every person in the research industry – policy factors weigh against this liability —> Don't want to hinder medical research
                - Better left to the legislature
                - Not necessary to recognize a conversion in order to protect patient rights – informed consent enough
    - **Dissent (Mosk J)**
        - Justice Mosk dissents, saying that the job of our court as the common law is to keep up with technology and objects of value
            - Argues that destroying resources is not inconsistent with property rights
                - **Bundle of sticks:** Says that other sticks might still be in the bundle. You could still contract with other facilities to do research within your property rights.
                    - This echoes the reasoning in Yanner v. Eaton, where taking certain rights away can still mean there is property rights, so long as property is a bundle of sticks and not consisting of something specific
                    - Just because you can't take tissue home, doesn't mean property interest is completely gone – certain bundle of elements gone, but not all
        - **In Canada there is legislation that effectively prevents donors from being compensated**

- New situation —> SC job to keep up with the times, just because there is no law, doesn't mean we can't create one
- *Res Integra*- new matter for the court to consider. No cases support his position either
- Legislature not intervening doesn't preclude court from fashioning judicial remedy

- He addresses policy concerns
  - Says it would be easy to create paperwork to show consent was granted, and that it would not be a litigation lottery
  - Should be able to enter into contractual agreements —> keep a record of who owns what
    - Says that even if there is a worry about consent, there are other rights granted
- *Human dignity → we should have ownership of our own body*
  - Notes that human dignity is part of our rights, and that part of human dignity is having rights over your own body
  - Relates a lack of human dignity to things like slavery and torture
    - He says that part of our package for respect of individual autonomy and self-ownership entails that we have robust rights to all the products of our body and human tissue.
  - No major distinctions between M and cell line. M wants compensation for unauthorized use before patent, and can't deny his contributions to product
  - Fidicuiary duty not enough; fails to protect patients from commercial exploitation.
- **Irreversibility of commodification**

B Ziff, "The irreversibility of commodification

- A limited view of the role of judiciary vis-à-vis (in relation to) the legislature as another reason for courts not to recognize novel property interests
- **Property rights are characterized by irreversibility**
  - Property rights are perpetual in nature and this can fall into the hands of other people (transferable) and so different people can put interests in —> it would be unjust to just take it away so therefore rights are limited (**Numerous clausus Principle**)

Restrictions on novel property interests

- There is a strong presumption against the judicial recognition of novel property interests, particularly novel interests in land ("numerus clausus' principle")
  - **Numerous clausus principle:** Closed number of property interests (the list of property interest is closed)
- In rem vs. in personam rights
  - We give parties leeway in creating contracts interests (in personam) BUT **property rights are limited (in rem)**
- Information costs imposed on third parties as one justification for restricting the creation of novel property interests (Merrill and Smith)
  - We have a fixed set on property interests as a way of knowing what they are entitled and not entitled to

Justification for private property

- Because of justice people should ought to keep the things of their labour
  - By recognizing people's interests in things we can incentivise them to make things that they can prosper from
- Liberty type arguments
  - Can protect a sphere of decision making
- Private property and inequality issues
  - Inequality can be problematic for different reasons

New forms of property interest

- Balancing of interests
- New kind of property place burden on everyone else to know what they cannot interfere with that property rights

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PLENARY SESSION: An introduction to Law and Economics

Who is the Law & Economics movement?

- People: Ronald Coase; Richard Posner; Guido Calabresi
- Economists can solve legal problems better than lawyers can do
- Originates from the U of Chicago, 1960s

Basic Problem: effects beyond boundaries

- Problem of disputes between neighbours
  - When neighbours want to use their lands in various different ways – conflicting ways
  - General issue: the effects of property use beyond boundaries
  - Who is right and who is wrong?
- *Sturges v Bridgeman (1879) 11 CH. D. 852*
  - Baker and doctor occupying neighbouring apartments: the baker can't work if the doctor can and vice versa
    - Issue of vibration from baker and there for doctor can't hear through the stethoscope
  - Who should change/ give up something?
- *Keeble v Hickeringill (1707) 103 ENG. REP. 1127*
  - Keeble constructed and operated an elaborate duck decoy (pond with duck traps); Hickeringgill disrupted Keebles decoy by firing guns on his grounds
- *Fontaiebleau Hotel Corp. v Forty-Five Twenty-Five,* Inc. 114 SO. 2D 357 (1959
  - No American decision has been cited in which it has been held that a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor
  - Issue of hotel blocking the neighbouring pools hotel to cause them to loose business
  - Holding: **you can use your land any where you want, it doesn't matter how you use light and air**

Traditional solutions: How to deal with the basic problem

- Trespass (public/private), nuisance, prescriptive easements
- Lawyers have been unable to develop a clear and concise doctrine to deal with said basic problem
- Questionable for a number of reasons:
    - 1. Does it matter who did what first? ("coming to the nuisance" defense)
    - 2. What weight should be given to every public and private element?
    - 3. Is there a policy preference involved (e.g. quiet is valued over noise, or profit-making is valued over leisure)? – and should there be?

The Coase theorem

- States that where **there is a conflict of property rights, the involved parties can bargain or negotiate terms that are more beneficial to both parties than the outcome of any assigned property rights.** The theorem also asserts that in order for this to occur, bargaining must be costless; if there are costs associated with bargaining, such as those relating to meetings or enforcement, it affects the outcome.
    - The Coase theorem shows that where property rights are concerned, involved parties do not necessarily consider how the property rights are granted if they can trade to produce a mutually advantageous outcome. Initial property allocation will not determine who will ultimately hold the property because users bargain (assuming no transaction costs) regardless of legal rule applied. Any initial allocation of property will lead to efficient outcome of mutual benefit to the parties involved.
        - **Qualification**- Must have zero transaction costs, and clearly assigned property rules. Initial entitlement will determine final distribution, not final allocation

Key findings of Law & Economics: **Coase's 3 innovations**

- 1. Double causation
- 2. Negotiation and efficiency
- 3. Transaction costs and transaction design

Coase's 1st innovation: Double causation

- Double causation = harm doesn't just go one way, both parties are harming each other
    - In some way everyone is hurting there neighbour
- Coase sometimes writes as if he finds the whole notion of causing harm unintelligible
- Hidden (?) anti-moralism in law & economics?

A problem of geography

- Externalities can be rephrased as having the wrong boundaries – or can they?
- Land boundaries should be adapted to the activities that take place on the land
    - **Different activities require bigger or smaller boundaries**
    - Highly liable for disturbances = greater land boundaries, vice versa
- In the case of Stuges v Bridgman the situation would not have been analytically different had the dispute concerned the ownership of a piece of land lying between the two premises

Coase's 2nd innovation: The centrality of negotiation

- The parties to a dispute can reach an ideal and most efficient solution through negotiation.
    - Such negotiations are independent of legal decisions!

Example: The polluting factory vs. the neighbourhood

- 5 households live next to a smoke-belching factory. The smoke coats the houses in soot particles.
    - Cost of each house = $400,000
    - Cost of the factory = $25 million
    - Cost of "scrubbers" (industrial air pollution reduction devices) = $3 million
    - Cost of household pollution reduction measures (insulation, asthma medicine, indoors air cleaning devices, extra medical bills, etc.) = $200,000 / household
- Solutions
    - 1 response: by every house surrounding
        - The households move away: $400,000 × 5 neighbors = $2 million
    - 2 response: the factory has to shut down
        - the households spend to live with the smoke (air cleaning devices, added medical bills, better windows, more cleaning costs, etc.): $200,000 × 5 = $1 million
    - 3 response: the factory installs ways to mitigate pollution
        - Factory moves: $25 million
    - 4 response: the factory is doing nothing wrong as there is no way to do this business without pollution therefore reduction methods need to be taken and the factory needs to financial contribute to that
        - Factory installs a pollution abatement device: $3 million
- Outcome – the efficient outcome
    - Coases is saying the outcome of the case does not matter because the rational factory owner will do the most rational thing which is to approach the house owners to buy them off. The courts judgments are only for negotiation – ultimately the outcome depends on the negotiations between both parties

Coase's 3rd innovation: The concept of transaction costs

- All of the above works perfectly – in a world where transactions and bargaining itself are free and instantaneous.
    - But nothing is in fact free…
- **Transaction costs to discuss all the ways for rational negotiation**

Quaker

- The price is a price – price tag world —> Movement away from the Haggel price

Corollaries of the concept of transaction costs

- Creating price tags has a cost: both positive (the tags themselves) and opportunity cost (money lost through the lack of bargaining)
- Not having price tags also has costs: the price of training clerks, the opportunity cost of potential customers dissuaded by bargaining.
- The price of determining prices depends partly on technology.
- Transaction costs are everywhere – they are there if or if you do not have price tags

Efficient Transactions

- What is something that virtually every voluntary transaction between rational and informed parties has in common?
    - Each party values what is received more than what is given up. In other words, transactions that meet these criteria make both parties better off
    - Barring any non-consensual effects on third parties, known as **externalities**, we can say that voluntary transactions are likely to make society as a whole better off. Such transactions move entitlements from lower value uses to higher value uses.
- **Transaction costs:** the costs that have to be incurred to bring about a deal of some kind between two or more parties
    - High transaction costs are generally bad for social welfare because they prevent what would be otherwise beneficial transactions from taking place
- **Administrative Costs:** the costs to society of administering various legal rules and institutions
- **Information Costs:** costs of acquiring the information for making a particular transaction

What is not a transaction cost?

- There is an argument that asks so what is not a transaction cost? Everything seems as though there is a cost but is that true?
    - Arguably, **every aspect of society is a transaction cost**: languages, mathematics, a monetary system – seems a bit overbroad.
- A clearer definition of transaction costs has never been given by Coase.
- Is "the minimization of transaction costs" a rational goal, then?

The price of property

- **Property itself has a price: the price of registering property, guarding it, marking it with boundaries, having a system of property law and courts and police etc. etc.**
- If we know this, we also know that some things will be outside the property system: it's not worth keeping track of them.

Strategic behaviour as transaction costs

- ***Free-riding:*** pretending that you don't value an asset, so that only others will pay for it.
- ***Holdouts***: pretending that you value an asset higher than in reality, so that others will pay you more for it.

Calabresi & Melamed Liability rules vs. property rules

- Torts and contracts are **both** transactions that make property change hands.
- Contracts v Torts
    - Contracts are voluntary, torts are involuntary.
    - Contracts are facilitated by property rules
        - Describe which owns what and facilitate monetary contracts
    - torts are facilitated by liability rules
        - Facilitate compensation
- For contracts, the price is set by the parties; for torts, the "price" is set by a judge.
- Liability rules = a shortcut around high negotiation costs!
    - A judge will impose the cost – this is because of the strategic bargaining costs; its more efficient when it comes to liability to have the judge determine (to must strategic behavior for the parties to have efficient intention and therefor efficient negotiation)

Property rule v Liability Rule

- Rule 1 (property rule)
    - Pollution is a nuisance, injunction granted to residents
    - Result: no more pollution; residents will have to be bought out by factory
- Rule 2 (Liability rule)
    - Pollution is a nuisance, damages granted to residents
    - Result: pollution continues, but residents get monetary compensation
- Rule 3 (Property rule)
    - Pollution is not a nuisance, case dismissed
    - Result: Factory keeps on polluting, residents will have to buy out the factor (if they can)
- Rule 4 (Liability rule)
    - Pollution is a sort of a nuisance, which residents can stop via paying damages to the factory
    - Example: Spur Industries Inc. v Del E. Webb Dev. Co, 494 P.2d 700 (Ariz. 1972) – Sun City developments case

Containerization

- Transaction costs before this concept
    - Stealing
    - Time/ effort - A week of loading
    - Food spoiling
- Transaction costs after containerization

    - Price of making containers
    - Price of acquiring the containers
    - Price of making this a world-wide standard
- At the end what seems to be worth it
    - Containerization and bulk shipping have essentially changed the world
        - Potentially lower transaction cost in the sense that less effort

Creating an efficient market in everything

- Once you accept the 3 principles of Coase then the next step is to try and look for other places where you can create an efficient market where today you have gov intervention
    - The price of entry: make a market in immigration
    - Crime and punishment: an economic approach
    - The economics of the baby shortage

Arguments for creating markets

- Markets exist anyways – why not legalize them?
    - Hidden market – but you do have adoption fees, consulting fees, administration fees so in the end you have an informal market that is disguised
- Example: "administrative fees" and "consulting fees" in baby adoptions.
- Anti-moralism turns into anti-hypocrisy.
    - You are doing this anyway while claiming to be moralists but you do have a market (hyprocritical) so therefore just be upfront about it

Example: The economics of crime and punishment

- Crime costs money; preventing crime also costs money; punishing offenders also costs money.
- Criminal fines are more resource-efficient than incarceration…
- Efficient level of setting fines:

$$Fine = \frac{Harm\ caused}{Probability\ of\ enforcement}$$

    - E.g. if prohibited parking causes $15 in lost time and extra expenses, and illegal parking gets punished about 10% of the time, then the fine should be $150.

<u>The Law of Demand: crime</u>

- **The higher the cost of something, the less people will demand of it**. If you want to deter something, you ought to raise the price of it.
- Punitive damages, or exemplary damages, are damages intended to reform or deter the defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit. Although the purpose of punitive damages is not to compensate the plaintiff, the plaintiff will receive all or some of the punitive damages award.
- The rational criminal understands activity as costs of crime vs. benefits of crime – (Expected cost of punishment) = (punishment) * (probability of being caught)
- **Opportunity Cost**: to measure the cost of something in terms of the next best alternative

Fairness v Welfare & Justice v Efficiency

- Fairness < Welfare
- Justice < efficiency
- "Suum cuique tribuere" —> give to each what is due to them
    - "Give to each the maximum possible without taking away from others"

Surges v Bridgement

- **Facts**
    - S, a doctor, moved next door to a confectioner, B, who had produced sweets for sale in his kitchen for many years. S constructed small shed for private practice on the boundary of two properties. Loud noises from the confectioner's industrial mortars and pestles could be clearly heard, disrupting his use and enjoyment of his land and he sought an injunction. The injunction was granted by the lower court and Bridgman appealed.
- **Issue**: is mortar a nuisance?Does it matter that the noise was there for an extended period but did not cause a nuisance until recently?
- **Holding**: Appeal dismissed and injunction stays in place.
- **Analysis**
    - Coase said that the court here used very simplistic reasoning
        - The harm is not one way (i.e. the confectioner harming the doctor)
            - It is reciprocal, both harming the other from doing what they want to do
        - Which is more valuable?
            - They should have considered efficiency and who uses the land most / best, or who the land is most valuable for
                - Also who would have the highest cost of moving
                    - Transaction costs weigh into this as well
            - <u>From social welfare perspective: whichever benefits society more should prevail</u>
- **Ratio: The character of a neighborhood matters in determining whether or not an action constitutes a nuisance.**

Coase, "The problem of social cost"

- Coase Theorem – The initial property allocation will not determine who will ultimately hold the property because users bargain (assuming no transaction costs) regardless of the legal rule applied. Any initial allocation of property will lead to efficient outcome of mutual benefit to the parties involved
    - Qualification: Must have zero transaction costs, and clearly assigned property rules. Initial entitlement will determine final distribution, not final allocation
- Coase Theorem
    - Doctor's cost of moving is $500, Confectioners is $1000 – including foregone business from leaving great location

- Result in absence of the transactions
    - Confectioner would just pay between $500-$1000 to the doctor not to use his right to sue
    - Entitlements of right wont matter
- If transaction costs are more than $500
    - There would be no way for the confectioner to pay the doctor and the transaction costs without making everyone better off
    - Entitlement of rights matters here
    - If you have high transaction costs, then it matters who the courts give the right too
    - If we use Coase's approach, then information costs would be high, it would take a lot of work/information to determine who values the property more

- Property rights save on information costs, do not want to think of property as novel interests is because it adds to the information costs of finding out what people's rights are in terms of property. Hard for people to know what their duties are if novel claims exist

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PLENARY SESSION: An introduction to Property & Aboriginal Interest in Land

Royal Proclamation, 1763
Treaty Number 6
Darcy, Lindberg, "Historical Lawsuit Affirms Indigenous Laws on Par with Canada's"
Angelique Eagle Women, "Treaty relationship from an indigenous perspectives"

Opening Discussion

- We have a couple of excerpts dealing with traditional indigenous laws. These traditions were in place prior to the presence of European settles. They are not merely of historical interest, they can form part of the modern day indigenous legal systems that operate within Canada and they can also influence laws of Canada as a whole in a number of different ways

Aboriginal Peoples of Canada

- The aboriginal peoples of Canada are:
    - First nations – formerly referred to as Indians, these groups inhabited the territory that became Canada south of the artic
    - Inuit – a distinct set of arctic indigenous groups
    - Metis – a group with mixed European and first nations ancestry that emerged in the Red River settlement area in the 18th and 19th century (Constitution Act, 1982, s. 35(2))
- The special status of Aboriginal groups derives from their prior existence as self-governing communities in the territory that became Canada
- Aboriginal interests in the land have an important and ongoing significance to Canadian property law

Settlers and Aboriginal Peoples

- European assertions of sovereignty in NA
- In early settlement of NA, the British generally recognized the Indigenous groups as self-governing and as holding title to land, though this recognition was not consistent over time especially as power dynamics shifted
    - Largely due to balance of military power
    - Not entirely consistent and depended somewhat on balances of power
- Phases of Crown- Aboriginal relations in NA
    - War diplomacy & Military Alliances – early settlement period (17th and 18th Cent.)
    - Policies of assimilation (19th and 20th cent.)
        - Indian Act, etc. about placing Aboriginal peoples under control of the state
    - Recognition of self-determination (present)
        - What this means and how it is reconciled with the Canadian legal system today is a complex question
- Important Legal Instruments
    - Royal proclamation, 1763
    - Historic Treaties (Including treaty Number 6)

The doctrine of discovery

- The doctrine of discovery was a principle of international law under which a European gov. could claim sovereignty over territory by discovering the territory prior to other European sovereigns (regardless of the prior presence of Indigenous groups)
- As successor to the British Crown, the Canadian Crown's claim to sovereignty is based (partly) on discovery
- As traditionally understood at common law, discovery gave the sovereign the power to govern the territory, but id did not necessarily give the sovereign a right to possession of land already occupied by indigenous groups
- The aboriginal property interest based on groups prior occupation of land known as "Indian title" (today Aboriginal Title)
    - Aboriginal interest in land

The History of **Aboriginal Title (AT)**

- Aboriginal Tittle is not a new doctrine but rather AT has been recognized by common law courts for at least 2 centuries
    - However, AT was recognized prior to that in the colonial practices of the British in NA, in colonial statutes and in imperial legislation
- The practice of entering into land cession treaties (and private land sales) with Indigenous peoples can be traced to the early days of british settlement of new England in the 17th century
    - These practices were premised on a recognition of an indigenous legal interest in lands they occupied and controlled – though there was often an inequality of bargaining power

Royal Proclamation, 1763 (RP)

- The RP was enacted in relation to territories ceded in Britain by France and Spain through the Treaty of Paris

- Trivia: when the british established newly conquered territory, there was a rule that allowed the crown to enact legislation without it being passed by leg until a colonial leg was established
    - This is how the Royal Proclamation (RP) was enacted
- The **RP 1763 formally recognized Aboriginal property interests in part of the territory that became Canada**
- The RP also **provided that these interests could only be transferred to the Crown via a treaty** (i.e. no private sales to settlers)
- As an instrument having the force of imperial leg., the RP is part of the Constitution of Canada (to the extent no subsequently repealed)
    - Still has force of law in Canada
- **The RP set out much of the basic framework for Crown-Indigenous relations in Canada**
    - Having to sell land only to the Crown undercuts bargaining power of the indigenous peoples for land sales
- "And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds ... We do ... declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid."

Treaty 6

- Treaty 6 (1867-1878) is the historic treaty that covers the Edmonton Area
- It was entered into between Canada and the Cree and other First Nations groups
    - "And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians: ... We do, with the Advice of our Privy Council strictly enjoin and require, *that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement*: but that, if at any Time any of the *Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us,* in our Name, at some public Meeting or Assembly of the said Indians..."
    - "And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada ..."
    - "Her Majesty further agrees with Her said Indians that they, *the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada*, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government...."
    - "And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall, in every year ensuing the date hereof, at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of $5 per head yearly.
    - "It is further agreed between Her Majesty and the said Indians, that *the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say:* Four hoes for every family actually cultivating; also, two spades per family as aforesaid: one plough for every three families, as aforesaid; one harrow for every three families, as aforesaid; two scythes and one whetstone, and two hay forks and two reaping hooks, for every family as aforesaid, and also two axes; and also one cross-cut saw, one hand-saw, one pit- saw, the necessary files, one grindstone and one auger for each Band; and also for each Chief for the use of his Band, one chest of ordinary carpenter's tools; also, for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band; also for each Band four oxen, one bull and six cows; also, one boar and two sows, and one hand-mill when any Band shall raise sufficient grain therefor. All the aforesaid articles to be given once and for all for the encouragement of the practice of agriculture among the Indians."

Implication for Canadian property law

- **The reception of English property law in Canada was based on an assertion of sovereign authority over territory in which indigenous laws and governance structures already existed**
- Treaties with Indigenous groups lie at the foundation of land titles in many parts of Canada, including Alberta
- These treaties effected the surrender of the interests of prior occupants, which in principle allowed the Crown to pass on good title to settlers
- In some parts of Canada (including much of BC), historic land surrender treaties were never entered into, giving rise to ongoing claims to Aboriginal rights and title

Perspectives on treaties

- Crown indigenous relations
    - Nation to nation agreement
    - Provided for ongoing rights and obligations
    - **Treaties are to be interpreted in a liberal and contextual manner, with ambiguities resolved in favour of First nations (R v Badger)**
- Indigenous Perspectives
    - Promise of kinship and alliance
    - An ongoing relationship
    - Role of indigenous legal traditions
    - (Eagle Women, "Treaty relationships from an indigenous perspective" & Lindberg, "Historical Lawsuit Affirms Indigenous Laws on Par with Canada's")

Aboriginal law vs Indigenous law

- Sources of Canadian property law: indigenous law
- **Aboriginal Law** is the law of the Canadian state as it relates to indigenous peoples

    - It includes the Aboriginal rights and title, treaty rights, other rights protected under s. 35 of the Constitution Act, 1982 and legislation (like the Indian Act)
- **Indigenous law** is the law of particular indigenous groups
    - the law recognized and applied by a particular indigenous group, consist of both traditional customs of the group, as well as modern legislation and regulations adopted by the group
        - It includes indigenous legal traditions that often can be traced back to before contract with Europeans (but that also continue to evolve)
        - It also includes modern formal laws (including leg.) enacted by indigenous communities exercising their self-government powers

Indigenous law

- Beginning especially in the 19th cent. British and Canadian gov. attempted to displace many of the traditional governance structures of the indigenous groups
    - **The Indian act** regime displaced many of the traditional structures of indigenous peoples
        - However, indigenous legal principles were still often maintained as part of the customary practices of many indigenous communities
- There has been a renewed interest in indigenous legal traditions in recent years as a basis for reconciliation that respects the traditional values of indigenous groups (see final report of the TRC of Canada)
    - These groups may wish to apply their own laws within traditional governance
- **Indigenous legal principles can inform aboriginal law doctrines like aboriginal title (AT)**
- **Indigenous groups may also wish to apply traditional legal principles with their own modern day governance structures**
    - Examples of formal indigenous laws today
        - Band bylaws enacted under the Indian act
        - Custom first nations band election codes
        - Institutions and laws provided for self-gov. or land claims agreements
            - An example is the tillingit peace maker court
        - Land codes under the first nations land management act
        - Other institutions and laws enacted under asserted first nations authority
- Formal indigenous laws may rely on the cultural and legal traditions of the group in question
    - This includes the inclusion and establishment of institutions of self-gov, which may be preferred
- **Two ways that indigenous laws are part of the laws of Canada today**
    - 1. These groups may apply indigenous laws within their own communities
    - 2. Indigenous legal traditions can be included as part of aboriginal laws and as part of the law of the Canadian state in relation to aboriginal groups
        - The content of aboriginal law can be informed by indigenous perspectives
        - Aboriginal right to hunt can be established in part based on custom
        - These are relevant to Canadian law and doctrines such as aboriginal rights and title

Traditional Gitxsan Property Law

- Complex tenure system of property
- Chiefs occupy a significant role – trustee for each clan, each clan assigns particular use rights, strict boundary rules
- Certain actions had to take place in order for property to be gained/maintained
    - Feasts, oral traditions
    - Was a decentralized legal order
    - Rules were enforced through social sanctions
- In common law: the state recognizes property rights in our system, there are regulatory bodies, but we have also emphasized that property is embedded in social norms, we have property like interests that are only recognized informally through customs
- Questions
    - *What is meant by the claim that the thing possessed is created in the space between two legal entities?*
        - Property interests arise out of reciprocal interactions. The chief of a particular clan merge with the spirit of a particular place. We see this at the feasts, hosts of the feast and the attendees.
        - Matrimonial relationships are the basis of property
            - Relationships elsewhere in the text are also fundamental: intermarriage custom linking one clan to the next (matrilineal), exclusive interests in clan territory
    - *What is the nature of property in this context?*
        - > Many claim that Indigenous didn't have sense of property. Not true, (i) distinction between lifetime rights vs. indefinite interests did exist, (ii) land ownership and trustees; subletting services to people, (iii) boundary delineation was critical
    - *Does Gitxsan property law recognize exclusive property interests? In what way are they different from exclusive interests at common law?*
        - > There is definitely an element of exclusivity with territory protected by clans. Still, there is a difference between lifetime rights and indefinite interests that exists in those groups
        - > Restricted forms of use-rights on property that does exist, not exclusive due to embeddedness in relationships (Relationship to nature, must treat land with respect, has to nourish people the land is shared with to nourish healthy relationships between said individuals)
        - Exclusivity is fundamental to them, clan boundaries strictly defined, use of ceremonial crests
        - There are differences between common law; the chief ultimately has a property interest, but there is an expectation of providing use rights, holding feasts, indea that constraint based on relationship to nature. On the one hand, we have the idea of efficient transactions, on the other hand the buying and selling can disrupt existing relationships

R. Overstall, "Encountering the Spirit in the Land: Property in a Kinship-Based Legal Order

- Gitzsan property law
    - It should be noted as background info. That this was particularly interesting at the time of the Delgamukw case because it was brought by the Gitxsan in the names of chiefs of distant clans

- The purpose of this reading is to give a sense of the traditional legal system which can inform the content of aboriginal title and other aspects of aboriginal law, but can also serve as a basis for the comparison for the common law

- Discussion
  - In the Gitxsan, there was the **idea of life time rights** as opposed to indefinite interests. We will see that when you have a fee simple interest in land at common law, it is not just interest for your life time, it can be passed down and transferred
    - In other systems, there was more of a focus on rights that are only good for ones life time
      - Clearly property rights existed, there was a complex land tenure system
- Does Gitxsan law recognize property rights? Is all land held collectively by the nation as a whole?
  - Chiefs hold rights in land, through their daxgyet, on behalf of a wilp or house
    - It was a land tenure system in which chiefs offered a significant role, akin to that of a trustee. Each clan assigns particular use rights to members and others in their territory
  - Strict delineation of boundaries between houses
    - Really strict boundary delineation, serious consequences for lone clam members who come into the territory without permission
  - Chiefs in turn allocate rights to use particular resources to individuals or families
    - There was not a centralized Gitxsan state like we would conceptualize in western society, but **there was a series of steps and actions that had to take place in order for property to be maintained**
      - Order was maintained in different ways, there wasn't a central state with a monopoly on the use of force
        - Decentalized system
        - Order was maintained in the absence of a state. On p.94 towards the starting on the 2nd or 1st full para. The author makes an interesting claim
        - From the iterative application of these laws, a complex legal order emerges, with a "deep and sustainable culture" that "stands in contrast to that of the dominant culture in Canada today"
          - So the author claims that one can contrast the decentralized nature of the Gitxsan legal order with the centralized Canadian property system that exists today
          - This is exaggerated to some extent. There is certainly something to it, it is a valid claim and is true to a great degree. To a large degree, the state recognizes and enforces property rights in our system and there is a sense of regulatory bodies that use complex rules. Another thing we have emphasized is that property rules are embedded going forward.
            - We have property-like interests, such as bedroom in a house. We have interests that are only recognized informally through customs
            - Therefore, this is an interesting form of comparison, but one wouldn't want to take this to far
- Slide notes
  - "From the iterative application of these laws, a complex legal order emerges, able to function with no central government of other authority yet supporting a deep and sustainable culture. Such a society stands in contrast to that of the dominant culture in Canada today"
  - "We have seen that, for the Gitxsan and their neighbours, the idea of "property" arises only out of reciprocal interaction. The thing possessed is created in the space between two legal entities. It relies on inclusivity. ... In contrast, the concept of property in Western legal systems appears to have at its core the monopolistic barring of others from the thing possessed. The thing possessed is owned by one legal entity. It relies on exclusivity."

