

# Property CAN

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## What is Property?

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### General

- Bundles of mutual rights and obligations between subjects in respect of certain objects
- Best seen as an enforceable claim (a right) to some use or benefit of something good against the world
- A social construct that is not static; responds to social, economic, and technological changes
- Not the same as possession
  - o Property rights trump possession
    - One can maintain ownership over something without having possession of it
      - Eg Lending a book
- Not just tangible goods
- Absence of constitutional protection for property in the Constitution evidences a choice to make legislative bodies, rather than the courts, the primary arbiters of the private property/public interest conflict
- There are no property rights in the Charter

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### Forms of Property

- Private property
  - o Exists where only the owner can access and enjoy the resource and has the right to exclude others
- Open access (non-property)
  - o Exists where anyone can access and enjoy a resource, and no one has the right to exclude others
- Common property
  - o Exists where a community owns and manages a resource and gives each member of that community an equal right to enjoy and not be excluded from it
- Public property
  - o Exists where government entities own and manage a resource and reserve the right to exclude
  - o The state remains bound by certain obligations to the people, since they hold property in trust for the benefit of the people

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### Theories of Property

- Commons
  - o Refers to the cultural and natural resources available to all members of society including air, water, and habitable earth
  - o If we didn't have property rights, people would overuse and over exploit
  - o Need social norms and enforcement mechanisms
- Incentives
  - o Anything that has some effort involved in order to produce incentives can be property

- Too much protection – not enough incentives
  - If it is difficult to sell property, people will stop using the proper mechanisms
- Collectives
  - Ownership of property by all members of a group
  - Comes from what our conceptions are of what things are important to protect

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### Importance of Defining Property

- What rights one has over property
- What punishments, can be had against those who interfere with property
- Whether the property can be transferred from one individual to another via contract, wills, etc
- What can you do with your property
- Whether the state can take your property with or without compensation

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## Aboriginal Property Law

### General

- Aboriginal law: The area of law that refers to how Canadian law deals with Indigenous peoples
- Indigenous law: The law of the Indigenous nation
- Strong oral tradition
- The land is sacred
  - Man belongs to the Earth, Earth does not belong to the land
  - Land is communally owned, and ownership does not rest with an individual but belongs to the tribe as a whole
  - Land not also just belongs to those presently living but those past and future generations
  - Land also belongs to other living things, not just humans
  - Source of Indian title to land can be traced to the Creator who gave it to all living creatures

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### Historical Context

- In very early settlement of North