The Doctrine of tenure reception & Classification of interest

Historical foundations of English property law - Quick Summary

- Hierarchical relationship between lords and tenants —> feudal relationship
  - Vassal would owe certain obligations to the lord —> feudal system not just about land but as well about social, political, economic relationships and structures
- Feudal tenure included **escheat** which meant if a tenancy came to an end, the land was returned to the lord (primary way of coming to an end was tennant died without heir)
  - **Occurred in two situations:1)** tenant died without heir or **2)** where tenant was obtained for felony
  - The tenants estate having come to an end, the lord is by his own right
- In England, there was only ever one person at the top of the Feudal hierarchy - THE CROWN
- **Doctrine of Tenures**
  - Following the chaos of the Dark Ages, security could no longer be found in the state. Individuals thus turned to the strongest fellows, the lord, and put his most sacred possession, land, in his care. England land law began in 1066 with the Battle of the Hastings (Norman scheme of law; William stood on top of landholding scheme). The doctrine of tenures emerged in English law as part of feudalism.
    - A "tenant" held title "of" a lord and would have certain rights and powers in relation to the land and would owe certain obligations to the lord
      - Although initially land was only given to the 'lord', land devolved downwards in exchange for services. Relationships became more complex with **subinfeudation**, where many lords and tenants could be involved, further fragmenting the land. System became so universal it led to consolidation of the law into a systematic whole. Eventually, complexity led to anti-commons problem, and it became impossible to tell who owed obligation and to whom they owed
        - 1290 - Quia emptores passed
          - This abolished subinfeudation and provided that all future designations of land are made by substitution. This prevented fragmentation of the land and prevented the feudal system from expanding
  - As English property law modernized, the structure of tenure became simpler and more standardized (only one lord of whom all land is held: the Queen)
- Key shift came with statute of ***Quia emptores***

- You could only transfer land through substitution (sell or give your interest to someone else, who would then enter where you are in the hierarchy)
  - No longer needed the permission of the lord above you to sell the land
  - part of move towards liberalism and capitalism and away from feudal structures

Detailed Summary

- *We look at where the idea of tenures comes from and what it means in etymological sense*
  - *Emerged out of feudalism – tenure (holding) land of someone else*
  - *There is the idea of the tenant - it comes from the french wording for holding*
    - *With this idea of holding you get hierarchical relationship in relation to the land with obligations in theory going both ways.* ***If you hold land of a particular lord, you would owe that lord certain obligations***
    - *Developed over time as parties sought protection*
      - *It's important to point out that it was not always this simple. Over time, you had these nested relationships that got far more complicated and this shows the nested nature of property rights*
        - *You see that through this process of* ***sub-infeudation,*** *rather than substituting a particular party or simply transferring the land outright, you could grant an interest to someone below you in the hierarchy with obligations to you. This sort of thing would take place over time*
- ***Developed in England***
  - *This takes us to an interesting point about how feudalism developed in England. In England, unlike in continental Europe,* ***there was only ever one person who was at the top of the hierarchy*** *and who was premised to have granted all of the interests below him in the hierarchy of English feudalism.*
    - *King*
      - *There was a presumption that the* ***King at one point owned all of the land in England****. We see in the excerpt this description that land tenure was not always feudal in nature, and that it eventually developed when someone from Continental Europe came to England. The Norman Conquest in 1886 is an important turning point in land law. When William the Conqueror conquered England, he confiscated large tracts of land from landowners who hadn't been loyal to him and re-granted these to his own lords. It wasn't the case that all of the land in the country was confiscated.*
        - ***The doctrine of tenures came to mean that all land in England was at some point granted by the kind and that the king was at the top of the hierarchy***
        - *The king benefited from certain kinds of tenure:*
          - *Military tenure*
          - *Escheat – in the absence of heirs, the land interest would revert to the kind*
            - *Escheat is the only remnant of feudalism that remains today*
  - *Another important point is that these nobles in the hierarchy did not just get what we would describe today as a property interest, they got other kinds of power that we would typically associate more with government than with private land owners*
    - *This was most acute in the case of manorial interests outside of feudal hierarchy. The lord of the manor had significant power and discretion to grant subsidiary interests, which meant granting interests to peasants in the area to work the land, impose obligations on them including quite onerous obligations of labor. The freedom of tenants was constrained, but the Lord of the manor also had the power to establish a court to deal with disputes in his land, which is something that did not just apply to manorial interests. Even further up the hierarchy, feudal lords could establish court to deal with land disputes over land where they were the Lord.*
      - *We have the idea here of a fusion between property and sovereignty, and this idea is important to feudal land tenure.* ***The nobles in the hierarchy didn't just acquire property rights, they also acquired delegated sovereignty from the king that was an incident of land tenure***
        - *This included the power to govern those who lived within the bounds of their land, and occurred most acutely in the case of manorial interests, which were interest held by peasants under the lords of the manor*
  - ***Feudalism does not persist to the present day****. There was shift away from feudalism towards our modern system of land tenure.*
    - *One of the really key shifts come from the Statues by Quia Emptores (1290) – p.104;*
      - *Quia Emptores: So what did the statute do and how did it alter land tenure in England?*
        - *Land could be transferred in principle by subbing someone else for you place in the hierarchy*
          - *There is another way of transferring interests, which the statute prohibited. Creating new interests below you: that's how we ended up with the situation seven different nobles each with their own obligations owed to them****. Through sub infeudation, creating new obligations below you, that was prohibited by the statute Quia Emptores***
            - *There was still a nested relationship of nobles, but it was not allowed to get more complicated from then on.*
      - *Around the same time, there was a recognition that it was unclear beforehand whether substitution, required permission of the lord above you in the hierarchy and around this time it was clarified* ***that permission for substitution wasn't needed and substitution became the default mechanism of transferring land. Interests were presumed to be freely alienable.***
    - *More and more, this got to a situation where parties owned land directly of the king. Layers of feudal relationships no longer existed to the same extent. More likely to have one owner per parcel of land*
      - *With all of these obligations of land interests owed to feudal lords, the confusion of what you were getting was more uncertain, you had to do some investigation to figure out what you were allowed to do and what you owe in exchange for being in the hierarchy (information costs?)*
      - *When you have more standardized interests, one owner per parcel of land, it becomes easier and easier for land to be bought and sold. This is part of the rise of capitalism, fuels the tendency to view land more as a commodity, making it easier to unlock the value in a parcel of land for the purpose of raising capital or to sell land to an investor that may have a more valuable use in the land*
        - *Went along with the simplification with hierarchical implications that existed in relation to a parcel of land*
  - *With feudal duties diminished, it became easier for the king to rely on taxation as a basis for raising armies, as opposed to wanting people to provide work or knights*

        - *So, relationships of tenure came to be more and more simplified and indeed the financial elements of these relationships were overtime replaced by taxation.* ***The incidents of tenure, or most incidents of tenure, were abolished in 1660 with one majorly important exception:***
            - *Escheat remained an incident of tenure*
    - *The final nail in the coffin of feudalism didn't come in England until* ***Law of Property act 1922****, where copyhold tenure which evolved out of manorial tenure was abolished. All property interests were held by the king and held in standardized forms, both forms that were dictated by hierarchical relationships*
        - *The final tend to be mentioned, the fusion of sovereignty in property (the idea of property holders as exercising delegated sovereign powers) is something that with moves away from feudalism was no longer present*
        - *We draw a distinction now between property and sovereignty*
        - *Monarchs came to rely more and more on taxation as opposed to feudal obligation, and taxation required the permission of parliament*
            - *Manorial courts were replaced by the kings court*
            - *No longer did you have local lords running own court according to their own system of law*
            - *That is where common law comes from, the law applied in kings court that was common to the entire kingdom, not local customary law applied by local lords in manorial court*
    - *So now we have the idea that the King and Parliament are the sole sources of sovereign authority and that sovereign authority wasn't automatically delegated on the basis of landholding*
        - *They would still delegate like local judges, but these weren't parties that were instigating sovereign tenure on the basis of landholdings*

Modern legacy of feudalism in the common law of property

- The legacy of feudalism is the doctrine of tenure, specifically the title of section (the big one conceptually)
    - **We still maintain this formally, this idea that all land interests are formally held by the Queen**
    - The greatest interest you can have in land in common law in Canada or England is the ***fee simple***
        - it is essentially the same thing as ownership —>It is a perpetual, exclusive, possessory interest in land
        - in formal terms, **if you hold a *fee simple* interest you hold land of the Queen**, the crown had the underlying title, and all private interests in land are taken to be derived from grants form the Crown,
            - This is true even in England where some land interests actually can be traced to before the Norman conquest
            - Greatest interest you can have in land is fee simple - essentially the same thing as ownership but in formal terms if you hold a fee simple interest you hold land of the crown, all land derive in grants from the sovereign
        - This position gets complicated when we talk about Aboriginal title, an interest tracing back to before the crown asserted sovereignty. This title, as a matter of historical fact, could not be based on grants from the monarch.
            - One of the unique aspects of Aboriginal title as compared with any other interest in land in Canada, which can be traced to either explicit or implicit grants from the sovereign
    - In practical terms the main way that the doctrine of tenures is legally relevant today is in ***escheat*****.**
        - ***Escheat* is the idea where when a landowner dies without an heir, the land reverts to the Lord above you in the hierarchy of tenures.**
        - In Canada and England there is only one such lord left, the queen. So more precisely in Alberta if you die without heirs, the land would revert to the Queen in right of Alberta, which is effectively the provincial government
            - This is how it is formally conceptualized, that the land is held of the queen, that if there is a case where someone dies without heir it reverts up the hierarchy. **Only one layer in the hierarchy now, the queen is at the top of it**

- **Fee-simple interest** – interest in land
    - **Most comprehensive form of property interest that a person can have in land**
        - right to exclusive use of possession (right to exclude, right to use property);
        - right to sell and buy;
        - technically crown has some interest in land (tenure system) – doctrine of escheat
            - not quite absolute ownership, but as close as you get

P. Butt, Land Law

- ***See CB 96***

Reception of English Law

- **English property law was received into every province and territory in Canada except Quebec. English statute and common law was received as it existed on the date of reception for a jurisdiction (1870 in Alberta).**
    - However, a law may be held not to have been received where it was not "applicable to the circumstances of the colony" *(Instrumental: We receive laws when absence of adoption creates uncertainty- if statutes aren't in place to rectify common law, inadequate common law will prevail AND Normative: English law is epitome of justice and is repository of centuries of wisdom, so to not accept them is taking a step backwards)*
    - Courts have rarely found English laws to be inapplicable to the circumstances of Canadian provinces (Ziff, "Warm Reception")
        - One example of an inapplicable law relates to the ownership of the beds of navigable rivers (*R v Nikal*)
- Basic position is that upon settlement, British Sovereignty supplants all other sovereignty. This did not obliterate existing property rights. Existing aboriginal property rights are amenable to reconcile this law.

B,Ziff "Warm Reception in a Cold Climate: English Property Law and the Suppression of the Canadian Legal identity"

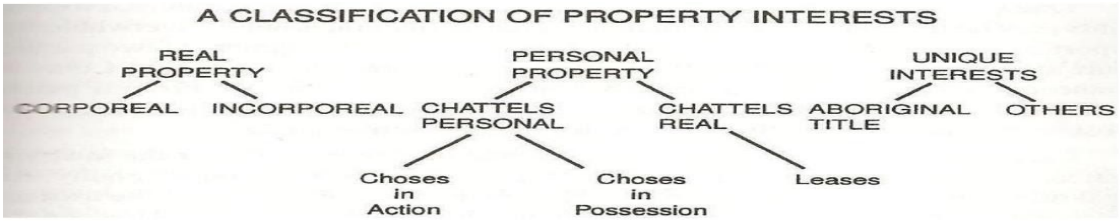
The reception of English Property law

- English law was received in common law provinces in dates that are either set in legislation or where a legislature first established (Date of reception)

- Of course, the idea of wholesale acceptance of english law ignores indigenous systems, however, the reception of english law is the basis of much of our property law today

- **Date of reception**
  - **In Alberta 1870**
- Exception to reception:
  - Local conditions - This exception based on applicability of which geographic features can be one element
    - The idea that some English laws could be held by courts to be inapplicable in a particular Canadian jurisdiction on the basis that they were not suited to local conditions. These conditions could be geographic, social or economic in principle
      - In theory this was a potentially broad exception, in practice it wasn't
- **English law was usually found to apply, but in some areas it would have no relevance**
  - An example of this is English law in relation to copyhold tenure (land interest held under local lord) not relevant whether that applies in Canada because we never had manorial interests in Canada outside of Quebec. For landholding in early centuries of the colony of new France actually was feudal in nature and there was a transition away from feudalism In Quebec in ways that are somewhat analogous to move away from feudalism in Canada (England?)
    - In terms of common law, some would have no relevance but where it could apply it usually was found to apply
- Why do we think it was the case that Canadian courts tended to find English property law applicable to Canadian jurisdiction? A number of factors...
  - **Admin cost, ease and convenience law** so in the books you can simply pick up and apply, there are people in Canada, lawyers who are trained in effectively English law, what Canadian legal education was in the early days of Canadian common law jurisdictions you simply learned English law. Elites in these colonies are familiar with English law, why reinvent the wheel. Anything else/ they talked about specifics or lawyers that change was risky and that it was better to know the law that you have and potential problems than try to reinvent the law
  - This idea that there might be **unintended consequences that existed if you changed the laws** because of the fact that English laws were interconnected. Rules of property were linked to laws of contract, linked to laws of torts, changing one area might have ripple effects.
  - There was a **belief in the English common law as repository of wisdom** developed over centuries and that we shouldn't mess with it
  - Belief in English law among colonial elites, lawyer, and judges that **it was fundamentally sound** and that even if a particular rule didn't seem like it ought to apply or we no longer understood the justification, we should apply them anyways. Conservative approach to reception.
  - Another point relates to **legal certainty.** This is the idea of upholding expectations. If you have the discretionary party on the part of judges to find English rules inapplicable, you might create uncertainty as to what particularly the nature of those interests was. This concern can be particularly acute in property interests where reliance can be placed in purchasing interests, etc.
  - **The exception exists**, you see some discussion of examples where laws were and were not found to apply, these mostly rely on knowledge you don't have yet on understanding doctrinal details. One example, or a few relate to the idea. Of future interests that won't vest for a long period of time, there were complex rules in English law dealing with these, including a rule against perpetuities.
    - This rule was found to be received in Canada even though the justification didn't exist to the same degree
  - What English courts were concerned about with future interests, was the aspect of nobility trying to keep land in family. The rules existed because they wanted to put limits on family to keep land in the family
  - **Mostly found to be applicable in Canada even though we didn't have feudal hierarchy**
    - English land law was received almost down the line with relatively few exceptions.

R. Chambers, An Introduction to property law in Australia



Classification of Property interests

- Real v Personal
  - Distinction is based on the nature of the right
  - ***Real property (immovable - right to land and things attached to land)***
    - Holder of the right could **bring a real action to recover land** from someone who was wrongly in possession of it
    - **Corporeal:** possessory rights now refers to estates (fee simples, life estates, etc)
    - **Incorporeal:** right to use (includes easements (non-possessory right to use or enter onto real property), non-possessory right of way like allowing cattle to move over land)
  - ***Personal property (moveable - rights to any other possession)***
    - No action available to recover the thing itself —>instead, holder of a personal property right had a **personal action to be compensated for the loss** caused by the person who wrongly interfered with that right
    - **Chattels personal**: 1) ***"choses in possession"*** right to possession of goods (moveable, tangible items capable of being moved into possession) and 2) "***choses in action***" personal property right to an intangible thing (intangible personal property; only enforced in legal action. Includes IOU; debt is legal action if not repaid, not the paper)
      - *Choses in action* survives the death of the piece of paper. Also includes intellectual property rights
    - **Chattels real**: lease of land- Lease used to be just a contract. Right didn't use to run with property, so new owner wouldn't be bound by old lease
- Legal v Equitable
  - **Legal interest:** Rights enforced in the courts of King's Bench and Common Please were called *legal rights*.
    - crown as fountain of justice, but which could grant right to court of equity
  - **Equitable interest:** A separate body of law, called equity, was administered by the Court of Chancery —> rights enforced in the Chancery, but not in common law courts, are called *equitable rights*

        - binding rules established by courts of equity where common law came up short to provide special remedies. More flexible rules came into play to fix imperfections of common law
        - Rules of equity were created to fill gaps in the common law and correct perceived injustices.
    - *Judicature Act 1873* merged the above court into a single high court of justice —> administered common law and equity as separate bodies of law
        - Separate categories of legal and equitable property rights continue to exist even though the court structure which created them does not
    - **Two main differences between *legal rights* and *equitable rights***
        - 1. Most equitable property rights can be created with less formality than the comparable legal property rights
        - 2. Equitable property rights tend to be less durable than legal property rights and are more easily extinguished by competing property rights to the same thing
- Tangible vs Intangible
    - Distinction depends on whether the property right entails the holder to possession of the thing involved
    - ***Tangible property rights*** include the right to possession of something
    - ***Intangible property rights*** do not include the right to possession of something
- In rem v in personam
    - **In rem** is the idea that it is a right that applies to an indefinite class of people; a right available against persons indefinitely (ex. Property rights)
        - *(individual against everyone, essentially)*
    - **In personam** A right in personam is available only against a determinate person or persons, corresponds to a duty imposed on determinate individuals.
        - *(between defined individual parties; not usually property rights)*
- **EXAMPLES:** Classification the following
    - A debt – personal, legal, intangible, in personam
    - A piece of paper saying A owes debt to B – personal, depends on what it is (legal v equitable), tangible, in personam
    - A contract under which A agrees to provide banjo lessons to B – personal, intangible (cant physical possess a contract right); in personam
    - A copyright in a song – personal, neither legal or equitable (Statutory), intangible; in rem
    - A fee simple interest in a farm – real, legal, corporeal (right to possession), in rem
    - The interest of a beneficiary of a trust in a far- purely equitable interest, corporeal
        - Real actions were actions in court of law

Property Creating Events

- The rights which people bears, whether in personam or in rem, derive from the following events: **wrongs, consent, unjust enrichment, and others**
    - Most property rights are **created by consent** —> For example, sale of goods, a bequest in a will, or a grant of a mortgage
    - Property rights can also be **created by wrongdoing** —> For example, an employer may have a property right to any bribes received by her or his employees.
    - Property rights c**reated by unjust enrichment —>** such as the right to recover land or goods transferred by mistake.

Property

- **Trust** (Type of equity)
    - Settle (convey property)
        - **Trustee** (who has the duty to hold the property for some other person, group or thing)
            - **Beneficiaries** (receivers)
            - Obligation of the trustee to hold it
                - Purely the work of equity
- Where do **aboriginal rights** fit within this structure?
    - **Pre-existing aboriginal rights may survive and can and are recognized by Canadian courts**
        - SCC describes their **rights as sui generis** – a thing of their own – these rights are so different that we can't assume our rights apply against aboriginal claims

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Protections for Property I & II & III

General Notes

- There are concerns about the government taking away property from individuals

B.Ziff, "Taking Liberties: Protections for private property in Canada"

- Many share the view that Canadian law should include an entrenched constitutional protection for property
    - Simply, where property is otherwise validly expropriated by the government, the Constitution mandates that compensation be paid (in the US)
    - **There is no purpose-built protection for property in the Charter, but it still affects property rights**
        - Protects against unreasonable search and seizure
        - Freedom of expression has been used to undo regulations affecting commercial advertising (including things like broadcasting, etc.)
        - Equality under law can be used to attack discriminatory property entitlements
- **Section 1** of the charter provides that rights conferred are subject to limitations as can be demonstrably justified in a free and democratic society
- **Charter imposes restriction on the regulations of public property**
    - Ability to exercise free speech can be costly, so access to public arenas of protest is often essential (freedom of expression)
- **Constitution provides protections against state interferences with Aboriginal rights**
    - *Delgamuukw v British Columbia* (1997) is very important Aboriginal land right case
- ***Canadian Bill of Rights (1960)*** most prominently relates to property rights today
    - **Recognizes a right to the enjoyment of property and the right not to be deprived thereof except by due process of law**
    - Applies only at the federal level, but many provinces have similar legislation

        - E.g. ***Alberta Personal Property Bill of Rights***
- **Each of the non-entrenched protections may be over-ridden by express legislation action**
- ***Authorson v Canada(2003)*** – breach of fiduciary duty;
    - **Facts:** Federal government holding veteran's assets, sitting stagnant. Veteran in Authorson sued them on behalf of veterans as a whole, arguing that the federal gov't has a fiduciary responsibility to act in best interest of individuals whose assets you are managing. Federal gov't had passed a statute stating they are not liable in these instances. Court of Appeal ruled gov't was within their rights. Plaintiff's used CBR stating that all other federal statutes must recognize right to not be deprived without specific exemption/clarity; state that Canada is ignoring their right to a property interest without due process in law.
    - **Decision:** Argument failed because the SCC stated that the due process distinction only applies to determination made under particular law and facts
    - **Reasoning:** Veterans were precluded by statute from suing Canada for the poor administration of pension and disability (basically the government messed up their investments). SCC found that the **bill of rights** did not work when clear and proper language was used to create the statute, even if it involved expropriation, i.e. no procedure for individual cases contained in the federal statute. Since everyone was denied the rights, there was no process, so there is no due process that must be followed
    - Notes:
        - In *Authorson* the SSC held that the bill guaranteed a right to a hearing if and only if an individualized determination of whether a rule is applicable must be made in judicial or quasi-judicial proceedings
            - Essentially, a statute that provides for wholesale confiscation – with no exception and absolutely no procedure – is unassailable as a denial of due process
            - Court held that due process guarantee only protects if something (tribunal or something) set up to ensure procedural fairness; parliament is not required to do due process
            - Very narrow reading – SCC reluctant to restrict the power of the federal gov to take property
- **The due process protection does not apply to the application of a law once enacted**
- **There are statutory schemes across Canada to provide compensation for the expropriation of land**
    - Spirit of the legislation is consistent: if land is acquired by the state, the erstwhile **private owner is compensated accordingly**
    - Possible for property may be acquired through less direct means
        - Ex) excessive regulation must be seen equivalent to confiscation
        - Indirect taking such as this often called ***de facto* or constructive expropriation**
- **De facto or constructive expropriation**
    - **Determining if state interference is worthy of compensation often involve case-specific inquiry**
    - Imposition of regulations that have the effect of draining away the full economic benefit of a property holding is per se taking
        - ***Lucas v South Carolina Coastal Council*** is the standard-bearer for that position
            - Case involves building restrictions on environmentally sensitive coastal lands
            - US SC held that when the owner of real property is required to sacrifice all economically beneficial uses in the name of the common good, the result of which is "To leave that property economically idle, a compensable taking has occurred
                - Protections found in the US justified primarily on the ground of fairness. However, it is also an incentive for governments to act prudently and the promise of compensation provides insurance to property owners
        - ***Mariner Real Estate Ltd. v Nova Scotia (Attorney General)*** – concerned legislation aimed at protection for ocean beaches; Mariner complained that the stringent regulation on development had effect of eliminating economic value of property; argument that this alone could stand as expropriation was accepted at trial, but rejected on appeal
- What sort of limits exist on the contents of government actions? **Restrictions set out in the constitution on what government can do in relation to property**

Protections on Property interests

- **Basic Division of power (*Constitution Act, 1867, s.91, s.92*): important in protecting private property of Canada**
    - **S. 92(13)**: **jurisdiction over property is given to provinces**. We rely on provincial statutes to tell us the story, but there is also common law that stitches the law together from across the provinces
    - **S. 91(2):** Federal government had trade and commerce- power to raise taxes, patents, current, trademarks, copyright, property crimes, Indians and their land
    - **S. 35:** affirms aboriginal rights, including land rights due to the strong connection between aboriginal culture and land. Expropriation of aboriginal lands is not possible; can regulate or infringe but not expropriate
        - Property rights that are protected against unjustified infringement by legislation
    - **Some things only federal government can do, some things only provincial government can do**
- **No constitutionally entrenched protections for private property in Canada; but statutory protections**
- ***Canadian Charter of rights and freedom***
    - Amongst modern entrenched bill of rights, ours is the only which does not explicitly protect property rights
    - Is the Charter really silent on protections?
        - s. 8: right to be secure from unreasonable search and seizure
        - s. 7: life, liberty and security of persons not to be deprived of except in interest of fundamental justice (arguably doesn't include economic interests)
        - s. 15: equality guarantee- can be used to protect property interests when attacked in discriminatory way
    - Many provinces viewed entrenchment as restricting ability to control laws. Property protected in other documents.
- ***"Due Process" Protections***
    - Key to this protection is due to process of law —> Essentially means fairness of law
    - ***Canadian Bill of Rights*** – ordinary statute providing various protections for various purposes
        - *S1(a)* most applicable today – applicable to property (right to enjoyment of property)
        - Operates as an interpretive presumption —> should be interpreted unless some other statute said otherwise
            - If a statute operates notwithstanding ***Canadian Bill of Rights*,** that statute trumps it
        - Difenbaker, 1960. Still in law. Says "the following human rights and fundamental freedoms, namely...enjoyment to property, and the right not to be deprived thereof except by due process of law." **This is not entrenched, so it can be overridden by any statute.**

Proven to be very ineffective in dealing with property rights. (See interpretation in Authorson v. Canada (Attorney General), 2003 SCC 39)
- If a government action arbitrarily takes rights away, a court can see this and rule to stop the infringement given section (2)
- Ordinary statutes can abrogate rights IF stated as exception to Canadian Bill of Rights or made crystal clear
- Furthermore, provincial legislation takes top priority over the CBR

- ***Alberta Bill of Rights*** only protects tangible items in personal property and they are protected by compensation
  - comparable to Canadian Bill of rights; also unentrenched so remains open to statutory body. Same language as federal counterpart, and thus just as toothless
  - Alberta Bill of Rights: ...right to enjoyment of property and the right not to be deprived thereof except by due process of law (does not guarantee the right to property, just that if property is taken away it will be done so by due process of law)

- ***Compensation Requirements***
  - ***Expropriation Act* (interests in land):** provisions are of no force or effect if property is owned by someone other than Crown and a provincial enactment specifies it is taken, UNLESS act of legislature expressly declares that the enactment operates notwithstanding this Act- just add "this bill does not apply" and its overridden.
    - it also applies only to personal property (tangible goods, capable of being physicall touched, seen, or moved) and not to land
    - they replicate a common law interpretive assumption that already existed. Common law courts already apply a fairly strong interpretive presumption that unless the legislature affirmed that they were taking the property, legislation would not be assumed to have that effect.
  - ***AB Personal Property Bill of Rights* (tangible personal property):** must follow certain procedures when taking land and compensation is to be paid; usually deal where land is needed for some public purpose (can be overwritten by legislation)
    - this Bill of Rights imposes a political limitation, not a substantive one. It forces the government to admit they are taking someone's property and paying no compensation
  - ABPPBofR and the Canadian Bill of Rights do not prevent takings, however, and provide minimal protection.
- **Compensation more important than protection**
  - **Except in emergencies, property can only be taken by the government pursuant to a legislative authorization. At common law, legislation is presumed not to take property without compensation (though this presumption can be rebutted with clear language).**
  - Holds government accountable
    - They'll have to look at costs relating to property and weigh it with the benefit to public
      - Is this good? Kind of incentive arc
      - Does government seeking out lower cost opportunities increase disparity or unfairness for lower income areas/people
      - We should be clear as to how gov respond to incentives
  - Moral/natural rights argument to property
    - E.g family home, etc.
  - Want to avoid disproportionate costs being born by certain people
    - E.g. if a new highly needs to go in, is it fair for the people whose land it will go through to lose that land and therefore have to pay a disproportionate share by forfeiting their interest without compensation
  - So, **compensation requirement serves as sort of an insurance component**
  - Don't want to restrict the gov too much though – they might not act in the public interest as well if they are unduly restricted
    - If we're restricting formal takings of property, as it seems fair that we should regulate economic takings away(to some extent)(
- **Expropriation –** taking away of private property by public body
  - Wealthy/powerful individuals/companies are more likely to successfully lobby, etc. and are thus often more protected through political channels than lower-income peoples/smaller companies, so these individuals/group need protection through legal channels

Protections for property
- Hierarchy of legal authorities
  - 1.Constitution
  - 2. Statute
  - 3. Common law

Common Law Protections for property

The common law backdrop for government takings
- Before you get to any statutes or constitutional provisions, it is important to have a sense of Common law backdrop
  - A starting point is **that property, except in emergencies, cannot be taken except pursuant to a legislative authorization**
    - Every **exercise of government authority has to either be authorized by statute or derived by royal prerogative** (Executive authority that the crown holds inherently)
      - Royal prerogative has been recognized to have a very limited power to take property in the absence of leg.
        - Taking property for the defense of the realm in emergencies
          - Case law in this area is limited, but it tends to involve situations of war, where the royal prerogative can grant a power to take property for a limited period of time
            - *A.G. v De Keyser's Royal Hotel*
            - De Keyser hotel was forcefully occupied during the war to house soldiers. The soldiers inevitably damaged the property and the owners are seeking compensation. Crown says it was an exercise of the royal prerogative and that no compensation is due.
              - Lord Atkinson: neither the pubic safety nor the defense of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from a subject.
              - **Rule of construction**: unless the words of the statute so clearly demand, a statute is not to be construed so as to take away the property of a subject without compensation

- **Usually only the leg. has the power to take property,** which can then be delegated to a branch of the executive, a municipality, an administrative agency, etc.

- **State interference with private property must generally be legally authorized by statute** – see entick v Carrington
  - **Legislation is presumed not to take property without compensation** (though this presumption can be rebutted with clear language)
    - "unless the words of a statute so demand, a statute is not to be construed so as to take away property of a subject without compensation
  - Interpretive presumption: **the taking of the property has to be derived from leg authorization** – leg authorization on a property interest though government regulation
    - The legislature will be presumed not to be allowed to take property without legislation.

Statutory Protections of Property

- In our constitutional structure, legislatures can enact statutory protections for property rights

Statutory provisions

- There are **two types of statutory provisions** that can be enacted to protect property
  - **1. Due process requirement**
  - **2. Compensation requirement**

- **(1) Due Process Requirement**
  - **Due process of law:** a procedural requirement not a substantive requirement (doesn't restrict the government from doing something but provides a process for doing it)
  - Example of this
    - *Canadian bill of rights*
    - *Alberta bill of rights*
  - But see restrictive interpretation in *Authorson v Canada*
    - **They provide that property is protected and that people should not be deprived of it except by due process of law**
      - Authorson case is an interpretation of this. A clear blanket taking away of property didn't work, because due process is not the legislature
  - **Exemption: Does not apply where clear leg. Says no due process is required/applies**

Canadian Bill of rights

- **In theory, the Canadian bill of rights acts as an interpretive rule in relation to any other/subsequent act of parliament/ statute, other statutes aren't to be interpreted so as to infringe the Bill of Rights**
  - **Section 2 – "all statutes should be interpreted to be consistent with the protections laid out in the bill of rights" & "every law in Canada unless expressly declared by an act of parliament" is bound by the bill of rights"**
    - An interpreter rule in relation to every other statute
    - In principal, if some other act of parliament were to deprive someone of these rights, a court could say we have the *Canadian Bill of Rights* and it says that other statutes should be interpreted to infringe in the *Canadian Bill of Rights*
    - **Bill of Rights does not apply if another statute expressively says it is enacted notwithstanding the Bill**
      - What this means, however, is that if a subsequent act of parliament does say this operates not-withstanding the Canadian bill of rights or is crystal clear in what it is doing in infringing on rights in question, that can trump the bill of rights
        - Unlike a constitutional protection that an ordinary statute cant abrogate, this can be cast aside
          - Provincial statutes not bound by the bill of rights
  - **A blanket indemnity would violate a person's right to property and right not to be deprived thereof except by due process of law**
    - This argument does not work because due process does not apply to parliament's action
      - The decision is the decision to pass this law, the SCC says this is not within the scope of due process requirement
      - Implication: for any statute that takes property away is going to be legal as it is unreviewable. Canadian Bill of Rights does not protect against this, it only protects from due process and this is not applicable to the act of legislating
- Weakness in the protection of rights set out
  - Federal leg
    - As an ordinary act of federal parliament, it cannot take precedence over provincial leg in provincial areas of jurisdiction
    - It is actually still enforced. The leg is from 1960 but was never repealed. Relevance has been sharply diminished by the charter. Most rights set out by the bill of rights subsequently set out in the charter.
    - If you were to challenge government actions you probably wouldn't frame it under bill of rights, you would frame it as being under more robust protections of the constitution act 1982 and that has actually been given far more robust interpretation

Alberta Bill of rights

- Very similar wording, analogues to the Canadian Bill of rights
  - Has been interpreted in like ways
- Alberta Bill of Rights: …right to enjoyment of property and the right not to be deprived thereof except by due process of law (does not guarantee the right to property, just that if property is taken away it will be done so by due process of law)

- **(2). Compensation requirement**
  - *Expropriation Act (*interest in land)
    - Different kinds of authorities (public) are specifically authorized to take away property rights and the above act allows for that to happen
      - Expropriation in Alberta and all other provinces provides that where an interest in land is taken by the gov, **compensation will be provided**
    - Ex) Expropriation Act Alberta

- *Alberta personal property bill* extends this type of protection to certain kinds of **tangible personal property** along with the requirement of compensation (except where comp is excluded on the basis of exception list)

Expropriation Act, ss.1 (g), 2(1), 3, 42(1)

- Defined to mean **the taking of land without consent of owner**
  - Deals with interests in land and essentially every province has one
- **Requirement for compensation when there is a legislative taking**
- Unambiguous subsequent legislation that says it is taking the property without compensation is not applicable to this act
  - **It's clear that when government does take property that a compensation process will apply.**
- The context under which we will consider the broader protections of if this should exist and under what circumstances
- To a significant degree, these statutes replicate common law interpretation that already existed
  - They already apply a fairly strong interpretative approach that says that legislation would be interpreted not to have the effect of taking property without compensation. If it was going to do that it had to state that intention clearly
  - Expropriating authority applies to all public authorities under provincial jurisdiction, including public bodies like municipalities
  - It's true that this legislation couldn't interfere with the legislature setting out clearly to take property without compensation, but all legislative bodies municipally are subject to provincial authority

Alberta Personal Property Bill of rights

- Provincial statute
- Relates to different types of property – **restricted to personal property** and does not apply to other types of property
  - Things that can be physically possessed
- Reason for the bill is to extend protection from interests other than land
- **Compensation if the crown is taking title to your tangible goods**
- **What type of rights does it protect?**
  - **Tangible Personal Property.** Crystal clear
  - Included that no interest in land can be interpreted
    - This definition makes it crystal clear that no interest in land, whether it would have historically been a real right or not, is not included
  - No incorporeal rights
    - Only tangible personal property that is capable of being physically touched, seen or moved. Only talking about physical goods here.
- What type of protection does it provide?
  - **Section 2** is the meat of the act. **Personal property is owned by a person other than the crown**
    - **Requirement for compensation.** When this was enacted, the expropriation act was already in place. Every province and the federal government have expropriation acts that require that where the government takes title to land that a compensatory status should be protected
    - **Sets up a compensation process if the government is acquiring title to personal property**. A long list of exceptions of acts that do not give rise to this compensation
  - The Alberta personal property rights act was established to extend that outside of land
  - **Section 3** – Provides list of <u>exceptions:</u>
    - 1. Can operate notwithstanding (express)
    - 2. Could repeal
    - 3. Could amend and add another exception
  - If one day the government wanted to take property or physical goods without compensation, it could pass an amendment adding an extra exception to section 3, unambiguously pass a statute, or repeal this statute
    - The statute requires clarification from the legislature and provides some clarity but doesn't stop a legislature that might be motivated to take property without compensation

Why would we want to limit government's ability to take away property?

- <u>Removal of the incentive for productive use of property</u> (could arbitrarily be taken, lack of security in ownership)
- When you force governments to pay for expropriation, <u>they have to consider the full costs of the measures they are contemplating</u> (fiscal illusion argument); we can improve government decision-making by making bills appear on their balance sheet (counter – does gov't really only want to minimize costs?)
  - Forces governments to actively consider their actions before taking land/ What are the alternatives they could possibly have if forced to pay for something
    - By forcing compensation you are forcing the government to consider as part of its bottom line, the cost that it imposing on private parties.
      - Governments will make better decisions if you force them to confront full costs of projects they want to build and don't allow them to offload the cost on private property
- Risk: <u>Idea of risk,</u> that government compensation provides a function similar to insurance. You can say that we are all under a risk that our property might come to be needed for a public purpose and in general risk is seen as a bad thing. A requirement that government compensate when it takes property asks as insurance for that risk.
  - Potential drawback means that sure it's good to have that insurance, but most of the risks that people have aren't dealt with through government compensation/ typically we require owners to get insurance on the private ownership for their own property. We wouldn't require the government to provide compensation, we could just require homeowners to get insurance that includes the risk of appropriation
    - Be aware of the risk and insurance justification
- idea of <u>incentivizing investment in property.</u>
  - One of the utilitarian or economic justifications for private property was that it created incentives for productive use of property and that security of tenure with respect to property was important for creating these incentives
- <u>Idea of fairness</u> that where something is for the public benefit it shouldn't only be one party whose property ends up being in the way that has to pay for this; Should not only burden one person whose property is being taken away for the public god

- **EXAMPLE**: One thing they could do, would to say okay you don't own your house anymore, we're going to expropriate and finish this freeway for the greater good.
  - What's wrong with that?
    - It's unfair. It's for everyone's benefit , why should one person have to pay.
    - Distributing the burden across all taxpayers instead of concentrating it on one homeowner.
    - Is there a fairness counter argument to taking away property
      - One argument of holdouts is that if we didn't have an expropriation power and there is one house in the way, assuming that the public authority doesn't have the. Power to expropriate, a homeowner could hold out for ten times the value of the house, based on the discretion o whether or not to sell
      - Explains to some degree why expropriation power exists in the first place
      - Counter argument might be that it is mostly the rich who own property and they're the ones who should bear the burden of public projects
        - On its face it's not a particularly strong argument, compensation would come from tax revenue
- Rights arguments you could make for wanting to have leverage for politically vulnerable communities that might be vulnerable for having property seized
  - **Fiscal illusion argument** -- forcing the government to pay the full cost of its measures
    - Weaknesses in this argument, assumes that governments are motivated to minimize costs or maximize their balance sheets. It could be the case that unlike a private individual or private business, a politician might not naturally be motivated to minimize the cost to government in the same way and individual or business might be If the government has to
- Make and argument that if you argue that people have natural rights, the government ought not be able to interfere
- If you argue that people's personality is intertwined with certain objects, those might deserve special protection.
- The question of the role of wealthy property interests and the potential need to regulate in the public interest perhaps becomes even more acute when we start talking about **regulatory takings** where the government seeks to regulate in the private interest in a way that deprives an owner of the value of their property.

Constitutional Protections of Property

Constitutional context for property in Canada

- Heads of power – authority to make law
  - **If you have a law that deals in pith and substance with the general law of property, you would guess it would fall under provincial jurisdiction (Section 92.13 covers property and civil rights in the provinces)**
  - Federal Heads of power
    - Trade and commerce; Trademarks; Intellectual property; Patents and invention of discovery; Copyright; Bankruptcy and insolvency; 91(24) Indian lands reserved for the Indians
- **Direct restriction on gov action in relation to property**
  - **Section 35** of the Constitutional Act, 1982: Aboriginal title, aboriginal treaty rights, title to or interest in reserve land under a treaty, are all property rights that receive express protection in the constitution
    - Cannot be infringed unless justified by statute
      - Understood to be property rights and unlike property rights generally speaking they receive constitutional protection
        - Gov interference has to meet **justification test**
          - However, an ordinary property interest doesn't receive protection from the state under the constitution
- **Indirect restrictions on gov action in relation to property**
  - There are a number of ways in which the constitution bears indirectly on property interest
    - 1. Division of powers
      - Federal and prov. Leg. Has to be intra vires (within the provisions of the leg.)
        - Provincial leg dealing in pith and substance with aboriginal reserve land would probably be ultra vires
    - 2. The section 8 right not to be subject to unreasonable search and seizure limits the state's ability to go onto somebody's property and conduct a search
      - In the Adams case we discussed how life, liberty, and security can implicate or relate to property.
    - 3. Equality and Discrimination Protections (s. 15 of the Charter)
      - There are other Charter protections that bear on property indirectly (e.g. the Right to Freedom of Expression)
      - There is a general sense that all charter rights relate in some way to property rights.
        - So, if the state was seizing a newspaper, which would infringe freedom of information, the charter could potentially provide some protection for property rights
    - 4. Life, liberty and security interests under section.7 of the charter
    - 5. Other charter protections that bear on property indirectly
      - E.g. right to freedom of expression

Constitution Act 1867, ss 91, 92

- S.91 = federal
- S.92 = provincial

Canadian Charter of rights and freedoms, ss 7, 8, 15

- **Section 7** of the charter, the liberty interest there could in principle have been broadly defined, although we don't know the full extent might involve property interests
- **Section 8** Right to unreasonable search and seizure implicates property interests, place restriction on the state's ability to search through your property, the right to seizure
  - The purpose of section 8 relates to the right of privacy, not expropriation
- **Section 15**: equality guarantee- can be used to protect property interests when attacked in discriminatory way

Constitution Act, 1982, s.35

- If you have a law that deals in pith and substance with the general law of property, you would be under provincial jurisdiction.
  - ***o*** **Section 92.13 of the constitution delegates Property and Civil Rights in the provinces to the provincial legislature**
- Just about any constitutional head of power could relate to property
- Certain that the federal government deals with have property implications:
  - Trade and commerce
    - o In regulating trade and commerce, the federal parliament could have implications
    - o Enumerated powers that relate to intellectual property
    - o Section 91.22 patents an invention and discovery
    - o 91.23 copyright
    - o Bankruptcy and insolvency -- a situation where a party is unable to pay its creditors, the distribution of the property that comes to creditors is governed primarily by federal
    - o 91.24 Indians and lands reserved for Indians
      - This is of course quite important areas
  - So that's just a general overview of what areas the federal and provincial legislatures can legislate in in relation to property
  - **Copyright** -- the copyright act is federal in nature
    - o That is legislative authority
  - **There are constitutionally protected rights that have implications for private property**
    - o Right against unreasonable search and seizure by the state
      - Has implications for private property, primarily in the criminal context
    - o The purpose of section 8 relates to the protection of privacy, so not a general right against expropriation, but does restrict gov actions in relation to property
- **Aboriginal treaty rights hereby recognized and affirmed**
  - o Largely property rights in terms of their content, rights to land under treaty, aboriginal title, right to hunt and fish. They receive constitutional protections unlike other property rights

TAKE AWAY: An ordinary property rights such as a fee simple does not receive protection under the constitution

Constructive Expropriation or Regulatory Taking

Constructive takings

- Also known as *regulatory takings, **de facto takings or de facto expropriation***
- Instances in which there is no forced formal transfer of ownership to the state but rather **substantial or complete restrictions on a property interest through government regulation**
  - o With a constructive taking, you do not necessarily have all of the indicia of a forced formal taking, but **through the regulation there is some kind of substantial or complete obstruction of a property interest.** Nevertheless, it can be found by a court to be a *de facto* interest of expropriation.
  - o (but see international trade and investor protection treaties with different standards (eg NAFTA ch 11).
- Can be thought of as a constructive taking because it is a legal construction that applies the name of a taking to something that in formal terms is not a taking
  - o **Where regulation goes too far, it can thought to amount to a de facto expropriation**, triggering the protections that exist against expropriation
- We have 2 US cases here that set the stage for constructive takings because the legal concept of regulatory or constructive taking really emerged in US case law first
  - *o Pennsylvania coal co v Mahon*
  - *o Lucas v South Carolina coastal council*
- **For a de facto taking requiring compensation at common law, two requirements must be met:**
  - **o (1) An acquisition of a beneficial interest in the property or flowing from it; AND**
  - **o (2)Removal of all reasonable uses of the property. (*CPR v Vancouver*)**

US Approach to constructive takings

- Amendment V (5)
  - o "not to be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation
- Court should examine (ad hoc approach)
  - **o The potential economic impact of the state action;**
  - **o The extent to which it interferes with legitimate investment-backed expectations; and**
  - **o The charter of the government action** - actually works for the goal of (i.e.) public good and safety
    - Test of balancing all things considered
- However, **in *per se takings, court do not use ad hoc approach***
  - o There is a per se taking where:
  - **o 1. There is a permanent physical invasion; or**
  - **o 2. The regulation denies an owner economically viable use of land**
- Idea of *de facto* expropriation holds in Canada to some extent
  - o So, in Canada we are talking about a statutory interpretive assumption (statutory protection in favour of protection) or in common law right (property owner has right to compensation where gov takes ownership interest away or regulates in a way that is tantamount to taking the ownership interest aways

Pennsylvania coal co. v Mahon

- 260 US 393 (1922)

- **Holds that if you take away enough of the value of the property interest, this can amount to a taking just as much as if the gov had actually taken away the land**
- Notes
    - Involves a coal company that had reserved rights to mine and granted surface interests to buyers while reserving the subsurface interests. The deed specifically said that the company would be indemnified from any impact that its mining operations had on the surface
    - A statute emerged that prohibited mining that caused land on the surface to subside in areas of human habitation
        - This all but nullified the coal company's right to mind the coal underneath the land. It would have to repurchase the lots the lots on the surface in order to exercise the right to mine
        - The coal company challenges this under the 5th amendment of the constitution
    - **The question that emerged was whether the state was actually taking away the right to mine the coal**
        - The state didn't gain a right to mine the coal, or the title to the subsurface interests
        - The issue here is whether 5th amendment protection extends to regulations that don't actually take property but somehow deprive owners of the value of it.
            - Here the value of the right to mine has been completely taken away because mining is no longer economically feasible
                - **The answer is YES,** that the 5th amendment does extend to cover this. **If you take away enough value from a property interest, at a certain point this can amount to a taking just as much as if the government had formally taken away the right to the minerals (Wendell Holmes)**
                    - Some action of the government is not formally on its face a taking of property but is found by a court to effectively be the same thing
                        - **Underlying intuition is that governments should not be allowed to do indirectly what they can't do directly. The government shouldnt be able to achieve the same result without having to pay anything**
- **Facts**
    - Plaintiff: Mahon Defendant: Pennsylvania Coal
    - D has right through contract to mine coal under home of P, but this will cause subsidence of the land. P argues D's rights were abolished by Pennsylvania statute forbidding mining of coal in manner which causes subsidence of any human habitation.
        - prevent the Pennsylvania Coal Company from mining under their property in such a way as to remove the supports and cause a subsidence (caving in or sinking of an area of land) of the surface and of their house
    - Bill sets out a deed executed by D in 1878
        - it conveys the surface, but in express terms, reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal
        - P says the D's rights have since been taken away by the **Kohler Act, 1921**
            - prohibited the mining of coal in such way as to cause the subsidence of, among other things, any structures used as human habitation
                - **Statute forbids mining anthracite coal in such a way as to cause the subsidence of any structure used as a human habitation, with certain exceptions, including land where the surface is owned by the coal company and is more than 150 feet from any improved property belonging to any other person**
    - P sued in the Court of Common Pleas to enjoin D from conducting mining, but the court denied the injunction, as applying the Kohler Act would be unconstitutional; appealed
        - Supreme Court of Pennsylvania reserved, holding that the statue was a legitimate exercise of the police power and granted an injunction
        - Supreme court of the state agreed defendant had contract and property rights protected by the Constitution, but held that statue was legitimate exercise of police power, directed decree for the plaintiffs
- **Issue**
    - Whether the police power can be stretched so far as to destroy previously existing rights of property and contract?
    - Whether the Kohler Act as applied to the property in question constitutes an exercise of the police power, requiring no compensation, or of eminent domain, requiring compensation
        - **Eminent domain** – legal strategy that allows a federal or provincial gov to seize property for public use. The seizing authority must pay fair market value for the property seized
- **Holding**
    - The Kohler Act as applied to the property in question **constitutes an exercise of eminent domain requiring compensation**
- **Analysis/Reasons**
    - If the land above required compensation, so therefore does the land below
        - **Statute makes mining commercially impracticable** by affecting mining of coals in places where right has been reserved. Some values are enjoyed with implied limitation and must yield to police power, but implied limitation has limits
    - Coal companies need to be able to mine coal to function
        - Extent of the diminution
            - There must be an exercise of eminent domain and compensation to sustain the act
    - Gov. hardly could go on if to some extent values incident to property could not be diminished without paying for every such damage – against excessive compensation
    - **DISENT** (Brandeis J)
        - Every restriction by police power deprives owner of some right and is abridgement of state of rights in property without compensation. **Restriction to protect public health, safety, or morals is not a taking; this is the case here, preventing a noxious use like subsidence; property remains in possession of owner, the state only prevents own from a use which interferes with paramount right of the public**
- **Ratio: while property may be regulated to a certain extent, if regulation goes to far it will be recognized as a taking**

Lucas v South Carolina Coastal Council

- Plaintiff: Lucas Defendant: South Carolina Costal community
- Notes

- Holmes, in *Mahon*, recognized that if the protection against physical appropriation of private property was to be meaningfully enforced, the govs power to redefine the range of interests included in the ownership of property was not necessarily constrained by constitutional limits
- **Two discrete categories of regulatory action as compensable without case-specific inquiry**
  - **1) Regulations that compel the property owner to suffer physical invasion of property**
  - **2) Where regulations denies all economically beneficial or productive uses of land**
- Functional basis for permitting the government, by regulation, to affect property values without compensation does not apply to the relatively rare situations where gov has deprived the landowner of all economically beneficial uses
- **Permanent physical occupations is compensable always, even when in public interest,** unless pre-existing limitation on property rights existed
  - Would permit an easement that was a pre-existing limitation upon landowner's title

- **Facts**
  - The case involves a party that had purchased residential lots on the coast and subsequent to that purchase the local council prohibited development. They were residential lots and now the developer could not build anything on them. The question raised was if this was a 5th amendment taking that violated the 5th amendment rights
    - 1988 the State passed *Beachfront Management Act* under which local council can designate lands as being unavailable for development
  - Legislation provided for no exceptions, so **had the effect of direct barring Lucas from erecting any permanent structure**
- **Holding:** Majority US SC found the legislative measure was a taking
- **Ratio**
  - **When owner of real property is called upon to sacrifice all economically beneficial uses in the name of common good, he has suffered a taking and this is compensable.**
- **Analysis/reasons**
  - Majority (Scalia)
    - This is a constructive taking
      - In this decision, Scalia noted that for most regulations, there is no bright line test to decide if it is a regulatory taking or not
      - Approach is ad hoc; depends on facts, but courts considers economic impact of regulation, interference with reasonable investment expectations, and character of gov't action.
        - *Mahon* says to meaningfully protect against physical appropriations of private property by state, governments power to redefine range of interests in ownership must be constitutionally constrained; we're not told when a regulation goes too far
    - Justice Scalia notes that aside from the balancing test you have two categories that are exempt from having to go into inquiry: (compensable without case specific inquiry)
      - **1) Cases of permanent physical invasion**
      - **2) Cases where a regulation denies all economically beneficial or productive uses of land**
        - **in these cases, no balancing test is required and the government action is assumed to be legislative taking**
    - **This case falls into the second category,** the holding here is that these are residential lots and you are saying you can't build a house, t**hat effectively denies the owner all economic and beneficial predictive interest in land.** Renders the interest in land close to value-less and is found to constitute a constructive taking, giving rise to the duty to compensate on the part of government authorities
    - Exception worth noting where what the conduct the state prohibits would have been already prohibited under the state's law of property and nuisance, that does not constitute taking
    - You have a situation where the background private law of the state is providing the constant baseline. If the owner would not have had the right at common law to do in the first place, legislation prohibiting that action won't constitute a constructive taking

Issues in the Canadian Law of Constructive Taking before CPR

- Can a court order compensation in the absence of a statutory authorization for compensation?
  - Do you need to be able to point to a particular provision in a particular statute to order compensation?
  - Cromwell J says that if the obligation to compensate exists it has to be found in a statute – obviously inconsistent with *Manitoba Fisheries*, which says yes
  - In this case (*Mariner real Estate*), the only candidate for statutory obligation is the Expropriation Act
- What are the requirements for a constructive taking?
  - What must the owner be deprived of?
    - Cromwell J says one must be **deprived of all reasonable use to the land;** virtual extinction of interest (*Mariner)* or **substantial deprivation of value** (*Tener)*?
      - There are still powers of owner that owner retained; main profitable value removed, substantial deprivation of value
  - What must the government acquire?
    - A legal interest in land (*Mariner)* or merely some kind of value or benefit for the public (*Tener)*
- **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. (*CPR v Vancouver*)**

Important Canadian de facto Expropriation Cases

- Constructive takings
  - *Manitoba Fisheries Ltd. V Queen*
  - *R v Tener*
  - *Mariner Real Estate Ltd v Nova Scotia*
  - *Canadian Pacific Railway co v Vancouver*

Manitoba Fisheries Ltd. V The Queen

- Summary

- The SCC decision prior to Mariner real estate, it deals with federal legislation that created a crown monopoly for marketing freshwater fish in Manitoba
  - Crown leg. creates crown monopoly but there's already a company doing that, so the effect of the leg. is to put the company out of business
    - Takes away good will company might have built
      - The idea that the company has value in the customer basis it has – good will
    - But the leg. does not provide for compensation
- **The court ends up holding that in the absence of a provision that explicitly rules out compensation, they will read it in, in the absence of a provision that explicitly rules out compensation, they will read it in or find it.** The court did not have to link this into the expropriation act, the court read it to mean that were there is a taking they would provide a right of compensation in the absence of statutory language expressly ruling it out

- Discussion
  - This is the strongest case we have there is a common law right from government taking away property and there needs to be compensation
    - No offer to compensate P for goodwill with existing customers
      - Customers now had to go to crown company
        - Relied on *de keyser's hotel (p.29)*
  - **Argument:** this statute is taking away goodwill of customers, giving it to crown, and not compensating P for this
    - **SCC Held that P was to be compensated for loss of goodwill**
      - Common law right to compensation for loss of goodwill
  - Worth noting there was no formal transfer to crown: legislation didn't provide for transfer of goodwill
    - Rather, t**he loss of benefit to Manitoba fisheries was a consequence of gov taking away the right to private companies**
  - **Holding:** (Lord Atkinson)
    - Appeal allowed – **appellant is entitled to compensation**
      - **Must take into account the loss to the appellant of the use of the assets of its business and its only fair and equitable that this loss should be reflected in the amount of compensation awarded to the appellant**
    - "There is nothing in the Act providing for taking of such property by the government without compensation and as I find that there was such a taking, it follows, in my view, that it was unauthorized having regard to the recognized rule that 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"

R v Tener (1985)

- **Facts**
  - Respondents (David and Gertrude Tener) owned mineral claims on lands located within Wells Gray Provincial Park
  - The owner of mineral claims had the right to all minerals in the claim, the right to use and possession of the surface for the purpose of getting the minerals out, and the right to take and use a right of way to the claims
    - If the right of way was to cross crown land, the consent of the minister of lands was required
  - Conditions governing the exploitation became onerous
  - Respondents were denied the park use permit necessary to explore or work the claims
  - They were advised by letter that no new exploration or development work would be permitted under the current park policy and were asked to itemize a quit claim price
  - Respondents considered their opportunity to explore their claims conclusively denied
- **Proceedings**
  - Trial judge found no compensation was payable
  - Court of appeal held that respondents were entitled to compensation under the *Land Clauses Act*
  - Crown appealed to SCC
- **Issue**
  - Whether a refusal by the crown to grant a park use permit needed by the respondents to exploit their mineral claims gives rise to a statutory right to compensation?
    - ie whether this situation constitutes as expropriation
- **Holding**: Appeal dismissed
- **Analysis**:
  - **Majority(Etsy J)**
    - Respondents interest was expropriated through the operation of the Park Act; the Land Clauses Act had no application and compensation was to be found in the ministry of Highways and Public works Act
    - **Prohibitions of the Park Act operative with the result that the rights granted to the respondents were reduced in law and recovered in part by the Crown**
      - **This process constituted a taking for which compensation was required notwithstanding the fact that the respondents retained their interest in the minerals themselves**
    - Regulations under the Mineral Act are to be considered in valuing the expropriated mineral rights
    - **Crown isn't taking title, but it has deprived P of interest**
      - Refers to idea of crown taking benefit away from private owner even though formal title isn't taken away
    - Takes pains to distinguish this from municipal zoning laws (which don't need compensation)
      - Because while municipal limits uses of owner, but does not provide benefit to public asset, whereas in this and *Manitoba Fisheries* the public interest is benefited
      - Relies on the bilateral relationship between individual and public body (Cost/benefit)
  - **Dissent**
    - This was a case of expropriation under s.11(c) of the Park Act for which compensation was payable under the Highways Act
    - Respondents had a profit a prendre in the land (a right to make some use of the soil of another, such as a right mine metals, and it carries with it the right of entry and the right to remove and 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 exercises of the profit) rather than two separate interest consisting of the minerals and the access rights
- Profit a prendre could be extinguished by unity of seisin
- Crown expropriated their interest in that it acquired, through its permanent refusal of a permit, title to the fee free from the encumbrance of the profit prendre
- The crowns action defeated the respondents interest and amounted to an expropriation
- The Highway Act permits compensation for injurious affection simpliciter but had no application in this case because of s.18(3) of the Highway act
- A right to compensation must be found in the statute. If land has been expropriated the statute will be construed in the light of a presumption in favour of compensation but no such presumption exists in the case of injurious affection simpliciter

Mariner Real Estate Ltd v Nova Scotia

- (Not endorsed by CPR)
- **Facts**: Plaintiff: Mariner Defendant: Nove Scotia
  - NS enacted *Beaches Act* which prohibited development on beaches unless authorized by designated minister. P is denied authorization due to sensitive nature of dunes by construction. Mariner claims land has been de facto expropriated.
    - P Owned land and wanted to develop on the dunes
      - Regulation said you could not build on the beachfront property
        - Legislation that applied to a beach front property held that no development was allowed without permission of the minister
          - A structure could not be built without the permission of the minister
            - Owners of the property applied for Ministerial permission
              - Minister denied the building
                - This was apparently on the basis of the finding that nothing should be built in the reason for environmental reasons; it was relatively clear that at no point in the foreseeable future was it going to be any different
  - The owner had purchased the property to build a structure on it, so this was very significant. **The owner argued that this amounted to a constructive taking, rendered the land close to valueless, and should give rise to compensation just as if the government had formally taken away the title to the land**
- **Analysis**
  - Majority (Cromwell)
    - Can a court order compensation for a constructive taking in the absence of some statute that requires it? Where does the court get this?
      - *The Expropriation Act*
      - **Cromwell says he has no right to read in compensation unless it is statutorily provided for**
        - No right to be compensated for the taking of property in the absence of a provision that provides for it.
      - There is a provision in the expropriation act. There is no way that this claim for compensation can succeed if it can't be fit into this provision somehow. That ends up rally coloring the analysis for him because the question isn't a matter of pure common law, whether there is a common law right to compensation, the question is whether this fits into the legislative provisions that already exist providing for compensation. So his answer to the question of "can a court order compensation in the absence of a statutory authorization for compensation?" is no.
        - Justice Cromwell uses the terms of ***The Expropriation Act*** **that state that for expropriation to occur, the government must obtain an interest in the land.** That does not happen with constructive takings
          - Whatever is taken away has to amount to an interest in land. If the government does not gain an interest in land, and interest in the land cannot have been taken away
  - Does the owner of the beach front property still have an interest in land? If so, what does that entail?
    - Most of the formal incidents of ownership are still their (possession, exclusion, anything other than building a structure)
      - Conducts a formal enquiry, not an economic one. Value is irrelevant here

- Nature of constructive taking
  - **No right to compensation unless there is a legislative authority taking the land** (Justice Cromwell)
  - **Claim to compensation cannot proceed if it does not fit within the legislative provision**
  - We have no power to order compensation unless there is a provision that says we can
    - Different than *Manitoba Fisheries Ltd:* where a crown monopoly was created that put the pre-existing private companies out of business. The regulation didn't provide for compensation – the court held that in the absence of the provision that rules out compensation, we are going to read in a right to compensation unless specifically expressed that you will not be provided compensation (common law interpretation of compensation)

Requirements for constructive takings

- Have to find something that fits the terms of the expropriation act that could provide a right of compensation
  - A) **governments must acquire a legal interest in land or merely some kind of value or benefit for the public**; an acquisition by the government. It has to be possible to construe it as a government taking an interest in the land
  - B) **The owner must be deprived.**
    - Taking away an interest in land away from the owner, talks about a virtual extinction of land
      - In the case of *Mariner Real Estate Ltd.* , it was found that the owner was not deprived, they could still find an interest in it, could still possess it and exclude it from others. Formal rights of ownership still here – not solely about economic interest

Issues in the Canadian Law of constructive takings before *CPR v Vancouver* (the authoritative case)

- Can a court order compensation in the absence of a statutory authorization for compensation?
  - Yes – Manitoba fishers Ltd v The Queen
  - No – Mariner Real estate
- What are the requirements for a constructive taking?
  - What must the government acquire?
    - A legal interest in land (*Mariner* case) or merely some kind of value or benefit for the public (*R v Tener)*
  - What must the owner be deprived of?
    - A virtual extinction of an interest (*Mariner)* or substantial deprivation of value (*Tener)*?

Canadian Pacific Railway Co (CPR) v Vancouver

- **Leading case with regards to this (authoritative case)**
- **Facts**:
  - CPR held title to a corridor on some of the most valuable land in Vancouver that was used for a railway, that railway no longer running the freight train there because no longer profitable to be used as a railway
    - They want to sell it to the city, the city won't buy it, but the city does pass a bylaw reserving the land for anything other anything other than basically recreation and some transportation
      - City wants the corridor to be maintained because it might want to use it in the future for other transportation (public transit, bike trails, etc)
        - But CPR would prefer to subdivide and sell the land or have the city expropriate it – none of the uses left to them are profitable (including what the city want)
      - The city could have formally expropriated the land, but they would have to pay market value for it, so they are trying to keep the corridor as is without doing so
        - CPR wants the city to expropriate the land and pay them market value
  - CPR sues the city for a constructive taking
    - CPR left with this piece of land that has liabilities – property tax, someone could hurt themselves, due to the zoning of the city there is no economic value to make money off this land the way they zoned it
    - CPR is able to point to a deprivation of value and public benefits arising from land
  - Leading case on constructive takings in Canada
    - Dramatically limits the ambit of constructive takings in Canada
    - The court appears to have been relatively strongly influenced by Justice Cromwell's influence in Mariner real estate
      - The effect was to virtually get rid of Constructive takings in Canada
- **Issue:** Is this a taking
- **Holding:** No
  - For de facto taking, **2 conditions must be met:**
    - ***Acquisition of beneficial interest in property of flowing from it-*** CPR argues city gets park for free; but users are still trespassers, so city only gains assurances of how land is used
    - *AND* ***Removal of all reasonable uses of propert****y*- Not 'best' but reasonable use; corridor could still be used as railway, track maintenance, or public-private leases, etc.
- **Ratio: In order for a de facto taking to occur there needs to be acquisition of beneficial interest in property of flowing from it and removal of all reasonable uses of property**
- **Analysis/Judgement**
  - Majority Opinion
    - CPR still had uses left to them
      - **Not constructive expropriation because it does not pass the test: two branches**
        - At least one branch of the test for constructive taking is that there **has to be removal of all reasonable uses of the property**
          - Echoes justice Cromwell saying that the question isn't whether the value has been taken away, the question is whether all reasonable uses have been taken away
            - The court relies on the fact that if CPR wanted to start running trains again they could
        - Second part of the test that the **court establishes is that the city must get a benefit (acquisition of a beneficial interest).** CPR makes an argument that the city is getting the benefit of a free transportation corridor
          - According to the court, this does not satisfy the standard of acquisition of beneficial interest
            - The city does not have traditional use or rights. People that go onto this land are trespassers. As a functional matter, maybe there is a benefit that the city is acquiring but it is not an actual right
  - **Court lays down a test to determine if it is a constructive taking**
    - **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**
    - Regarding this case:
      - One requirement – that all reasonable uses of the land be removed –it is not met in this case
        - While there are no profitable uses, there are reasonable uses still (e.g. run train)
      - Second requirement - Court says you need a beneficial legal interest, not simply a benefit (public use as a park does not count – CPR has a legal right to still exclude people from this land)
        - The city gets a benefit in the sense that it can expropriate it one day, and their citizens were using it for transportation/walking path, however the language suggests that the legal label affixes to these people: if you go onto this path you are technically trespassing no right is accrued, there is no right in the traditional sense of property.

- This portion of the test is criticized for restricting the distinctions between this and a formal taking
- Right to the use and benefit of land is a formal legal right – but the Crown has taken it away, essentially, which collapses the distinction between formal expropriation and constructive expropriation (Brown J)

o The court here does not endorse the approach in *Mariner* (that compensation must flow from the statute)
- Here we see the language of a *de facto* taking at common law;
- Not something that has to flow from statute

D.C Harris, "A railway, a city, and the public regulation of private property: CPR v City Vancouver

International investments

- International trade agreements
  - Governments are held to a higher standard with regulations that relate to international investors
  - Talks about measures that are tantamount to expropriation and not just formal expropriation (NAFTA)
  - Similar approach to US case law as part of the standard to determine expropriation
  - Canada's international agreements, property of foreign investors receive more protection than Canadians do with SCC Rulings

North American Free Trade Agreement

o International trade agreements - Excerpt from NAFTA Chapter 11
  - **Seems like governments are held to a higher standard with respect to regulations that effect the property interests of international investors whose interests are protected.**
  - CH. 11 talks about government measures that are tantamount to expropriation. On page 170, similar protections against de facto expropriation are built into the agreement

o Subsection 2
  - NAFTA talks about measures that are tantamount to expropriation and it is definitely more rigorous than Canadian jurisprudence
  - Later, they expressly adopt US case law as part of the standard, which is much more welcoming of claims for de facto expropriation
  - Bottom line under Canada's international agreement and there are quite a few of those, the property interests of foreign investors receive stronger protection than those of Canadians.

o **protection for private investors against expropriation by another state without fair compensation. Prevents expropriation of investments by other countries in Canada. If the province breaches NAFTA, the feds would be liable and not the province.**
  - Compensation paid is equal to market value before expropriation took place
  - Canadian government cannot say "NAFTA doesn't apply" short of withdrawing entirely from NAFTA; therefore large amounts of control over public policy have been surrendered- no amendments are even possible unless agreed to by all 3 parties
  - State doesn't sue on behalf of citizen; **company sues the federal government** (even if provincial gov't does the expropriating)- BUT federal law has power of disallowance (disallows provincial laws if they violate NAFTA
  - Could have influence on environmental regulations- if one firm is relaxing standards to attract firms, they only need to consult with other countries first
  - Purpose- to protect foreign investors against risk of nationalization
  - Americans studying NAFTA consider their definitions of takings to be more broad then even US jurisprudence; but tribunals aren't bound by precedent, co chance of being unevenness in application

UNCTAD, World Investment Report 2015: Reforming International Investment Governance

Agreement Between the Gov. of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments

- Deals with indirect expropriation
- Clause 2
- These are the same factors that apply to US constructive taking
- Test looks at the impact on the property owner

Formal Expropriation

Expropriation

Marks v Westlock

- About the town of westlock expropriating land within its boundaries
- Westlock argued that the compensation board granted to much money and it should be reduced
- **Issue:** how to value the expropriation of the land and how to deal with the damages
- Westlocks main argument errored in valuing the land
  - the land should be valued based on the time of expropriation
  - The market value of the land is the highest and best use of land before expropriation takes place
    - in this case it is commerical development
- **The court says you need to consider what an owner could have got (this is not necessary what the gov could do with it)**
  - in this case there is overlap between owner and what the gov is going to do - the development of the land the owner could do
- There was discussion of damages and it points to available damages in formal expropriation

Civil Forfeiture:

Alberta v Echert

- Is a case that touches upon protections to private property law
- **Civil forfeiture: The government can take property without compensation if the courts can demonstrate it was property used to commit a crime or is the proceeds of crime**
  - Modern civil forfeiture acts
    - Victims restitution and payment act

- New regime in Canada
  - Designed to take assets away from individuals who were engaged in illegal behaviour
- Charter protections under criminal do not apply under civil forfeiture
  - ex) right to counsel
- Criticisms of the regime
  - Incentive problem
    - Has been police incentive to possess assets and it goes towards police
  - Low evidentiary burden
  - There is a potential negative effect on third parties
    - ex) someone living in your basement engaged in criminal activity but the owners are held responsible

- **Facts**
  - Decision of Alberta Queen Bench → Discusses the protections that apply to property
  - **Typical civil forfeiture case - two step process**
    - 1. **Restraint application**
      - takes
      - Establish that on reasonable and probable grounds it is associated with illegal activities
    - 2. **Disposal hearing**
      - Establish on a balance of probabilities is associated with illegal activities
  - Constables affidavit stating that from his perspective of watching the cars it seemed their activities are reflective of "drug dealing" behaviour and in the search of the house there was evidence
    - based on his view and the view of his fellow officers
      - Relies on hearsay evidence
    - Court said that opinion evidence has to be offered by an expert who is qualified as an expert but in this case the police officer was not qualified as an expert
    - Regarding the cash that there is no particular indication that the cop was there and thus it is hearsay evidence but this evidence was not mentioned in the constables affidavit
  - Court held the reasoning to strict statute - claimed that it did not meet the burden of proof
- **Analysis**
  - **Leg can authorize civil forfeiture but in doing so it will be strict reading**
  - Discussion of *alberta bill of rights*
  - Discussion of *alberta personal property bill of rights*
    - Compensation when personal property taken away
      - **Exemption Regulation**
        - Regulation enacted under the alberta personal property bill of rights
          - **section 2 of the act does not apply in respect of the following provincial acts**
            - **F.1 Victim restitution and Compensation Payment Act**

Lateral Boundaries: Right of Support & Land Bounded by Land

Right to Support - Lateral boundaries

Right of support

- The holder of a surface interest in land has a **right for horizontal support** from adjacent parcels, as well as a **right of verticle support** from mineral interest holders.
  - Normally this right is enforceable on a strict liability standard (i.e. no need to prove fault, simply a **matter of causation**)(but see special circumstances in *Blewan*)
  - **Right of support may be waived by agreement**
- An ordinary reservation of a mineral interest presumptively does include the right to take measures necessary to extract the minerals, but does not waive the right of support (*Fuller v Garneau*)
- In AB, in order for a mineral owner to have a right of entry to remove minerals, the mineral owner requires either A) consent of the surface owner or B) a right of entry granted by the Surface Rights Board (*Surface Rights Act*, s. 12)
  - Many parcels of land in alberta owners only have ownership of surface level and the crown owns subsurface levels

Horizontal Right of support

- You have a scenario where lot A is owned by a separate party from lot B. The owner of lot B starts digging, creates a hole and causes land to subside. Now what?
  - The normal rule that would apply is the **right of support**
    - **The owner of lot A is entitled to lateral support for the land from neighbouring properties and where some action is taken by the neighbouring property owners to remove the right of support, the owner of lot B is liable to the owner of lot A for breach of the right of support, even if they took great care**

Blewman v Wilknson - Horizontal right to support →AKA developer case

- A New Zealand Case, but it alludes to the law as it exists in Canada
- **Facts**
  - Developer owns entire parcel. Subdivides it. Builds a road at the bottom of the hill. Later lots are sold. Plaintiff buys lot 7. Plaintiff sues the developer for interfering with the right of support.
    - When excavation took place, Wilkinson owned both lots
  - **Normal rule for lateral support:** neighbouring properties owe a duty to neighbors to not remove land that would cause neighbors property to subside

- **Issue**:
    - Whether this case is different because when the excavation occurred the land was owned all together?
        - How is this the rule resolved? Do you have to show fault or is it strict liability
- **Held :** appeal dismissed and purchaser could not recover
- **Ratio: where it is clear (manifest) that sections in a subdivision have been created by excavation, the subdividing owner is not under a strict non-contractual duty (to provide lateral support) to a subsequent owner of a section on which subsidence occurs because of the excavations, but that principles of law of negligence will apply**
- **Analysis**:
    - **General rule: If your neighbour takes your right of support by means of excavation, the landowner has a right of action against original excavator (strict liability) ; it does not matter if there is negligence, no fault element to liability question - simply a matter of causation**
        - Difference in this case: **Wilkinson owned both a time of excavation.** At the time of the suit, the owner of lot 7 is a different set of owners; before the land was subdivided there was no boundary line, all of the **land was owned by the same person**
    - Court ruled that this was not an action of strict liability
        - Can't use strict liability since it would set a precedent that **would prevent development of land and subdivisions**
        - The idea that you should be responsible if someone else owns the land more than if somebody else might someday own the land
        - **We won't apply strict liability standards where at the time of excavation it is all owned by one property**
            - **When digging occurs on land owned by the same person, strict liability standard not going to be applied, even if it is further subdivided - negligence could still apply but not strict liability**
    - **Negligence:** application of negligence only applies when there is one property owner when the horizontal support is removed

Question P.207: What happens if A owns the mineral rights under B and works the minerals. A then sells them to person C, but land owned by B subsides because of A working the rights. At the same time that this damage occurs the mineral estate is in the hands of C. Is C liable?

- Cannot hold C liable according to case law, but why might we say that we do want to hold C liable?
    - "I would hold that the duty of lateral support from adjoining land runs with the ownership of the land. A purchaser of land certainly has the right to inspect the same for defects before acquiring it and should assume the risk of such defects"
- Right to support is not strictly personal or fault-based (not on the basis that A did anything wrong, but there is an obligation for horizontal/vertical support)
- You carry burdens and benefits with ownership of mineral rights; C should ensure that A's activity unlikely to cause damage; element of due diligence for C
- Section 12 of Mines and Minerals Act: don't necessarily hold mines/minerals below your property by extension of ownership rights.

Ontario v Petrofina

- The ontario court of appeal decision in Petrofina concerned **vertical support rights**
- Right of support (parties owning right of support to other owners) exists on vertical supports as well - also **strict liability**
    - Where A owns the surface and B the mines and minerals, mineral exploration leading to subsidence is actionable. A sufficient causal connection is presumed in the absence of evidence to the contrary

Fullner v Garneau

- Was there a difference **between a typical reservation of mines and minerals to the grantor, and a more fulsome reservation** (the reservation explicitly reserves the right to do what is necessary to remove the mines and minerals?)
    - When you have an ordinary reservation of mines and minerals, does this include a waiver in the rights of support
    - Do you reserve the right to do what is necessary to get the minerals?
        - court holds that **ordinary reservation of mines and minerals** at common law would include steps necessary to mine minerals but it **WOULD NOT waive the right of support**
        - If you have a **fulsome reservation** that **could amount to the waiver of a right to support** (there is a difference in language)
        - Cannot mine with potential threat to damaging the property above
        - If you have a title that reserves mines and minerals, do you also have rights to do things to the surface? **NO**
- **Ratio:**
    - **Regular reservation of mines and minerals does not include a waiver of support but more implicit language could**

Section 12 of AB Surface rights act

- Qualifies the mineral rights- as a mineral rights holder, you do not automatically have the right to enter the surface if you do not have priate proeprty rights you can make a deal with surface holder or apply for the right through a board (surface right board) which would order the right with compensation to the owner

Land bound by land - Lateral Boundaries

Lateral Boundaries

- Land boundaries can be delineated through a description of the **perimeter (**metes and bounds) or through reference to a **survey plan**
    - Methods of drawing land boundaries
        - **Land Surveys - grid system**
            - We know that property interests presumptively include right to exclude so it is important to understand where the right to exclude begins and ends
                - If you want to know where something is you first would look to what meridian is belongs to
        - **Metes & Bounds**
            - A different approach to grid system; Describe the boundaries of the land in question
            - Once you go down one round, people have reliance interest
                - Make land reform difficult - not impossible, but very difficult

- In areas where you don't have a comprehensive survey prior to settlement you have to rely on a description of the perimeter of a parcel, more common in places like the Maritimes (metes and bounds description) (p.208)
    - When you have property delineated this way you can end up with ambiguities
- **Where there is ambiguity in a property description, metes and bounds description: factors will be given priority in this order: 1. Natural boundaries, 2. Lines and corners marked at the time of the grant, 3. The boundaries of adjacent properties, 4. Distances listed in the description (McPerson v Cameron)**

- **Land dimensions**
    - 1)Vertical Axis Above - rights above the surface
    - 2) Vertical Axis Below - rights before the surface
    - 3) Lateral - the area on the surface
    - 4)Interest in land over time
- The Prairies
    - Prairies were settled in a manner that allowed for comprehensive **land surveys**
        - You could do these comprehensive surveys before ownership
        - Dominion land survey applies on the prairies
            - **Have a fairly rigid grid system, breaking the land into townships**
                - The land is broken down into different townships with 36 sections that are further divided in ½ and sub sections
                    - Essentially it is a massive grid
                - **Range roads go north/south; Township roads go east/west**
                    - Effectively form a grid (p.208)
                - Land parcels were sectioned essentially in a grid system and numbered in the prairies
    - By a description (p.208 for example) you can know and understand the boundaries
- Ambiguity
    - **In the event of contradiction natural monument is regarded as more reliable**
    - Common law has developed a list of priorities that will be allocated when there is an inconsistency in a description (p.209)
        - (1) Natural boundaries - taken to be more reliable than the distance listed
        - (2) Artificial marks placed on land
        - (3) Boundaries of adjacent properties that could be determined in a precise fashion
        - (4) Distances listed in the description
    - ***Conventional line doctrine***
        - where there is ambiguity between two properties, that can be resolved by agreement(agreement about where the boundary is) by the landowners; a disputed boundary can be agreed upon by owners under said doctrine, but only where an actually ambiguity exists in the title description
            - Onus is on landowners to prove conventional line doctrine on the balance of probabilities
            - *Ex) Robertson v Wallace* - case regarding conventional line doctrine
        - **You cannot have a conventional line unless there is some actual ambiguity about the property - it can't contradict the actual registered title of the property**
            - E.g. *Bea v Robinson* (1997)
            - In rem nature of property interests
            - If two owners agree on a boundary that is not the registered boundary, they must actually register this otherwise it will not apply
        - Conventional line can only be a boundary if there is an ambiguity
            - cannot contradict an unambiguous document
            - **Court want to restrict this doctrine only to places where there is ambiguity, because it doesn't want to contradict the publicly made documents (title registry)**
            - Takeaway: interests of 3rd parties in certainty can be undermined if you have unambiguous title

Robertson v Wallace → AKA Fence case

- Conventional lines doctrine → The doctrine that is meant to govern ambiguities regarding the dividing line between two properties
    - If there are disputes and there is an agreement between adjoining property owners as to where the boundary should be, it can be recognized as the boundary
- **Facts**:
    - Have a boundary that is supposed to run along the river, however the flow of the river changed over time. P and D arguing over boundary
        - One of the arguments that the court has to deal with was that there had been an agreement that a particular fence would be the boundary, even though the fence wasn't along the river line
            - The court has to determine whether on the facts of the case it had been established that there was an agreement that this would be the boundary
- **Issue**:
    - There had been an agreement that a particular fence would be the boundary, the fence was somewhat back from the river, do the facts of the case establish an agreement that this would be the boundary?
- **Analysis**
    - The essence of this dispute is that you had a property dispute and the bank of the river was used as a boundary between land but the river moved over time so the question is do we follow the new boundary or the old boundary where the boundary used to be → **Movement of boundary line**
        - What do you do in such a situation where the parties agreed to a particular fence as the boundaries?
            - One party said they agreed the fence would be the boundary in light of the ambiguity of the river
            - **Conventional line doctrine**: allows the parties to come to an agreement as to where the boundary is after ambiguity with respect to boundaries arise → Based on verbal agreement
                - NEED A GENUINE AMBIGUITY BEFORE YOU GET TO THE CONVENTIONAL LINE DOCTRINE

        - An agreement between two parties cannot be the boundary if it contradicts an unambiguous boundary that is a registered document:
            - **Title registries** → Part of the reason they exist is to provide a public repository to find out who has what and where the boundary is
                - You can't come to an agreement that contradicts what the registry says
    - **The onus is on the party that claims there is an agreement; onus falls on the party trying to establish a conventional boundary**
- **Held:**
    - **Court held that there was no direct evidence to a point in time where a real agreement between the landowners happened, it was all kind of inferenced that over time they had treated it as a boundary so there must have been an agreement in the past**
        - Not established that there was an agreement (alternative explanations for why the fence was where it was);
        - conventional line doctrine does not govern this case
- Notes:
    - Why would the court have wanted to restrict the ability of neighbours to randomly change things?
        - If you have a verbal agreement between two parties and it contradicts something set out in a written document/ title registry, it partly defeats the purpose of having the property
            - Part of why we have that registry is that the delineation of property interests could be relevant to third parties:
                - Future purchasers
                - Adds information costs
                    - That is why the court wanted to restrict the scope of the conventional line doctrine to cases where there is an ambiguity and whatever is being agreed upon doesn't contradict a registered title instrument
        - Main takeaway is that the interests of third parties and others in certainty could be undermined if you have agreements that contradict unambiguous title documents
    - **Torin system** – the government guarantees it is correct and acts as an insurer – goes to the question of the certainty of title documents and the interests of third parties
    - Ecretion occurs with gradual changes
- **Ratio:**
    - **You cannot have a conventional line become the boundary unless there is an ambiguity but there is also the possibility to have an agreement that resolves ambiguity but you need evidence to support such an agreement**

Lean

- Security interest guaranteeing a debt (ensures you get paid for something)
- Section 68 of *Law Property Act* provides incentives for people to monitor their land
    - E,g, If someone builds a barn on your land, you would owe them money under section 69

Section 69 AB Law and Property Act

- **Provision essentially holds that where a party makes improvements on a parcel of land under the mistaken belief that the land belongs to her, she can get a lien on the property for the amount by which the value was acquired → security interest**
- **Why do we want to protect the interest of someone who mistakenly builds on someone else's property?**
    - **We want to incentivize people to correct errors before it gets built**
    - **Shouldn't get to have the benefit and sit on your hands**
    - **Wants to avoid incentive to remain silent get a benefit from something you didn't have to build yourself**

Doctrine of Unjust Enrichment

- Sometimes refered to as law of restitution
- Plaintiff must show
    - 1) enrichment of defendant
    - 2) a corresponding deprivation to the plaintiff
    - 3) there is no juristic reason for the plaintiff to keep the enrichment
- If these three conditions are satisfied, the defendant does not keep the enrichment

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PLENARY SESSION: Vertical Boundaries **- Subsurface Rights**

Ad Coelum rule: Cujus est solum eius ad coelum et ad inferos

- Literal meaning - Whoever owned the soil, owns up to the heavens and down the hell
- Functional - no one takes this maxim literally;
- **GENERAL RULE: rules have been established such as that the surface owner holds entitlement to airspace a reasonable height above the ground**
    - **Presumptively applies to subsurface interests**
    - **At common law, caves belong to the owner of the surface above the cave (*Edwards v Sims*)**
    - **at common law, minerals, except gold and silver, are presumed to belong to the surface owner, unless specifically reserves in a grant.**
        - **However the practice in Western Canada has been for the Crown to reserve minerals in grants of interest in land**
    - Exception made for airplanes

B.Ziff "The Great Onyx Cave Cases - A Micro History" - See CB

Edwards v Sims* → *AKA CAVE CASE

- **Plaintiff**: Edwards **Defendant**: SIms
- **Facts**
    - Case concerning ownership of cave - who has property rights: Edwards (who's property the entrance is located) or neighbouring land owner (whos land the cave goes under)

- Edwards develops Great Onyx caves as tourist attraction (put great expense into it) since entrance is on his property. Cave reached under Lee's land (1/3 of cave), hundreds of feet beneath. Lee sues Edwards for trespass, and Sims presides over whether survey of land could be forced.
  - Neighbour wants damages from claim that will allow them to get of the profits from this attraction
    - Lee asked a court to order a survey of the cave to see if there was any of it under his land. If so, he would be entitled to ownership of the cave under his land (and, thus, some of the profits).
  - P sought a writ to keep the judge from ordering the survey.
    - Sims is the judge that ordered survey of land - Edwards does not want this, Lee (neighbour does)

- **Issue**
  - How far below the surface does entitlement extend? Does equity court have the right to invade ownership of one individual (Edwards) to ascertain truth before it?
- **Holding**
  - Can a court order a survey - yes
- **Ratio**
  - **Maxim applies to subsurface rights. Edward's best use of land doesn't matter private property allows for owners to be pointlessly selfish**
- **Analysis**
  - Majority:
    - "A true principle should be announced to the effect that a man who owns the surface, without reservation, owns not only the land itself, but everything upon, above, or under it which he may use for his profit or pleasure, and which he may be subject to his dominion and control. But further than this ownership cannot be extended - p.184
    - Maxim *cujus est solum* - certain limitations on rights to the enjoyment of possession: you own the surface, all the rights below and the rights above
      - Court found little reason to distinguish caves and mines, and since mine owners can be compelled by the court of equity to permit inspection, so too can the court force a survey of the cave if a bona fide claim is made
  - **Dissent (Logan)**
    - survey is wrong against Edwards and does not benefit Lee
      - Edward loses valuable rights and may have land destroyed by someone without an interest in the cave, since Edwards spent valuable resources making the cave into an attraction
    - **Maxim has never been true → should be that he who holds the surface where the entrance is entitled to everything that can be taken from earth and used for profit / happiness - not applicable here**
      - The principle should be that a man who owns the surface, without reservation owns not only the land itself but everything upon, above or under it which may use for his profit or pleasure and which he may subject to his dominion and control. But further than his ownership cannot extend
    - Mining is not like a cave; valuable aspect cannot be brought to surface, and has no value without Edwards investment; the cave should belong to owner of the entrance, and should extend to all parts of the cave that was explored
      - considering the work that P put in it would be unfair that people should benefit from his work - argument against moral entitlement to products of ones labour
    - **A guess that the cave extends under Lee's land is not enough evidence to warrant potential destruction of Edwards interests**
    - Assuming Logan J's rule…
      - What if there was more than one entrance?
      - What if the entrances was/were man made?
      - What if the cave was just a few feet below the surface?
      - What if Lee bough a large amount of dynamite?
      - What might ronald coase say?
- **Ideal rule**: In the absence of agreement, default rule should be that of the majority; whoever own surface rights owns the cave, since cave only few feet beneath.

Barton on Mines and Minerals

- **(1) Basic Canadian common law rule- minerals, except gold and silver, are part of land itself and belong to owner of the soil (Prima facie rule, not absolute- exceptions are frequent); reserving minerals for Crown- part of keeping in public ownership.**
- **(2) Tests for Mineral Reservation:**
  - **> Vernacular test: Is substance regarded as "mineral" in vernacular of miners, landowners, etc at time of severance?**
  - **> Purpose and intentions test: Mines and minerals- not definite terms; susceptible to limitation or expansion according to intention used**
  - **> Exceptional Occurrences test: Minerals is not ordinary rock of district; must be exception (rare) substance**
- **(3) What constitute a mineral is question of fact and is not definite.**
  - **Onus to prove what is a mineral is on person alleging it to be a mineral. Whether it can be worked to earn a profit is relevant, but not absolutely dominant. If no limitations, minerals should be construed in widest sense.**

What if we have access to below surface mines/minerals, but not surface?

- **Common law implied right to be able to enter; granting mineral rights is deemed to provide easement of necessity to that individual.**
  - New Method: *Surface Rights Act, s. 12* enables two ways for access: (i) consent of owner/occupier or (ii) appear before surface rights board to obtain order of entry
    - When surface owner is different than m/m owner? What if A sells B all mines and minerals, including access? *Surface Rights Act, s. 12(2)*: must be separate consideration of sum of money to protect farms so they knew what they were giving up in order to gain right of entry of the surface

Alberta

- **As a result of statutory change, Crown grants of surface interests are now *presumed* to reserve mineral interests in AB (*Public Lands Act*, s. 35). In Alberta, legislation now deems "pore space" to be held by the Crown (*Mines and Minerals Act*, s 15.1).**
- In Alberta, land on the surface is privately owned but the crown owns mineral → *Mines and Mineral Act*
  - But, there are some people who own the mineral interest to their property
    - Vernacular test - what did term mean

        - Purpose and intention test
        - Exceptional Occurrences test
        - Section 56 of *Law andProperty Act*outlines what are deemed as mineral
        - Section 57 & 58 of *Law andProperty Act* outlines what is not deemed as minerals

Reservation of Mines and Minerals

- **Crown can grant a surface interest, but they reserve the right to mines and mineral**
- **Presumed to have rights to mines and minerals** (*Section 35 of Public Lands Act)* ⟶ does not apply retroactively
- Fairly **expansive statutory definition** of minerals (*Section 1 of Mines and Minerals Act)*
- **Oil and gas** are considered minerals, so normally will have been reserved by the Crown, which means the Crown in right of Alberta holds most of the rights to oil and gas, therefore **royalties** are given in recognition of the rights of the crown, with some exceptions
    - **Royalties**: payments by oil and gas companies in recognition that the oil/gas belongs to the crown
    - CPR was granted large amounts of land in Western Canada, including mineral rights, CPR ended up holding a lot of oil and gas rights in Alberta
    - Created subsidiary, encana
    - You can keep the mines and minerals rights when you sell the surface
- **Pore Space:** Section 15.1 (page 195 CB) - **do not own pore space underground in Alberta**
    - Retroactive legislation ⟶ So feels a bit like expropriation, because <u>assumption before would have been that you did own pore space under land</u>
        - No action against Crown though because the property protections we do have cannot trump clear legislation - so, with the way our property rights are protected, they are not protected from the Crown taking away property rights if they make clear legislation allowing them to do so

Publics Land Act, s.35(1)

- All mines and minerals and the right to work them are, by implication and without the necessity for any express words of expectation, expected from every disposition and notification made under this act
    - Implies holding back of mines and minerals underneath someone's land

Law of Property Act, ss 7, 56, 57,58 69

- ss.7
    - In a transfer by owner of land to another, all entitlements are transferred unless expressly reserved or exempted
        - Default rule is the transfer of all rights
- ss.56
- ss.57 & 58
    - States that even though a surface owner may not own mines and minerals, he is deemed at all times to be the owner of, and entitled to the: Sand, gravel, clay and Mari on the surface of the land and all of those substances as can be obtained by stripping off overburden or excavation from the surface (or otherwise recovered by surface operations)

Mines and Minerals Act, ss 1 & 10

- ss.1 - includes all naturally occurring minerals and excluded sand and gravel (surface rights) clau and marl (surface rights) and peat (**Law property act s.56(1) is a list of such materials)**
- ss.10:
    - it is hereby declared that no grant from the Crown, whether relating to minerals in land or otherwise, has operated or will operates as a conveyance of gold and silver unless gold and silver are expressly named in the grant
        - Protects old exchange from commodity loss

Surface Rights Act, s.12

- Must be separate consideration of sum of money to protect farms so that they knew what they were giving up in order to gain right of entry to the surface
- Hypothetical examples
    - 1. What happens if the crown grants something in Fee Simple to A with no mention of mineral rights?
        - Maxim would suggest that A gets mineral, but section 35 of the *Public Lands Acts* reads that all mines and minerals and the right to work them are excepted from every disposition and notification under this act
            - Reservation of property rights
    - 2. Crown grants something to A in fee simple including mines and minerals. What are mines and minerals?
        - Can't we just look for the definition in the Mines and Minerals Act, s.10?
            - No gold and silver for A. In general however, *Act* specifies "in this act, mines and minerals mean this..." not intended to answer general question, depends entirely on understanding at time of grant
                - You must know what parties meant by mines and minerals at the time for the grant
- s.12(2)
    - must be separate consideration of sum of money to protect farms so they know what they were giving up in order to gain right of entry on the surface

Section 12 of AB Surface Rights Act

- Qualifies the mineral rights
    - As a mineral rights holder, you do not automatically have the right to enter the surface, if you do not have private property rights you can make a deal with the surface holder or apply for the right through a board (Surface Rights Board) which would order the right with compensation to the owner

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***PLENARY SESSION:Vertical Boundaries* - Airspace Rights**

Maxim Ad coelum rule:

- Starting point: *cujus est solum ejus est usque ad coelum et ad inferos*

    - **Ownership of a tract of land also confers rights in the airspace above the surface.**
    - Furthermore, rights to airspace may be severed from the surface and allocated separately. That is the position of the common law understanding of airspace rights. However, property rights to a column of air do not extend infinitely upwards. Instead, they are **limited in a way that strikes a balance between the realistic needs of landowners and those of the public, for whom air is common property.** **The owner of the surface holds an entitlement to the airspace up to a certain height above the ground** – that which can be reasonably used or occupied.
- **"Intrusion must not interfere with actual or potential use and enjoyment".**
- There is, therefore, no fixed upper limit, and the imprecision of the loose balancing approach can hamper land transactions because, without a clear crystal rule, it may be difficult to know whether it is necessary to bargain with a landowner over the use of airspace.
- Establishing boundaries for the geometric area above the surface is distinct from the question of the nature of the rights enjoyed within that zone. It might be that these rights are possessory; or they might amount to something less, such as rights of use. Classification will determine what remedies are available.

Note: An action in trespass will lie for a permanent intrusion which impinges on the actual or potential use and enjoyment of land (*Didow)*

Didow v Alberta Power Ltd.

- **Facts**
    - AP Constructs power line along municipal road allowance which runs alongside farm of D. Cross arm conductors overhead hang onto D's land by six feet. The pole is 50 feet high and has power lines that droop at 34 feet. D alleges it is trespass since they own all of the airspace up to the heavens
    - D say the P cannot be mad about it because the logic behind airplanes being able to use the airspace above should apply to the utility poles
- **Issue**
    - What is the extent of D's rights to own what is above the surface of his land?
- **Ratio: Landowner is entitled to freedom from permanent structures which in any way impinge on the actual or potential use and enjoyment of his land**
- **Analysis**
    - Haddad J.A looks solely at common law cases → what does that case law say about this so far?
        - Difference between transient nature of airplane flying above and permanent structure of utility poles
        - Authorities divided into two groups
            - **permanent and relatively low hanging structures were trespass**
                - permanent structures- trespass, but ownership of land doesn't necessarily include all air space above land;
            - **transient structures were not trespass (aircraft)**
                - transient structure- not trespass (aircraft).
        - **Air space trespass only occurs where intrusion interferes with use and enjoyment of space;** owner has limited right to air space- only that which he can occupy- rest falls under res communis; latin maxim should be qualified by weighing rights of landowner v. Public
    - **Problem:**
        - 2 ways to describe ownership of air:
            - (**1**) Treat air as possession of owner; corporeal (if you own the land, you also arguably own the air space to some limit),
            - (**2**) Just right of use- possessory ownership to use airspace (same as water)**.**
        - Is *Didow* a right of use or right of possession? Trespass was defined as protective of possessory interest. But court views temporary interference as nuisance. Court missteps here- can't have possessory right interfered with in nuisance, because that is trespass. Cannot have transitory interference as nuisance, and permanent as trespass
        - CA does not deal with zoning requirements preventing D from building on trespassed land, only refers to moving equipment
        - Why does D seek only declaratory relief? (No damages)? Wants to deal with company later, instead of receiving nominal damages by court.
    - **Policy Response:**
        - **Hydro and Electricity Act-** Power poles can cross land without consent without entitlement to compensation. Does this violate *Bill of Rights*? No- bill is toothless and overridden.
    - Judge decided that an unauthorized intrusion is trespass, so Didow is protected by a property rule
        - However, in alberta, whenever a resource company needs access to surface rights on private property, they can go to the surface rights board and they can assess damages.
- **Held**
    - All cases involve air space immediately adjacent to the surface of the land; trespass should be limited to height at which it is contemplated owner might try to make use of land. Fact that he doesn't occupy space doesn't matter- it is so close to the land that continuous invasions of it affect use of surface itself

Hydro and Electric Energy Act, s.37:

- ss.3 - any structure that is part of a transmission line and is located on land comprising a public highway or other public place and any power line attached to may project into the airspace over the property adjoining that land without the consent of the owner or occupants
- ss.4 - no person is entitled to any remedy or damages or any other compensation or relief as a result of the existence of a projection described in subsection (3)

Economic Efficiency

- We are looking for a legal rule or set of rules that is most likely to bring about an efficient allocation of economic use of resources
- Essentially, If we knew that air space was always or generally more valuable to power companies to landowners we could pass a rule regarding that vice versa → This however is not the case

Coase- Applied to Didow

- **Scenario 1: Assume least costly response of power company is to remove posts at cost of $32,000, all on its own.** Assume further airsport is worth very little to farmer. If power company wins, farmer suffers loss. What if farmer wins? Power company has incentive to bargain with farmer for efficient outcome. Likely would result in deal; company could offer farmer any amount less than $31,999 and both parties would be better off. Regardless of litigation outcome, AGREEMENT IS REACHED.

- **Scenario 2: Assume farmer wishes to protect against effect of electricity.** Farmer is willing to pay $40,000 to install property installation, this is cheapest response. Power company can still bury lines for $32,000. If farmer wins- company buries lines, since 32,000 < 40,000. Farmer won't accept payment of $32,000, and power company won't offer more. Poles go down. NO AGREEMENT If power co. wins- Cables will stay up, but farmer will pay more than $32,000 to power company to remove them. AGREEMENT REACHED. Lines get buried.
- **Scenario 3: Given tens of thousands of transmission lines across Alberta occupy private property, assume lowest cost of abating is $3 mill.** Value to farmers land is $100,000. Power companies available resources are $1,000,000. If power company wins, farmer still does nothing. If farmer wins, power company can pay off $100,000 with their $1 mill, and agreement would likely be reached. Theorem holds.
- **Scenario 4: Same scenario above, but value to farm is now $2 mill, cost of abating is $3 mill, and available resources are $2 mill.** Power company wins- poles stay up; farmer wouldn't think it sensible to bury them. Farmer wins- Power Co. cannot afford to pay off farmer, nor can they afford to abate it. Wealth effect (constrained preference) comes into play. Idea is about facilitating deals, since there are many reasons why they won't occur. It's clear that it's important to get the allocation correct in the first place, since often ends up being final allocation. From efficiency point of view, make allocation that is mostly likely to occur if market functions properly. Law should be market mimicker.
- **Broader Lessons: If Coase is right, why do we need property rules? Efficiency is not the only thing that matters! Need for initial allocation. Law tries to minimize transaction costs. Anticipating market problems à high transaction costs, hold outs, bilateral monopoly (impossible deals), free rider effect (organization is able to benefit from the actions of another without contributing to the cost associated with such actions), and endowment effects (receiver of initial allocation may have higher**
- **The Coase Theorem**
    - In the absence of transaction costs any initial assignment of rights will lead to an efficient result
    - Brillance founded on insight that legal rights/entitlements are factors of efficiency / production
    - Legal entitlements can also be bought and sold
    - All of this assumes the absence of transaction costs, which are impediments to guarding in the market

Transaction costs

- What might impede bargaining
    - Collective action problems: free riding & holdout
    - Strategic bargaining : bilateral monopolies
    - Non-productive costs: costs of contracting &costs of monitoring and enforcing

How legal rules can minimize transaction costs

- This law should mimic the market
    - try to accomplish what the market would in a world without transaction costs
- assign property to the likely highest value user
    - Who is most likely to value the airspace at 5m? 50m? 5km?
    - Roman ad colum rule good if we assume the airspace is more valuable to the surface owner than any one else **BUT** modern ad coelum rule predicated on idea that airspace for a certain amount of vertical distance over land is most valuable to the surface owner, but after a certain height it is more valuable to someone else
- **choose a remedy to protect the entitlement**
    - choose a "**property rule**" (injunction) when transactions are likely to be smooth
        - Parties themselves decide on the terms
    - choose a "**liability** rule" (damages) when courts are more effective
        - Third party decides on the price for entitlement after the fact
    - **How do you choose between property rule and liability rule**
        - If we think bargaining is straightford we protect via property rule but if we anticipate a break down of bargaining process or high transaction costs we use a liability rule
- Relative costs of various choices influence best choice
    - property rules best when low transaction costs and low likelihood of disagreement between the parties
- Called a per se taking and would be unconstitutional in the US but is legal in Canada because of parliamentary supremacy
- There are provisions in Alberta for buying into airspace
    - need right of way or strata title

Lateral Boundaries: Water

In Western Canada & Ontario, at common law, title to the beds of navigable waterways is held by the Crown (*R v Nikal*). With respect to non-navigable waters, at common law, the owner of adjacent land presumptively owns the bed up to the middle of the stream (ad medium filum aquae).

- **The test for navigability relates to the stream as a whole, not just a particular portion of it (*R v Nikal*).**
- **In Alberta,** under statute, title to the beds and shores of all permanent & naturally occurring bodies of water & all naturally occurring rivers, streams, water-courses and lakes is held by the Crown (*Public Lands Act, s. 3*).
- Gradual and imperceptible changes in the shoreline alter the boundaries of the adjacent landowner (**accretion**), whereas sudden changes do not (**avulsion**) *(Roberston v Wallace*)

Section 3 of Public Lands Act

- The title of the bed of any permanent, naturally occurring body of water is owned by the Crown
- This can be rebutted by very clear language granting the bed of the waterway otherwise
- S 3(1) language interesting
    - Grant or certificate of title issued on, before, or after a certain day (so anytime)
    - This language helps rebut title/property interest arguments based on takings - language is clear that title issued before this statute is still affected

- **S. 3- *Public Lands Act*- 3(1)** grants, notwithstanding any other law, the title to the beds and shores of (a) all permanent and naturally occurring bodies of water, and (2) all naturally occurring rivers, streams, watercourses and lakes, is vested in the Crown in right of Alberta.
    - BUT: **3(2) says 3(1)** does not operate to affect grant that specifically conveys be *express* description a bed or shore
- This legislation makes it clear it is taking property without compensation, as long as it is clear they are intending to take land they have an unlimited right to do so

R v Nikal

- **Facts**:
    - Native charged with fishing without a licence contrary to s. 4(1) of the British Columbia Fishery (General) Regulations. Native persons, although required to have a licence, were entitled to a free permit to fish for salmon in the manner they preferred. Appellant had been gaffing salmon in the Bulkley River where it flows through his reserve. He took the position that the licensing scheme infringed his aboriginal rights as provided in s. 35(1) of the Constitution Act, 1982 and was therefore inapplicable. He further contended that the river is, at this point, part of his reserve so that only the band by-law, which allowed band members unrestricted fishing in the river, applied.
        - First Defence: the riverbend is in the reserve only subject to reserve by laws
        - Second Defence: fishing regimes infringe the Charter Rights
    - The land on each side of the river is in the reserve, presumptively this would mean ownership of the river bed, and therefore municiple bylaws would succeed over provincial legislation
- **Issue:** Was river part of reserve?
    - Turns on whether the bed of this river is part of the reserve or not?
- **Held:** River found not to be part of the reserve.
- **Reasoning:**
    - When Crown created reserve, it included lands on both sides and therefore would include ownership of land in the river. Legal title to the land is held by Crown but there is a beneficial interest held by the fishing ban. However, **must use navigable vs. non-navigable distinction to determine ownership of river.**
    - River is navigable because, for the most part, it allows for travel from start to end. Therefore, owned by Crown.
        - Court hold that some interruptions in navigability (like rapids) do not impede the overall navigability (there are options like portage, etc.) therefore if a river is mostly navigable it is still, legally speaking, to be thought of as a navigable river and cannot thus be privately owned → **River in this case held to be navigable** and thus as a result the bed is presumed to be held by crown
        - Court also holds that the right to fish is separable from title to bed to river
            - Presumptively the title to bed comes with right to fish BUT can be separately granted
        - Court holds that there is a presumption that for non-navigable rivers the bed held by the land owner
            - Again, presumption that can be rebutted; in this case, the Crown would have still taken ownership of bed
        - Recognition of Aboriginal right to fish and regulatory framework impeded this, so case dismissed
        - Fishing
            - even if the bed had gone with the adjacent land, the intention not to give an exclusive right to fish would have succeeded in defeating the claim anyways

Reserve Land under Indian Act

- Reserved for use and benefit of band in question
- Legal title to land held by crown
- benefical interest held by the band
- Band has most of the rights of a landowner except the right to sell
- Reserve bylaw making power
- Because the riverbend is part of reserve land, the band's council's regulatory power extends to the river, therefore provincial licensing regulations should not apply

Change in water boundaries

Doctrine of Common law of England

- In England, **non-tidal and tidal waters** is the distinction that matter
- Non-tidal: the owner of one side of the river presumptively owns title from the bend of the river, up to the middle of the river
- Tidal rivers: crown holds the title to the river bed
- **This distinction was not received in Canada were fundamentally different, rivers and lakes were essentially the first public highway used for public transportation**
    - Canada is landlocked so the major rivers that are needed to transport through Canada cannot be privately owned as it would cause issues. Having private ownership would interfere with the usefulness of the the water way as a highway → **Justification for public ownership**

Doctrine of Canada

- Idea of private ownership of non-navigable rivers (like in England) not a problem when you do not need to rely on them for transport and navigation (like in Canada)
- Need those rivers to be useable by public for transport in a large continent like Canada
- Benefit to public as a whole to access rivers (including non-tidal rivers) outweighs the interest of benefit of private ownership
- Important distinction: **navigable vs non-navigable** rather than tidal vs non-tidal
- **Navigable**
    - if the river is navigable as a whole (foro the most part) title of bed is to the crown
- **Non-navigable**
    - if the river is non-navigable as a whole, held to adjacent landowner to middle of stream → **Ad medium filum aquae**
    - title held presumptively by adjacent land owner to the middle of the river

Accretion & Avulsion

- Boundaries of waterways that might shift overtime

- Key is to distinguish between **accretion v avulsion**
    - **Accretion**: more gradual and imperceptible change in boundary between land and water causes change in property line; e.g. over time, land or sediment could be moved from one side of a river to another
        - as a land owner, you lose this land if you are on the losing side, gain it if you are on the growing side
        - as long as the change is gradual, natural boundary remains legal boundary
        - similar idea would apply to rising or waning water levels
    - **Avulsion**: sudden shift there for boundaries stay the same
        - natural boundary does not remain legal boundary
- People refer to natural boundaries because they are convenient (in a way); so, something like 1 cm of movement of a river over a period of time that would create a sliver of land just in front of the river that impedes a landowner's access to that river would not be efficient, thus the accretion principle allows that river to continue using that river as a natural boundary
- **Protecting reasonable expectations balanced with convenience of using natural boundaries; avulsion would significantly impede expectations, but accretion would not**
- **Example :***Robertson v Wallace (see above for case detail) or* ***more examples in Taylors CAN***

Why does the law distinguish between avulsion and accretion

- **Protects expectations → A sudden change is not clear it is going to be permanent**
- **it would be impossible to regulate constant change - convenience, administrable and unworkable**
- **Balancing of the importance of protecting expectations v convenience and administrable reason, it is not that unfair, you can both gain and lose by it**

Fixtures and Transformation of Chattels

Chattels

- **Personal property** - chattels
- **Real property -** property in land
- Not the physical fixation that is relevant, if it does get labeled a fixture it is part of the real property interest

Lending:

- **Security interest is a form of guarantee for a loan**
- If you lend someone money and they fail to pay you, you can sue them
    - Problem arises when someone does not have enough assets to pay debt
        - **right to take possession of assets in the event the debtor does not pay you back**
            - Debt is guaranteed by that asset
    - One of the ways that lenders can mitigate the risk of something like this happening is to get the added protection of a security interest in a particular assets
        - **A security interest is the right to take possession of the asset by default**
            - It takes priority over unsecured creditors in respect to the asset
            - In the event the debtor doesn't pay, the borrower can repossess the house and use the funds to satisfy the debt
                - Those funds will only become available to unsecured creditors in the event that anything is left over
    - **Conflict can arise when someone has a security interest in a chattel, but has become a legal fixture in the property in question**
        - Legislation that deals with this problem exists

Fixtures

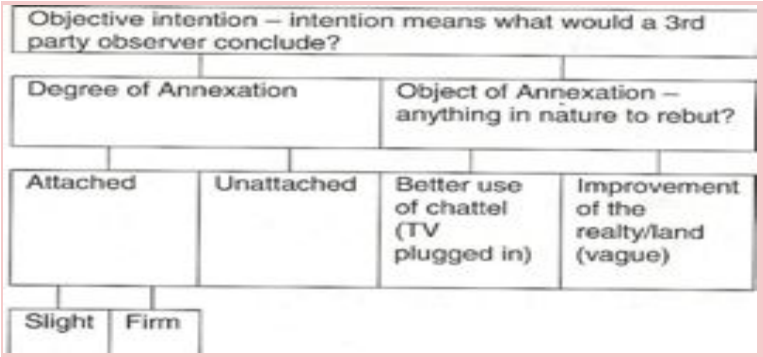
- **A chattel that is attached to land can become part of the real property interest if it is deemed a "fixture". A chattel that is affixed to land, even slightly, other than by its own weight, is *prima facie* a fixture (*La Salle Recreations*), and one that is not affixed is *prima facie* not a fixture.**
    - **The degree and object of the annexation can reinforce or rebut these presumptions (***La Salle*);
        - the degree of **annexation** relates to the extent to which the chattel is physically attached**.** The object of the annexation is assessed by asking whether the purpose of attaching the chattel is primarily to enhance the value of the land or to enhance the value of the chattel (*La Salle*)
- Boundaries between the chattel and the land - whether is has become incorporated into the interest in Land
- Important background information - **distinction between personal and real property**
    - When you buy a carpet it is person property
        - That status can change when you affix it to land - becomes real property
- If something is a fixture of the land or the building or house, it is part of that real property interest
- Why does it matter?
    - In a will
    - The interest in real property being sold presumptively includes all fixtures
        - if you sell a house and don't specify otherwise, presumptively the interest in the house comes along with all the doors in the house
            - Becomes a fixture, becomes a part of the interest in land
    - Security interests:
        - A form of guarantee for a loan → Normally, a lender could sue a borrower for what they are owed
        - Whether a chattel has become a fixture of a land can be relevant to lenders, where they have a security interest in a chattel and another lender has a security interest in real property (mortgage)
- **Fixture can be rebutted**

Fixtures

- La Salle demonstrates how Canadian courts determine whether an item has been transformed into a fixture
    - Establishes **test for when a chattel becomes a fixture (must use objective intention of what parties thought)**
        - **All fixtures, if truly fixtures in law, are subsumed in title with reality and cease to be personal property**
- **First step:**

- **Is this affixed other than by its own way** → If it is somehow stuck to the land their is a presumption that it is a fixture
  - This is not determinative
- **The first question is whether the ---------- is affixed, even slightly - has it physically affixed other than by its on weight**
  - If it is affixed by a means other than its own weight, it is prima facie a fixture
  - If not, it is not prima facie not a fixture
    - "Even slightly" - is the language that is used in the test

- **Second step:**
  - **(1) Degree of annexation** (What is the degree of annexation)
    - **How physically affixed to the land** → What degree is the carpet physically incorporated
    - **The degree of annexation is the extent to which, in physical terms, the chattel has been incorporated into the land**
      - can be attached but not a fixture, but the rebuttable assumption is that the item has become fixture
      - **Is it affixed to such a degree that you would have to do physical damage to get it detached?**
        - **strength of attachment = strength of presumption**
      - **Must be attached by more than own weight**
      - In something that is physical affixed to the land or the house that is on the land, it is prima facie a structure – you can still rebut this as a result of the degree and object of the annexation
        - ex) The nails that are holding boards together started as chattels, but they have pretty clearly become fixtures
  - **(2) Object of annexation**
    - **Why the chattel was connected to the land? the purpose...**
    - Question of why was it affixed - was it affixed enhance the value and utility of the building or the value and utility of the chatle
- **Note: Chattels attached may still be chattels and items not attached may be considered fixtures**
    - Objective test



*****Including in a contract "this is not a fixture" is not enough to determine characterization.**

Test for Fixtures
(1) If article is not attached by other than own weight =**chattel** → unless circumstances show intention for it to be part of land
(2) If affixed even slightly, = **fixture** → unless circumstances show opposite intention,
(3) Unless circumstances are clear for all to see (objective test) to show alternative intent via (a) degree of annexation or (b) object of annexation
(4) Intention of person affixing article is material only so far as can be presumed by degree and object of annexation (not interested in subjective reasons)

La Salle Recreations Ltd. v Canadian Camdex Investments Ltd.

- Facts:
  - a dispute between secured creditors over the right to repossess wall-towall carpeting
  - The carpeting was purchased under conditional sales agreement, under which the carpet vendor retains title security until the full purchase price paid
    - The building with which the carpet was installed was subject to a mortgage
  - The lender wants to take the carpet & resell it to get back their loan
  - The court go to look at if the carpets have become fixtures
- Issue:
  - whether the carpets are fixtures, such that the lender cannot come and repossess the carpeting?
    - Is the carpet now an interest in land?
- Held
  - The carpets were fixtures
- Analysis
  - Question of priority - The question of which lender takes priority will be determined as to whether or not the carpet becomes a fixture
    - Does the carpet vendor lose its rights to take the loan do to it being part of the hotel → What point does the carpet become part of the building
    - The mortgagee is the bank, whose loan is secured by a mortgage
    - The carpet vendor who had an interest in the carpeting when it went out the door as a chattel
  - **The judge decides that you need to apply certain principles to determine the answer**
    - **2 part test - all things considered balancing test**
    - **(1) what is presumed to be a fixture?**
      - **Is it affixed even slightly? Other than by its own weight?**
        - **Yes - Prima facie a fixture, creates a presumption that it is a fixture**
        - **No- Prima facie is not a fixture**
    - **(2) Degree and object of the annexation?**
      - The judge looked at the factors of the carpet

        - the floor would have been unusable as a hotel without a carpet
        - the object of the annexation was for the better use of the building
        - The carpet was permanently affixed
    - **Degree of Annexation** - is this slightly attached or really strongly attached that you would have significant damage to remove it (in this case descibed as slight)
        - **object of annexation:** no longer asking about physical connection, **asking why it was connect?** - is it the private intentions of persons who put it there, or is it something else? **this is an objective test, creating a hypothetical 3rd party** (What does this look like to other people)
            - trying to keep law relatively predictable and stable, not just the person who installs its interest is affected.
            - **Ask: from this objective perspective, was the chattel annexed to the land primarily to enhance the land or chattel?**
    - In this case, we have a degree of physical connection that is described by the trial judge as slight
        - A slight physical annexation still raises the presumption that it is a fixture - you still have to ask about the degree of annexation, and the object of the annexation
    - The judges of the opinion that the object of the annexation was the better and more effectual use of the building is a hotel and not the better use of the goods as goods
        - The carpeting and accessories were annexed to the land in such a manner and under circumstances as to constitute fixture
- Ratio
    - two part test to determine if something is a fixture:
        - Step 1: What things are presumed to be a fixture?
            - articles that are attached to the land not only by their own weight are fixtures
                - Affixed = presumed fixture
        - Step 2: Rebut the presumption based on the object the degree of the annexation
            - The degree of annexation
                - How physically attached is the item to the land
                    - How hard would it be to detach the item?
            - The object of annexation
                - the purpose of the object
                    - to enhance the value of the land or enhance the value of the chattel
    - Important to use the perspective of an objective observer
        - Because the questions affect 3rd parties - other parties would have interest in the land
            - What would an observer think about looking at this

Potential fix: disputes are now regulated by statute- must take chattel interest and register it before mortgage and before becoming fixture; failure to register means loss of priority in subsequent dealings (Personal Property Security Act, Ontario)
> Right to removal in default may be exercised, with notice, and damage caused by removal may be claimed by person with land interest.

A contract between two parties relating to fixtures can alter the rights of the parties (eg reserving fixtures in a grant of real property) but such a contract generally will not affect the rights of third parties who do not have notice of it (*Diamond Neon*)
> If tenant installs fixture, according to fixtures test, you enhanced freehold tenure since chattel becomes subsumed in realty

Tenant's Fixtures
- Fixtures attached while under a lease agreement
- Lease: time limited right to exclusive use of property
- At the end of a lease, a tenant can have a right to move things otherwise considered a fixture
- Right to remove fixture only applies to those added/installed by tenant
    - Those affixed for purpose of carrying on a trade
    - presumptive rights - can agree differently in lease agreement
- Why are there a presumptive right for tenants for them to remove things they have installed?
    - leases are time limited, not perpetual interest, if the rule was that any fixture got turned over to the landlord, tenants would be disincentivized from doing useful or beneficial things because they would have to give them up
    - There is a fairness element - fair to the tenant
        - The tenant would not benefit from the increase in value that the property owner would get from the fixture
    - If you have a time limit interest- incentive not to do things to the building if they were going to lose out on their capital investment
    - Economic argument
        - leases would become undesirable

Transformation of Chattel Ownership

Transformation
- Now we are no longer talking about chattel. We are talking about real property, how it can be mixed and transformed
    - Like fixtures in the sense that the court have adopted very malleable tests and approaches to enable their ability to do justice in a wide range of cases with different factors
- Boundaries between two chattels→ Things that can occur to chattels
    - **Confusion/ admixture**
        - **Fungible goods are combined in such a way they cannot be practically separated from each other**
            - Combined bulk
                - Question of who owns it
    - **Accession**
        - **One chattel becomes physically fused to a second chattel in a way that you can determine between both chattels but it would be destructive to separate**

        - Secondary chattel becomes part of the primary chattel - ex) windshield becomes part of a car
    - Guiding principle here is similar to fixtures
        - Will have a principle chattel and a minor chattel and the minor chattel will exceed to and becomes part of the principle chattel
            - BUT there can be a question of which chattel is principle? Usually the more valuable one is the principle
- **Transformation**
    - **Where one chattel is fundamentally changed in terms of its character /nature so it becomes something different = create a new chattel**
        - i.e. Corn into whiskey
    - Conduct:
        - Mixer: party that mixes the goods of another person - innocence can have relevance
        - Other party: relevant to the extent that court might ask if they contested
    - Remedies
        - **Proprietary**: order from the court that possession of goods be turned over
        - **Compensation**: the party gets goods returned, in addition he could potentially get compensation for being deprived of possession compensation can go the other way as well
    - Cause of Action
        - basis upon which a claim is being made against the other party
            - **Tort**: conversion/detinue: normally only gives rise to compensation in certain circumstances when dealing with unique goods you can have proprietary remedy
            - **Contract**: normal remedy is damages, with respect to unique goods, remedy might be specific performance
            - **Unjust enrichmen**t: defendant has been enriched at the expense of the plaintiff. Seems unjust for the defendant to be so enriched in absence of jurstic reason. Possible to get compensation, order for the specific restitution of the goods - order goods turned over is discretionary, guided by the question of whether they ought to have proprietary interest
- Conduct of the parties can affect legal result
    - Situations where a party acts in bad faith can
    - Situations where a party acts mistakenly
- **Who has the property right in these situations?**
- **Question of monetary compensation**
    - Fairness of outcomes

Old rule- if wrongdoer and you combine your goods with B, combined mass is owned by innocent party

> **Problem-** your punishing wrongdoer, but we should be aiming for compensation, not punishment. Court's decided that if A's portion is larger than B's pilfered portion, applying the above rule would result in substantial injustice.

New Rule- Decide what original proportion was, and reassign them. Discrepancy is held against wrongdoer (reverse onus of proof)

>Confusion results in ownership of a share proportionate to the value of the contribution from each source, including from wrongdoers, where the resulting bulk can sensibly be physically divided (Glencore International). However, in such cases, a wrongdoer must affirmatively establish its share (Glencore).

Glencore International A.G. v Metro Trading International Inc. -

- What happens when two chattels are mixed together, fused or transformed?
- **Facts:**
    - Metro trading international was in the business of buying, mixing, and selling oil
    - Glencore had contracts for the storage of oil in MIT facility
    - The oil was not stored separately
        - Motor oil company associated with MIT had entered into refining contract with Texaco
    - Not only was the ownership of the commingled oil in question, but also the ownership of the oil that had been transformed into a new product
    - MIT went bankrupt and they only had 750000 tons of oil but according to the oil companies there should have been 2.5 million tons in storage
    - Proprietary claims take precedents over unsecured debts that the company might owe to other creditors
        - That is why they want show that this is their oil, so they do not have to wait in line with other creditors
        - Taking priority in bankruptcy proceedings (motive
- Issue
    - there is a confusion element - cannot practically separate oil
    - There is a transformation element as well: changed grade of oil
    - Who owns the resulting oil - because MTI goes bankrupt
    - How to determine who owns what
- Results:
    - The oil which is been comingled and turned into something **new belongs to both parties**
    - as in the other cases of mixing, any **doubts** about the quantity or value of the oil contributed by the innocent party **should be resolved against the wrongdoer**
    - Does the comingling of the oil from other companies terminate property interests
        - no they own it common
        - proprietary interest in the share of bulk oil in question
        - quantity and quality of share determines your proprietary interest
    - Innocent: was not their idea to mix the oil and did not do anything to create potential confusion
    - oil owned by the wrongdoer creates this situation
        - Past case law says that some wrongdoers can lose their interest completely
        - if there is any ambiguity as to the specific share, will be resolved against the said wrongdoer
        - up to MTI to affirmatively prove what its share was, if it fails do this then the lack of clarity gets resolved against it

    - Innocent party is also entitled to recover damages from the wrong doer in respect of any loss which he has suffered as a result of the wrongful use of his oil
- Court analysis
    - the court determines that the companies own the resulting bulk of oil in common
    - MTI is the wrongdoer
        - they should not have mixed the oil
        - Do they lose their interests?
            - the court says where it is feasible to separate the goods
                - To say you own x and they own y
                    - then the wrongdoer does not lose its interest
    - The idea that the different companies get a share of the oil and MTI also gets a share in the oil because the oil is shareable
        - important that the oil in this case was shareable
            - all parties could have a share in the oil
            - therefore, the fact that MTI was a wrongdoer was not as relevant here
- **Ratio: in cases of comingling new belongs to. both parties and. in circumstances of doubt it will be resolved in favour of innocent party**

ACCESSION → Case Law where goods have been fused together (**accession**) **the end item cant sensibly be divided:**

- Beaver case (*Jones v Demarhand*) - husband takes wife's pelts along with his own to create fur coat for mistress
    - Wife sues because most of the coat is made from her pelts, wants coat turned over to her
    - Accession because we have the fusion of the pelts, but also have transformation (different item)
    - Wife gets possession of the resulting fur coat, husband wrong dooer
- **Being a wrongdoer can (but does not always) affect the result of the case**
- Transformation of a chattel does not limit our ability to trace back to true owner
- Acknowledges that at a certain point where the transformation is fundamental and the new item is mainly the work of the wrongdoer, it might not be the case where it goes back to original owner, however this is a high threshold

4 different standards have been proposed for determining accession

- **1. Injurious removal - accession occurs where the chattels cannot be removed without seriously damaging the chattel-dominat test**
- **2. Separate existence - whether the secondary chattel maintains a distinct identity as something separate**
- **3. Destruction of utility - removing the secondary chattel would render the principle chattel useless**
- **4. Degree and purpose: same as the test for fixture - degree of annexation combined with what is the object (is it to enhance chattel A or secondary**

Copyright

Copyright

- Is an ***in rem* property right** (good against the world)
- Leg power for copyright is **federal under section 91(13) Con Act, 1867**
    - Federal parliament power
- Purely **statutory law →** there is no common law for copyright
    - Judicial reluctance to create novel forms of property, at one time copyright was considered novel form of property, so it is now exclusively **statutory right**
- Claims need to be based on **Federal *Copyright Act***
    - Copyright relates to original, literary, artistic, musical, computer code works - core forms such as books, music, film, computer code
    - A work **does not have to be registered to be copyrighted,** but it does need to be fixed some way (ex. writting it down)
        - Cannot be in abstract but rather be fixed
    - **Protections of unauthorized copying**
        - Allows the creator to derive economic benefit from work (create a monopoly on the work) and disciplines those who steal it → so it incentivizes people to create original work
    - Exceptions:
        - Parody, short excerpts for education purposes, etc. do not apply to copyright
- **Copyright does not last indefinitely**
    - Default term of copyright is life of the **creator + plus 50 years**
    - Creator often drawing upon past works
        - **Idea of balance between creator and public interest →** explains why we are okay with indefinite interest in land but not with indefinite interest in copyright is the idea of the public domain of creative works
            - Ex) Fee-simple interest in land last forever; copyright does not
                - Drawback of copyright is that you might impede future creators from drawing on past works so this ability for copyright to expire (time limited nature) allows this
        - Time limited because of the competing interest, a work of art can be the raw material for future art, works of creativity are seldom the sole product of the authors own efforts
    - Consumer perspective in access to works
        - Increases the pool of work freely available

Theberge v Galerie D'Art du Petit Champlain Inc

- **Plaintiff:** **Defendant**
- **Facts:**
    - Théberge (T) is a Canadian painter with an international reputation. Appellants purchased rights, permitted to produce poster art, but instead transfer ink from poster backing onto a canvas backing, such that the reproductions look very similar to the original works with the intent to make more money from their works. T sues for copyright infringement.

        - Instead of poster they make a canvas - not replicating
- **Issue:** Was there copyright infringement? Can artist control the eventual display of a reproduction?
    - Was there unauthorized reproduction
    - Whether there was a violation of the moral rights of the creator
- **Holding**:
    - Appeal was allowed - decision for the appellant Galerie d'Art.
- **Analysis**:
    - An artist has no general right to control legitimate subsequent usage of copyrighted work. Artist has moral, but not economic rights, in this scenario. Canadian copyright law does protect both economic and moral rights, but tends to be more concerned about the economic. Theberge gave up the economic rights when sold copyrights to the poster makers. For there to be a violation of economic rights, there must be a reproduction of a substantial part of the work. Here, there was only a transfer of the work from one medium to the other -- not a reproduction.
    - Question #1 At the end of the process there needs to be more copies - there was no replication (only one representation of that work). To call this reproduction would interfere too much with the owner of the physical poster
    - Question #2 Did this violate the moral rights?
        - Moral rights (*Snow v Eaton Centre)*
            - right to attribution, right to integrity of work
            - What has been done here does not undermine integrity of the work
                - requires that work be distorted/mutilated/changed
                    - The way a work is displayed does not mean it is distorted
            - The more you expand moral rights of artist the more you diminish the rights of tangible owner
            - **Moral rights cannot be sold or transferred** - residual interest artist maintain even when it has been sold to someone else
                - This was the basis of Theberge argument
        - Court says no because it does not go to the integrity of the work
            - court weary of restricting rights of the owner of the physical object to far
                - work must be distorted but in this case where it looks essentially the same after the transfer there is no distortion or mutation
- **Ratio**
    - **So, the interests of the owner of tangible assets should prevail as long there is not some kind of violation of tangible intellectual property rights**
- Notes:
    - Owner of the tangible physical item (poster) prevails
    - Theberge is a visual artist who has a copyright in his paints as soon as he paints them - no need to register
    - Grants a license to a company to make and sell posters of his work for a fee
    - A poster sells for much less than the original painting
    - The company uses a process to take an image off poster and put it on a canvas
        - so they can sell it for more
        - might look like an original to an observer
    - Initial poster was an authorized copy
    - Art gallary transfers ink from poster to canvas
    - P says that is not allowed under copyright
        - company that makes poster authorized to by P and the process of transferring this to a canvas is not akin to replication (there are not two posterest at the end of the process and they were not using unlicense poster to being with)
        - To call this reproduction would interfere too much with rights of the gallery, who own the physical poster
    - In absence of a breach of intellectual property rights we should protect the interest of the owner in the physical property
        - If there is a breach it does not take priority over the interest of the owner with physical tangible assets
            - Distinguishing features
                - on the courts interpretation of the copyright act, what the copyright owner was doing was not breaching the copyright of T
    - Attribution and integrity of the work are two moral rights under Copyright Act
    - But does this violate the moral right of P
        - moral rights (*Snow v Eaton Centre)*
    - Analysis rooted in the nature for the property right: copyright is purely statutory in nature, if there is going to be more expansive conception of moral rights it is up to parliament to decide
    - Distinguishing features
        - On the court's interpretation of the copyright act, what the copyright owner was doing was not breaching the copyright of P
        - By contrast the courts finding in Monsanto was that what the farmer is doing on his land with respect to his crops amounts to violation of Monsanto's patent

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Patents

Patents

- **Patents are exclusive rights to make, sell, use an invention**
    - invention is novel, useful and non-obvious art, process, manufacture, combination of matter
- IP interests are statutory and are federally mandated, also purely statutory
- **Time limited monopoly on the use of an invention for shorter period of time than copyright - 20 years**
- Patents must be **registered** to be protected (unlike copyright) and disclosed to the public
- So, you have to **disclose the invention to the public** and in exchange you get exclusive rights too it for some period of time

Monsanto Canada Inc v Schmeiser

- **Facts:**
  - S farms in Sask. His neighbours began using P's round-up ready canola (RRC). At some point, without obtaining license for its use, P tests and finds 95% of S's crop to be RRC. Original of it unclear (S claims it blew on land), but would clearly have been intentionally replanted.
- **Issue**:
  - Is the patent valid?
  - Did S's "use" (intentional in growing this seed in his field) the patented cell thereby infringe on patented gene?
- **Reasons**:
  - In previous SCC decision, you cannot claim patent for higher life forms (genetically engineered mouse). Court holds this is different. Patent- intended to provide holder with full enjoyment of monopoly; interference with enjoyment is prohibited. Commercial benefit must go to patent holder. Can still infringe on patent if patented invention is part of broader, unpatented plant structure. (expansive rule- elements rarely used in isolation). Doesn't matter patent never advanced S's interest (never used roundup)- some utility accrues to S (could spray if he had do without damage). S contributed to plants reproduction through working land, even if an innocent finder
  - Issue 1 - is the patent valid
    - in Harvard Mouse, the court found that higher life forms were not the statutory definition of a patent
      - Harvard Mouse case says cannot patent living organisms, higher life forms, they distinguish it by saying they patented the genetic material, not the plant itself, you can patent the gene and the cells
    - Also indicated that plants and seeds were no fair game for patent
    - You could not have a patent in these items, even if it was genetic modification that took place
      - In this case, the genetic material was patented, of the cell itself
      - Maybe you cannot patent plants or seeds but you can patent the gene itself
        - court does not find that the patent is invalid on this basis
  - Issue 2 - did S's intentional growing of this seed in his field infringe on the patented gene?
    - Exercise in statutory interpretation (p257-258)
      - Purpose, context and past case law should guide the interpretation
        - the court holds that the purpose of the act is to provide the owner of the patent with monopoly on the invention
          - if you allow others to intentionally grow seed which is derived from patented material without permission this would deprive patent holder of monopoly use and enjoyment of his invention
            - The court holds the S did infringe the patent
  - Ownership is no defence to breach of patent act
    - The argument that it is his land and he should be able to do what he wants with it is not a defence
      - Court deals with this quite summarily (p.261) saying that the issue is not a property right but patent protection, ownership is no defence
        - here we are talking about intangible interests
- Holding:
  - Yes it did violate the patent
- **Class Discussion:** Not concerned with 'innocent' blowing of seeds on field- intention not necessary for liability. Pollen-cannot claim when blowing onto land.
- **Response:**
  - Gov't is free to legislate biotech companies; they have no yet done so. Are they truly free? Possible NAFTA issues- may be contravening NAFTA if you interfere with a multinational company like Monsanto.
- **Notes:**
  - **You can register a gene or a gene insertion procces, but not a living organism**
  - Monsanto patents the gene in their round-up ready canola
  - Monsanto charged farmers licensing fee based on number of acres under cultivation
  - You cannot patent a living thing, but courts find you can patent a gene
  - D plants seed of round-up ready canola, but did not pay licensing fee, Monsanto sues for breach of patent
    - but does what he did constitute use of these patented genes
      - yes, his plants consisted of cells which were patented
  - D has infringed on the patent - growing and cultivating GM seed was breech
  - Did schmeiser use the patented gene in violation of the patent
    - statutory interpretation
    - Purpose of the act is to provide a monopoly to the owner of the patent - if you allow others to intentionally grow seed which is derived from patented material without permission this would deprive patent holder of monopoly use and enjoyment of his invention

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Trademarks

Trademark

- Unlike copyright and patent law, which are purely statutory in nature, **trademarks have common law origins**
  - Traditionally under the *tort of passing off*
    - Wrongful passing of of ones goods - to free ride off another seller
    - it was possible to sue a party that was selling goods and passing them off as yours
- Still common law dimension and a federal trademark act
  - Protections developed at common law for particular marks have been reinforced by statutes (**federal trademarks act)**
- Trademark are under federal jurisdiction
  - Section 91 - Const 1867 - federal power of trade and commerce
    - dealt with in leg terms by the federal parliament
    - trademark law deals with the marks that a seller of goods use to distinguish its goods from other parties

- **distinguishes the goods and services of one company from others** → ensuring that a business can have exclusive rights can in principle serve a few related purposes
    - **allow a business to build and benefit from reputation**
        - Protects the brand from others claiming to be associated
        - Consumer protection (protects the customer from being tricked)
    - **if a company does good work it can benefit from the reputation it builds by signalling to customers**
        - Distinctive trademarks can serve an information cost - benefit - can rely on experience of seller in the past if they have the trademark, rely on general reputation of seller
        - Facilitates transactions (so that consumers know where goods have come from)
    - **in the absence of this, there might be a perverse absence of incentives** - if anyone could affix their mark to your goods, they could freeload and potentially undermine your reputation
    - **Incentives of market participants of sellers of goods and services, the ability to affix marks that are distinctive and that only one person can use can bring about incentives**
- Could create potential for confusion
- **Mechanism to register a product and registration creates a presumption to that person to use that exclusive mark**
    - trademark has to actually be in use to be enforceable
    - **"use it or lose it"** - cant register something and just sit on it which is a key distinction between patents and copyright
    - also distinguished by **time limitations - as long as the trademark is in use it nevers runs out (patents need to be re-registered)**
- Registration of trademarks creates a presumption that the party has an exclusive right to use that trademark
- Trademark has to actually be in use for trademark holder to exercise rights under the act (use it or lose it)
    - Can last as long as it is in use

Boundaries Between trademarks

- Fuzzy boundaries with an open ended standard to know if the boundaries have been crossed
- Earlier trademarks generally take precedence over trademarks registered later
- standard for whether there is conflict is confusion
    - will simultaneous use of trademarks create confusion for purchasers
    - possible for two companies to be using the same name as long as there is no confusion
        - ex) apple computers v apple autoglass
        - ex) barbie v barbie restaurant
- It must be left to the court to decide when an infringement has been made
- it is unlike traditional land where boundaries are fixed and can be found through survey → this is an open ended standard

Mattel Inc v 3894207 Canada Inc

- Mattel, the toy company, has a registered trademark in the name "Barbie" that it uses primarily to sell dolls and doll accessories but also to sell backpacks, bikes and other merchandise
    - this case arises because there is a Montreal area causal dining chain called "Barbies"
        - It tries to register to a trademark in the nature of "Barbies"
            - Mattel challenges this trademark as being inconsistent with its registered trademark in barbie (standard of confusion)
            - standard for establishing this conflict is **confusion** - will people confuse the restaurant with the Barbie doll
            - Mattel says the Barbie doll and Barbie brand has achieved such fame and ubiquity that its use in any domain would be confusing
                - The restaurant trying to deceive customers
        - The case acknowledge their defence to the trademark review board and discusses the standard review
- Court analysis
    - Court agrees that there won't be confusion (agrees with trademark review board)
    - How to tell if confusion is present
        - Court looks at the 5 factors
            - all surrounding circumstances test (SEE CB)
            - factors set ouot in the act to determine confusion (not exhaustive)
                - nature of goods/serivices being sold
                - nature of buisness
                - lengther of trademark
                - degree of resemblence between trademarks in appearance / sound
    - Court addresses the argument of the transcendent fame of Barbies
        - The court looks at:
            - distinct nature
            - length of time they have been in use
            - and nature of goods and services
                - court holds that the confusion standard is not met here
    - Nature of the trade is industry
        - what potential purchaser would think, not what a company would imagine
            - court draws an analogy to trespass
                - The court said if it is affirmatively established that there was an intent to confuse, that could be relevant and make it difficult to establish that there was not confusion
                - The intent is not determinative, it is not the standard, but it can color the courts perception of the confusion standard
                    - open ended rule
                        - registration creates a presumption in favour of the trademark

Trademark Act Section 2 & Section 6

- Possession has a number of different uses in the common law of property. First of all, possession can be used to justify a claim to property, in particular first possession -- aboriginal title
- But even the cases for today -- Popov and Hayashi
- Played a really important role (historically) in proving property claims -- and still does
    - A means of establishing ownership
    - Possession proves a strong signal that something is mine and it is up to you to prove otherwise
    - Possession serves as a signal or way of proving or establishing that property interests exist
        - See particularly next class that possession particularly over a long period of time can give rise to a claim to ownership and a claim to ownership that can give rise over the party that had been lawful owner
        - Claim to priority of different things over same property
            - Title is relative at common law -- rather than relying on an absolute conception of ownership there can be different parties with claims for differing strength and the concept of possession plays a role in ordering those claims -- earlier possession generally takes precedence over later possession
            - A party that is actually in possession in that item generally has a claim that is good against anyone but the lawful owner
            - Relative nature of title -- concept of possession plays a big role in ordering the strength of the different claims
            - Start off today with materials going to different uses of possession

Intellectual Property (IP) v Other Property

- **What does IP have in common with other property?**
    - rights that operate in rem
    - operate against indefinite class of people (whole world)
    - if you have a patent no one else can use it just like if you have land no one else can come on your land
    - there is an exclusive interest (exclude people)
    - can license the rights too copy a song, can transfer patent
- **How is IP difference from property of intangible things?**
    - time limited in nature for patents doesnt apply to land
    - someone else can use it without affecting anyone else
- **How difficult is it to delineate boundaries**
    - really easy to delineate boundaries between physical objects BUT hard with intangible property interest
        - confusion is trademarks is onoe
    - boundary issues because you dont have a physical thing that can be possessed

Inetl v Hamidi →AKA email scandal at work

- What causes of action is this basis for intel's claim
    - trespass to chattel
- What are the chattels being interfered with?
    - the computers and servers
- Trespass to chattel
    - International interference with the chattel
- Unlike trespass to land, actual damages or harm is required for this
    - Mere act of touching someone else's chattel does not give rise
- **Facts**
    - On six occasions over almost two years, defendant sent e-mails criticizing the plaintiff company's employment practices to numerous current employees on the company's e-mail system. Defendant breached no computer security barriers in order to communicate with the company's employees. He offered to, and did, remove from his mailing list any recipient who so wished. Defendant's communications caused neither physical damage nor functional disruption to the company's computers, nor did they deprive the company of the use of its computers. The contents of the messages, however, caused discussion among employees and managers. Plaintiff company sued defendant for tort of trespass to chattels. The trial court granted the plaintiff's motion for summary judgment and enjoined defendant from any further mailings. The Court of Appeals affirmed. On review, the court reversed.
        - Had to be some interference with the server and there was not one (or more emails had to be sent to actually effect)
- **Issue**
    - Did the facts presented during trial sufficiently warrant summary judgment in favor of plaintiff where defendant's communications caused neither physical damage nor functional disruption to the company's computers, nor did they deprive the company of the use of its computers?
- **Ratio**
    - **While a harmless use or touching of personal property may be a technical trespass to chattels, an interference (not amounting to dispossession) is not actionable, under modern California and broader American law, without a showing of harm.**
- Intel's argument
    - say it should be a trespass to land
    - it does not work though
    - if we are just applying if the tort should be extended, it does not constitute trespass to land
    - Why arent the computers land?
        - Are electronic signals
        - is not a physical thing
        - ex) sound waves onto someones land is nuisance not a trespass
        - is missing the physical element
    - They want the tort extended
    - should develop a new tort where consent is needed for electronic communications
    - want unwanted electronic communication as actionable
        - how is this different from sending a letter

        - sending mass amounts of physical mail is less likely because that would cost more
- Excluding emails
    - less spam but loss of network benefits
    - arent going to extend the law
    - see there are pros and cons but too early to develop the law in this way
- Is anti-spam legislation
    - will eventually be statutes for this (on what intel was arguing)
    - will only be for commercial communication
    - potenttial for implied conssent

Possession

The concept of Possession

- Historically courts relied quite heavily on possession and it still plays a significant role
- Often there is a great deal of uncertainty in what actually happened in dealing with possession claims
- Title is a relative concept: different parties with different claims of differing strengths
- Someone who has possession generally has precedents over everyone except the true lawful owner
- Possession has a number of different uses in the common law property
    - To justify property claims
        - Possession can be used to justify property claims
            - If you have something first there is a moral intuition that it is your property
            - But even the cases for today - Popov v Hayashi
                - Played a really important role in proving property claims and still does
            - first possession is key to Aborginal claims
    - To prove property claims
        - Possession as a Means establishing ownership
            - Possession proves a strong signal that something is mine and it is up to you to prove other wise
        - Possession serves as a signal or way of proving or establishing that property interest exists
    - To ground claims to a right in a thing
        - Possession over a long term can morph into a claim that trumps true ownership claims
            - Possession over a long period of time can give rise to a claim ti ownership and a claim to ownership that can give rise over the party that had been lawful owner
    - To set order of priority of claims in a thing
        - Possession plays a role in setting the order of priority in different claims to an object
            - claim to priority of different things over same property
                - Title is relative at common law - rather than relying on absolute conception of ownership there can be different parties with claims for differing strength and the concept of possession plays a role in ordering those claims - earlier possession generally takes precedence over later possession
            - A party that is actually in possession in that item generally has claim that is good against anyone but the lawful owner
            - Relative nature of title - concept of possession plays a big role in ordering the strength of different claims

Two elements of possession (CB 268)

- **(I) Physical control** (factum)
    - Might have different idea of possession when it comes to first acquisiton v something already in your possession
- **(II) Intention to possess** (anlmus possidendi)
    - Can you objectively be intended to possess something even if you are aware of it? Sometimes the court says you constructively possess something if it is found on you

Other relevant factors to possession

- Degree of physical control
- Knowledge of existence and nature
- Constructive possession: refers to form of possession in which mandated elements of control and/or intention have been relaxed. Likewise one might be considered to have the intention to possess the items on one's property even though the presence of those items are unknown
- Possession v custody: an agent or servant takes possession (not just custody) that person must really be independent contractor but no legal possession. If an employee/servant takes possession (not just custody) that person must really be an independent contractor
- Immediate and postponed rights to possession
    - immediate right: when you can claim a good back immediately, even if not in your possession (loan of chattel)
    - postponed right: when you cannot demand your good back for certain period of time (ex. estate)

Popov v Hayashi

- Equity - remedy is discretionary - comes up with this remedy is something that is fair in light of the fact that both parties have a legitimate interest - **Cleans Hands Doctrine**
    - He who comes to equity must come with clean hands
        - If Hyashi was found to be a wrongdoer, then it would have an effect on the case, equity wouldn't have worked to his benefit
- **Facts**
    - Popov had the ball in the upper part of the webbing of his glove and at that point was forced to the ground by people pushing •
    - Would Popov have maintained control of the ball if he was not pushed? We don't know
    - Popov was pushed to the ground by third parties and ball got loose (not Hayashi) Hayashi was also pushed to the ground. Hayashi picked up loose ball

        - Ball is abandoned property after it was hit - no intention of recovering it from MLB; the practice was if you catch it it is yours
            - Important because one with possession can ground claim in the absence of someone with a superior claim
    - Trial judge makes key findings of fact that are important to outcome
        - You would never be able to tell if popov would have been in full possession
        - Finding of fact that Hayashi was not a wrong doer
    - Why does it matter legally speaking who has possession first?
        - the ball is considered abandoned property and there is clear intent to abandon (legal principle)
        - The legal standard that the 1st person to come into possession of abandoned property possess it
            - One of the functions of possession -- **it can ground a claim in otherwise unknown items -- in the grounds of a party with a superior claim, simply having something in your possession can ground a claim to the item**
        - Prior possessory claims take precedence over later possession (if there was no subjective intent to abandon by the person who has possession)
            - If the initial owner never intended to abandon, they would retain claim to possession
            - **Earlier possession takes priority over later possession**
                - Relative nature of title
                - You take priority over later interests not previous ones
                - Not saying B is the owner of the item, just saying B has a better claim than C
                - If a third party D comes along, and D never had possession
                    - Doesn't ground a claim against the owner, but does protect against third parties
                        - When you see a term "relative nature of title" that is what we are talking about
    - What if party A gets possession, sometimes loses possession, and then B gets it
        - A had possession before B had possession, so A has ownership and had a better claim
        - If Popov ever had possession, he had it before Popov
- **Analysis**
    - The prior possessory claims principle is why it really matters if Popov has possession initially
    - Trial judge broadly speaking, sets out the **two principal elements of possession at common law**
        - (1) Physical Control (Factum)
            - The judge makes quite clear that the element of physical control, what it takes to manifest physical control will vary from context to context -- what the accepted practice or custom is in this particular context •
            - **Rules are contextual in nature** -- the reasons that absolute dominion and control aren't always required is because such a rule would be unworkable and unreasonable
            - It is possible to wrap your arms around a baseball in the stands -- fans generally expect it
            - Custom and practice of the stands create a reasonable expectation that someone will establish full control
                - Graves Rule
                    - The person who catches a baseball that enters the stand is its owner.
                        - Popov has not established that he had this a**bsolute and complete control** -- it was dislodged before we had established that he had or was about to have absolute or complete control
                            - Popov and Hayashi aren't playing baseball -- they're involved in the alternative activity of catching a ball in the stand
                            - It is totally possible that the expected practices of
            - **Note: What is the virtue of absolute and complete control standard**
                - **Clarity of application**
        - (2) Intent to control (anlmus possidendi)
            - intent to possess
            - Popov defs had intent to possess
    - Court would look to accepted practices/customes/norms of social context if no case law on a possession claim
        - Partly dependent on how the members of that social community would accept as possesion/control
    - So using the above standards, Popov didn't have possession -- it's usually binary
        - The trial judge identifies a **qualified possessory interest that occurs when one is unlawfully interfered with before establishing possession**
            - <u>Person takes significant but incomplete steps</u>
                - The court explicitly indicates it is occupying its equitable jurisdiction and coming up with a remedy here
                    - They each have a 50% interest -- the ball is sold and it has to be split
                        - If Hayashi had been one of the wrongdoers, that would have affected the result
    - The customs and practices of the stands don't recognize a qualified pre-possessory interest with someone that doesn't catch the ball -- why does the trial judge depart from that and why don't we apply that standard?
        - It seems unfair
        - Popov may have had the ball but for the unlawful acts of third parties that push him to the ground
        - Highlight the idea that when you have legal ambiguity or a contextual standards, pre-existing customs and standards can be a good starting point but maybe should not be determinative
        - Trial judge is motivated by a desire to be fair to Popov
    - The standard isn't what people actually do, but it is what people expect to be done
    - Where the stakes are higher, it might be worthwhile applying a more complicated rule -- make room for nuance and allow for 50/50 split
    - No Canadian cases that recognize a qualified pre-possessory interest
        - Also discuss why the courts might not want to implement this
        - Because it is a complicated standard to administer, it is unlikely that it will form part of customary norms in a field

What does physical control require

- Context specific, standard can differ depending on the property we are applying to it

- Crafted in response to the conduct that is regulated or accepted in each industry
- For this case, the custom is that someone will have complete and full control over the ball to establish possession (Gray's rule)

Possession and Animals

Pearson and Post

- Post is suing in trespass to chattels, on the basis that Post had a pre-possessory interest in the fox that he was chasing
    - Post chasing a fox with dogs, Post is in pursuit but before he has killed or wounded the fox, Pierson enters the scene and takes it
    - Who has possession of the fox?
        - Majority
            - **Chasing it doesn't constitute possession, even if you've been chasing it for a while or you're likely to kill or wound it**
                - chasing is not possession, **mere pursuit is not possession**, because it will give rise to an uncertain standard - we dont know how it is going to apply. **It is not a clear enough signal to the world that you are establishing possessory interest**
            - Why doesn't the majority accept that that is possession?
                - Uncertain standard
                - Give rise to no end of litigation if just chasing is enough to give you an interest, we don't know how that will apply and neither do parties, end up with litigation because that doesn't send a clear enough signal -- not a clear enough line we can draw
                - At least need to have seriously wounded the fox before you can have a possessory interest
            - Livingstone Dissent
                - An element of outrage that there is an interloper that comes along that hasn't doesn't the work of chasing -- why does justice Livingstone want to reward the party that has done the work of chasing down the fox
                - Economic efficiency argument -- blunting incentive (opportunistic behavior undermines incentives to do a productive and virtuous activity - - hunting foxes)
            - The majority thinks it is most important to have a clear rule or there will be a harder rule to apply, or the dissent that is more concerned about incentives and wants to apply a standard where you have a possessory interest if you have a reasonable prospect of capture

Wild animals

- **<u>General rule:</u> if you capture a wild animal you have a proprietary interest in it → wild animals are <u>unowned</u> unless you have some sort of legislation that indicates that they are owned by the crown or something to that effect**
- Presumptively they are unowned so if you reduce them to possession you will have a recognized interest -- but if it escapes, you will no longer have an interest
    - If a wild animal escapes, property interest is no longer yours
        - Contrast to domestic animals = property even if escapes
    - However, there is an exception for a particular type of wild animal that doesn't have to be in your possession
        - A trained hawk, however, can fly away and can be trained to come back -- you can be recognized as having a constructive possession in carrier possession of your carrier pigeons or trained fox
    - Flip and Caine -- dead animals escape
        - Seal hunting -- a party where there were two ships, one killed and stacked seals on the ice, ice moved around and then was closer to some other ship and the dissent said no you haven't fully reduced the animals to your possession they can still move around and escaped by the ice moving around
            - The majority holds that once you've killed the seals, you reduce them
                - Standards are very contextual
                    - Wouldn't necessarily want to point to a hard and fast rule even for a dead animal

Adverse Possession

- Relates to possession in long running possession in land or chattels can give rise to a right that is good against the paper title holder - the party that would otherwise be considered the owner of the title in possession
- Mostly governed in statute - statutes exist governing the limitation in statutes
    - Statute of limitation limits the amount of time an action can be brought forth
    - Evidence could go stale over time
    - For chattel, the default limitation period to recover is 2 years
        - but the period restarts if the chattel is transferred to new owner
    - Applicable period for actions to recover real property in AB is 10 years (statute of limitations)
        - Actions for the recovery of land have to be brought within ten years -- this is the basis for the doctrine dealing with adverse possession -- the general idea is that undisturbed possession for a period exceeding the limitation period means that action for the recovery of the property can no longer be brought by the paper title holder and because all actions are barred this extinguishes the right of the paper title holder
- Generally speaking the general thrust of these acts is to make sure the legal claims are made in a timely manner, otherwise the claim cannot be brought at all
    - Claim usually initiated within two years or its barred by the statute of limitations
- Where a person does not intend to get adverse possession and has no preconception of title and occupies a part of land, they will only get possession of the part of they occupy
- Where there is a defective title, possession can be received for the whole parcel
    - Protects expectation of title
- In most jurisdictions, we have legislative exemptions -- crown land in Alberta and municipally owned land (land owned by the government) cannot be subject to adverse possession
    - In alberta, municipally owned land cannot be adversely possessed

Keefer v Arilotta

- Facts
  - Strip of land runs between property of K and business of A, including driveway, grass strip, and a sidewalk providing access to K's apartment
  - K had an easement to enter house but parcel of land still owned by A
  - A legally owns it but K challenged adverse possessory interest in land
  - K's conduct - used the driveway at night, put down gravel, maintained grass, etc for over 10 yrs
  - A's conduct - used land for deliveries, customer parking, moving trucks
- Analysis
  - The nature of the actions taken → are they sufficent to ground a claim of adverse possession? Time is not in question here, the time is sufficient
    - Parking on the driveway almost exclusively, sometimes by agreement other parties would use it
    - They were using the grass for recreational activities, cutting the grass
    - Put the garage on part of the strip of land
    - Was this sufficient to ground a claim of adverse possession?
      - The use at least for the grass and the driveway was not inconsistent with what the owners intended -- they didn't mind what happened to it
      - The use that was made with the possessors on these two parts of the land was not inconsistent with the grass
        - BUT the claim succeeds in respect to the garage
  - **3 part test for person claiming possessory interest in land:**
    - Actual (exclusive) possession for statutory period by themselves and those through whom they claim
    - That such possession was the intention of excluding from possession the owner or persons entitled to possession
      - Easement (right to cross or otherwise use someone else's land) granted to K does not necessarily translate to possession
    - Discontinuous use of possession for statutory period by the owns (and any other parties entitled to possession)
      - Hard to prove when on land pursuant to permission A
  - **Another way of framing this in terms of animus and factual -- intent and actual physical control -- the standards we referred to last time**
    - Prong two refers to intent and the other two factors go to this q as to whether as a matter of fact the possessory title claimant was in continuous use of the land, was possessing the land exclusively.
  - Intention to exclude fails in this case; just good neighbourly relations allowing land use
  - Discontinuous use fails - owners used land as much as they wanted to; constructive possession legal owner has of whole property cannot be ousted because he is not in actual possession on the whole
    - **Test for adverse possession = Inconsistent use test** -->Acts relied on as dispossessing the true owner must be inconsistent with the form of enjoyment of the property intended by the true owner
      - use has to be inconsistent with actual paper use of the title land owner
        - Fatal in this case as the true owners did not intend to do much with this land (preservers their interest)
          - For the most part, since they didn't want to do much with the land, whatever it was that the possessors were doing was not inconsistent with what they were doing
  - Relative nature of property
    - reference to stronger and weaker claims
  - Possession on its own is an indicator
    - party in possession of land has superior claim
  - What constitutes actual possession? See *Teis*
  - Was this sufficient to ground a claim in adverse possession?
    - No, use was not inconsistent with land title's owner intent
    - claim failed with respect to grass and driveway
    - but succeeded in the garage

3-Prong Test to Determine Adverse Possession

- **1. Actual possession for the statutory period (actual possession)**
- **2. Such possession was with the intention of excluding from possession the owner of persons entitled to possession (intent to exclude)**
- **3. Discontinuance of possession for the statutory period by the owner and all other if any entitled to possession (discontinuance of possession)**
  - **In order to succeed in prongs two and three, use made by possessor has to be inconsistent with intended use or paper title holder**
  - **They did not intend to do much with this land, so whatever the possessor was doing was not inconsistent with it**

***In the next case, Teis and Ancaster, the court restricts the ambit of the inconsistent use test o

- The court first flags Jewitt and Bill, which is introduced in your materials, to reinforce the idea we talked about last time, which is the relative nature of title -- that in the case that you have a party in possession of land with a pretty sketchy paper title, so paper title holder is almost certainly not in valid possession of the land in question, bringing action in trespass of party that hadn't been in possession
  - The defendant said you can't maintain this action because this isn't your land -- how can you initiate a trespass action with me ·
    - Based on what we talked about last time, that would not be likely to succeed -- we talked about the idea of the relative nature of title and that the party in possession may not have the best claim to a particular object or parcel of land, but their claim is still better than no claim
      - The fact that there is some potential third party out there with a better claim does not diminish the possessory claim that a party in possession has, which is good against any party with a worse claim

Teis v Ancaster (Town)

- Facts
  - Teis bought land adjacent to land that had been bought previously by the town. Both town and Teis were under mistaken assumption that Teis owned the land for more than 10 yrs
  - Accordingly, Teis farmed the ploughed strip and made a laneway to get farm equipment out
  - Members of the public used part of the land for walking and parking when little league was on
  - Teis claimed possessory title to the strip of land

- Issue
  - Whether a person claiming possessory title must show inconsistent use when both the claimant and the paper title holder mistakenly believe that the claimant owns the land in dispute (that claimant's use is inconsistent with the true owners intended use of the land)
- Analysis
  - Possession must be - On pager 306, it says "possession must be open and notorious, peaceful, adverse, exclusive, actual, and continuous"
    - Open and notorious
      - if possession was hidden, it wouldn't signal to the public that they possess it, has to be something a diligent owner would be able to notice, apprise him or herself
        - It cannot be hidden and reason for that should be obvious
    - Peaceful:
      - cannot come into possession through threat or violence or use of force
      - Can't be with the permission of the owner -- in possession while at the same time acknowledging the owners right
        - **Codified in 3(7) of the limitations act** -- when you have an actual acknowledgement that the other party is the true owner that doesn't count
    - Adverse
      - can't be with the permission of the owner, can't be in the possession with acknowledgement of owner's rights, have to physically be using the land without authorization of paper title holder
    - Exclusive
      - Cannot be shared with the paper title holder
    - Actual
      - Actually be in possession
      - **Doctrine of constructive possession**
    - Continuous:
      - depends on nature of land and use of land,
      - continuity is something that is assessed in light of context
      - whatever the acts of possession are, they can't have ceased completely for a particular period of time
    - Trial judge found this to be the case
      - Continuity - varies with type of property
  - The crown applied the three-prong test --in applying this test, you get a more detailed account of what possession actually entails.
  - Inconsistent use test
    - Was not adopted in AB
    - The test of inconsistent use does not apply to case of mutual mistake
      - You could never succeed in mutual mistake cases on the grounds of Inconsistent use
    - The judge doesn't want the law to treat the wrongdoers better than those in good faith
    - Out rules inconsistent use test in mistakes cases
  - To succeed the acts of possession must be open, notorious, peaceful, adverse, exclusive, actual and continuous
    - Trial judge found this to be the case → continuity = varies with type of property
  - T contends possession was not inconsistent with T's intended use, since they never intended to use it until 1989, so statutory period should not run until then
  - What would be wrong with applying the inconsistent use test in this case? (See CAN - LSA)
    - different cases of adverse possession
    - Concern about difference in treatment that these different parties would receive if you applied inconsistent use test across the board. This would make it almost impossible to establish adverse possession in mutual mistake claims, but easier in cases of known trespass
      - court says this would be incoherent - court should be harder on knowing wrongdoers, not those who make good faith errors
  - Not clear if inconsistent use test is part of the anymore
    - No case that adopts it in Alberta
  - Signal that possession sends to the world of property right being in rem
- **Ratio**
  - **Possession was sufficient, inconsistent use test does not bar the claim. Test of inconsistent user cannot apply in cases of mutual mistake**
- Notes
  - If the claimant acknowledges the right of the true owner then the possession is not adverse
  - It is not possible to determine what use they intended for the property when they at no time contemplated its use
  - Application of the test would defeat adverse possession claims in cases of mutual mistake, yet permit such claims to succeed in case of knowing trespass

Pedal v Constructive Possession

- The distinction between pedal and constant possession relates to when you have the party possessing land with no pre-tensive title -- adverse possession can only be made to the parts of the land that are physically being used in an exclusive way
  - The test gets applied
    - If the possession were farming, you would only have control over what you were cultivating
    - In cases where adverse possession is pursuant to some kind of definitive title -- the possessor believes he or she has legitimate entitlement to the land in question but turns out to be mistaken and defective
      - Nonetheless, the title holder possesses the land
        - If only part of the title is physically possessed or used, you can also have a claim to constructive possession of the land
          - Like a nature parcel
- When might this distinguishment be made? •

        - In cases where adverse possession is pursuant to some kind of definitive title ·
        - The possessor believes he or she has legitimate entitlement to the land in question but turns out to be mistaken and the title holder possesses the land
- Part of what adverse possession aims to do is to uphold settled expectations •
    - The nature of what your expectations relate to would differ based on whether or not you are pursuing relative to defective title or not ·
        - For pursuing due to longstanding possession, you would only relate to parts you are possessing
            - If your possession is related to defective title and your legitimate expectations relate to the entire parcel
                - Be aware of the doctrine of constructive possession and to a certain degree all possession of land is constructive
                - Last class we talked about different objects of property and how those objects differ in terms of what you can do to possess them (you can't wrap your arms around a whale, nor can you wrap your arms around an entire parcel of land -- but you could wrap your arms around a baseball)
                - To a certain degree, we are not talking about physically occupying land at the same time
                    - Regularity of actions and regularity of use -- the intensity of which varies based on the type of land and that type of use that is being made of it
                        - This is a nuanced, contextual inquiry but we have this explicit doctrine
                            - The point there is that to a certain degree all possession of land is constructive, but we have an express doctrine of possession that applies to constructive title

Chattels & Adverse Possession

- limitation periods apply in relation to chattels (Barbery Case)
    - Tangible personal property
        - Since these are not real property, they are not subject under the AB limitations Act to the special ten-year period of recovery for land, but are instead subject to a two-year period
            - The way the legislation is framed is in terms of a two-year period starting at the time the wrong was discovered
                - In the case of chattels that have been transferred from one party to another, there is case law to the effect that if there is a new party wrongfully detaining your chattels, the limitation period restarts
                    - This is different from land, where once a ten-year period has started, a transfer of ownership will not eliminate the possessory chattels
- In terms of the two-year limitation period on chattels, it is not helpful for making sure that possession of chattels is secure

Section 10 Limitations act

- Section 10 of the limitations act is added statutory limitation periods, there is an equitable knit on a potential limit on state claims within the discretion of the court
    - This is something that has existed for a long time, and section ten of the limitations act makes it clear that the doctrine of Laches and Acquiescence continues to exist
        - Acquiescence is an equitable doctrine and effectively allows the court in its discretion to bring a claim is there has been an unreasonable delay in bringing a claim -- unlike statutory limitation periods where there is a set number of years
            - It allows the court to deny enforcing a claim if there has been unreasonable delay or acquiescence

Debates the Merits of Adverse Possession

- In BC, it was eliminated in the 1970s
- It continues to exist in AB today (hands out article on adverse possession) but the government is considering getting rid of it
- In Ontario, as well with respect to land registered under the Torren system, adverse possession no longer applies
- Bill will likely succeed
- Reasons for and against adverse possession:
    - For
        - Reduces information costs (people know what they own based on what they are using)
        - Efficiency -- society will benefit from whoever makes the best use of the land · In cases of mistake, adverse possession protects the user who may have come to depend on the land
        - Encourages owners to take care of and make productive use of their land
    - Against
        - Increases information costs -- A potential buyer might have to go scout out a claim to see if anyone is using it that might be able to bring a claim in adverse possession
        - Not all socially beneficial interests require "work" -- what about the interest that results from leaving land alone in its natural state (a nature reserve)
        - Unfair! Someone paid for the land up front and now has to give it away for free!
        - Has the potential to discourage investment in land

Justifications for preserving adverse possession

- reduces information costs, possession sends a signal to world
- encourages landowner to take casre of their property and be diligent with what is happening on their land
- if you are not using it someone valuing it more than you (redistribution
- Innocent mistake seems unjust that someone should be deprived of that
- Counter argument
    - idea that sometimes doing nothing with the land is the most valuable thing to do
    - increases costs, having to do a thorough search for title and boundaries
    - reference to violation of right to property

Limitations Act. ss 1-4, 7, 10, 13

The relative nature of title: Finders

Finders

- The claim of a finder of a chattel is based on possession
- The claim of an occupant of land to a chattel found by another on the land is based on prior possession or prior constructive possession
- Possession not title - it matters who occupies and is factually in possession of the land would prevail if it was deliberately stowed
    - It not clear that objective intent to enhance the value of the land would be relevant - somehow a part of the land but possessory interest prevails
- Loss chattels lying on surface of land ⟶ finders tend to prevail (true finders cases)
- Chattels delibertatly hidden or placed on land ⟶ party in possession of land that tends to prevail (recovery cases)
    - by virtue of being in possession of land you have taken a constructive possession in the chattel
- Competing claims: finder vs occupier of land
    - *Trachuk v Olinek*
    - *Parker v British Airways*
- Abandonment - requirement of intent to abandon
    - *Charrier v Bell*
    - *Stewart v Gustafson*

Competing claims: finder v occupier of land

Trachuk v Olinek

- Facts
    - The plaintiff, Trachuk, and the four defendants, Olinek, Fulkerth, Austin and Muntz (the "four defendants"), each claim the right to possession of and title to $75,960 (the "money") which was uncovered by the four defendants from under the surface of a quarter section of farmland near Two Hills, Alberta. After they discovered the money, the four defendants notified and delivered the money to the police. The four defendants base their claim on the basis of being the finders of the money and fortune finders of lost property are entitled to it against all the world except the real owner. Trachuk bases his claim on being an occupier of the property and being in possession of the money by virtue of being in *de facto* possession of the lands which contained the money. He built a fence around the area where the money was found. However, at the time the money was found he was not the owner of the property, he was a lessee from an oral agreement with the land owner.
    - This is a contest between defendants who uncovered chattel and a party who claims to be in possession of land
    - Realty company who owned the land would not have right to money because they are not in possession of it
    - The most either could be granted is a possessory title - a right to exclusive possession of the money except as against one who is able to prove a superior claim
- Holding
    - Four defendants assume a position of a quasi-bailee of the money
        - A finder holds the position of a gratuitous bailee because he may refuse to hand over the thing found until he has reasonable opportunity to satisfy himself that the claimant is the person entitled to it
    - The finder of a lost chattel acquires a right to keep it against all but the true owner or those in a position to claim through the true owner, or one who can asset a prior right to keep the chattel which right was subsisting at the time when the finder took the chattel into this case and control
- Reasons
    - Olinek was lawfully on the premises, took possession of money; Trachuk loses because he could not show: de jure (legal title) right to the land where money found, de facto (actual) possession of the land since the fence was not meant to exclude others from the area.
    - Because the money had been deliberately hidden under privately owned land, the general rule, that the finder of lost property is entitled to it as against all the world except the real owner, does not apply
- Ratio
    - Where a person has possession of a house or land, with a manifest intention to exercise control over it, then, if something is found on or under the land the presumption is that the possession of that thing is in the owner of the location in question
- Note: true finder cases v recovery cases
    - True finder cases = where a lost chattel has been found on privately owned land
    - Recovery cases = uncovering of a chattel which was intentionally placed on or under privately owned land
    - No one could reasonably say that the money was abandoned because it was buried
        - If it was not abandoned, the true owner is deemed to to have relinquished all title of claim to it
    - Trachuk would need to have possession/occupancy of the land
        - Requires the intent and ability to control the use of land and exclude others from it and
        - particularly requires the intention to exclude visitors from articles situate on the land
        - Trachuk was not in de facto possession of the land
        - He rarely entered the fenced location and he did not intend to exclude workmen
    - The defendants have possessory right superior to Trachuk

Parker v British Airways

- Person finds gold bracelet in lounge occupied by British airways
- Finder keeps it because British Airways had not manifested an intent to keep items in the land
- Finder of a chattel acquires no right over it unless: 1) it has been abandoned or lost; 2) s/he takes care of it and takes it under their control
- Finder has very limited rights if he takes chattel into his possession under wrongful intent
    - if the only reason you are in possession of something is because you stole it, thhat does not give you rightful possessory claim to it
- principles laid out here

- 1. The finder of a chattel acquires no rights over it unless it has been abandoned or lost and he takes over its care and control
- 2. The finder of a chattel acquires very little rights over it if he takes it into his control with dishonest intent or in the course of trespassing
- 3.The finder of a chattel will not acquire aboslute right to chattel, but will acquire rights over all but the true owner of those who are able to claim for the true owner, or a prior possessory interest
- 4. Unless otherwise agreed, any servant or agent who finds a chattel in the course of the employment or agency, and takes it into his care or control, does so on behalf of his employer.
- 5. A person having finder's rights has an obligation to take such matters to find true owner and acquaint them with the chattel, as reasonable in the circumstances and to take reasonable care of chateel
- 6. Occupier of land has rights superior to chattels found in or attached to the land, occupier of building has similar rights with chattels attached to building, even if they did not know of its existence
- 7. Occupier of building has rights superior over finders to chattels inside ab uilding but not attached if occupier has manifested intent to control over chattels (this case, found to not have manifested intent to exercise control over chattels)
- 8. Occupiers when they take possession are under duty to find true owner
- 9. Same rules apply to chattel left inside large chattels

Abandonment

Has to be an intent to relinquish control

Charrier v Bell

- Facts
  - P obtained the permission of Hoshman who he believed was the owner of plantation
  - He located and excavated burial plots
  - Hoshman then advised him that he was not the owner of the property
  - P continued to excavate the area for the next three years
  - He could not prove ownership so he could not sell the goods
  - P filed a suit against the non-resident landowners of the plantation, requesting relief
  - confirming that he was the owner of the artifacts
- The fact that the descendants or fellow tribesmen of the deceased Tunica Indians resolved, for some customary, religious or spiritual belief, to bury certain items along with the bodies of the deceased, does not result in a conclusion that the goods were abandoned
- If chattel has been abandoned by an owner, the finder has a better right to it than the owner
  - But in this case the items were not abandoned
    - Did not take possession because the burial item were not abandoned
    - Finder cannot prevail against a party with a prior ongoing claim
    - What is unambiguous is that the act of abandonment requires an intent to relinquish ones title to an article in question
- There is a present day party with a superior claim that was claiming the chattel

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Gifts

- Gifts
  - Different from contracts in that no consideration but rather gratuitous transfer of title from one person to another
    - **Gifts don't have consideration, so it is not a binding contract**
      - One way transfer title
        - a transfer where you **don't get anything valuable in return don't count**
        - Can give property away with a valid will or a deed
    - There is a difference between gifts and bargains. **Gifts require delivery, signature, or attestation,** whereas contracts require offer, acceptance, consideration
  - A gift may be effected through:
    - 1. a valid will
    - 2. a deed (document under seal)
    - 3. Declaration of trust (to the effect that the initial owner holds the property in trust for a beneficiary)
    - <u>4. Inter vivos gift (a gift between living persons)</u>
      - Intention to make gift on part of the dooner
      - intention to receive the gift on the part of the donee
      - delivery: the act of transferring property
        - evidentiary point
        - courts are reluctant to enforce a bare promise
        - harder to establish when both parties are living in the same space (*Nolan*)
    - <u>5. Donatio mortis causa (a gift made in contemplation of death)</u>
      - Impending death from an existing peril
      - delivery of the subject matter (constructive delivery required) → lower standard
      - only to take effect upon death and will rever to the donor should he/she recover
    - **intention to give and accept are not sufficient legally to give a gift → NEED DELIVERY**
- Delivery with gifts absence of a deed
  - serve the function to signal to the parties that you are actually giving it away not just saying it
  - is the actual transfer of position and represents something of legal significant happening
- **The legal goal of a gift is to effectuate donative intent and formalities are required to put that intent beyond question**

Nolan v Nolan & Anor → Inter vivos gift

- **Facts:**
    - Three paintings by the well-known artist Sidney Nolan are said to have been given from Nolan to his wife Cynthia, and now belong to her estate including Jinx Nolan, Nolan's adoptive daughter
        - Daughter claims since her adoptive father had gifted paintings to her mother, she owned the paintings
    - The paintings had remained in Nolan's possession prior to and after Cynthia's death, and up until his death
    - Unable to prove intention to give: no witness, questionable document, not other evidence of intent
    - Delivery not completed: paintings had been in a shared household for a time but were mainly stored in a galler
- **Issue**
    - Were the paintings gifts?
- There are three recognized methods for making a valid gift
    - 1. A deed
    - 2. Declaration of trust
    - 3. Delivery
- The defendants have had continuous peaceful possession of the paintings for 27 years
- **To establish inter vivos gift - 3-part test**
    - (1) Intention to make a gift (give)
        - Usually words of gift
    - (2)Intention on the part of the donee to accept the gift (receive)
    - (3) Delivery
        - Transfers possession and ownership
        - Delivery may be actual (manual transfer) or constructive (when the nature of the goods make manual delivery impractical, annual delivery is not required and other acts are sufficient to show change in possession)
    - Onue on the party claiming there was a gift
- **In common households it is difficult to establish delivery** → some act of delivery should be necessary but in our case there was no evidence of an act of delivery
- **Holding:**
    - There was no donative intention and no evidence of an act of delivery so there was no gift
- **Ratio: The promise to make a gift is not sufficient to establish a gift**

Re Bayoff Estate → Intro vivos and Donation Mortis causa

- **Facts:**
    - The deceased gave the key to a safety deposit box to Simard and said everything in there is yours. This was done in the presence of lawyers . Signed paper authorizing access but the bank would not accept it, he died before executrix was able to access the safety deposit box. After he died she became an executor of the state and could access it.
    - In the safety deposit box were a bunch of savings bonds and some deeds to property, which all parties agree are not the subject of the gift and subject to the will
- **Result:** The gift was found to be a valid inter vivos gift
- **Donation mortis causa**
    - A gift in contemplation of death
    - 3 elements must be present
        - Impending death from an existing peril
        - Delivery of the subject matter
        - The gift is only to take effect upon death and will revert to the donor should they recover
        - *****The third criteria is not met because the gift was intended to be given while he was alive, given that he had just signed his will and then gave the key
    - Not donatio mortus causa , had intentded to give her the contents while he was alive and did not take effect upon his death
- This could be **inter vivos** though
    - Only delivery is an issue since the goods were not retrieved until after Bayoff died due to paperwork issue
    - Delivery was made of the key not the contents of the box
- **Where delivery cannot be given physically, symbolic delivery suffices**
    - The donor must give up control of the gift and do everything possible to vest title in the donee
- **An unfulfilled gift will be treated as complete if the donee becomes an executor of the will of the donor**
    - So as long as the intent to make the gift continues until death, by administering the estate, the donee receives control over the donor's property and can perfect the gift through sufficient delivery
    - if one obtains possession via their role as executor then the transfer of possession is complete if the deceased intent did not change prior to death
- The delivery of the key was not enough to be delivery of an inter vivos gift (higher standard than gift in contemplation of death)
- Notes:
    - **Symbolic delivery is not the same as constructive delivery**
    - **Constructive delivery**
        - Something that is not a delivery is treated as if it were one
        - Key to something if it is the only means of getting to it, so everyone else is excluded
        - Might be required that the gift could not be delivered any other way

Alberta Evidence Act, s.11

Midterm

- 3 hours
- Open book - may bring any books or documents written on paper
- Answers will have word limits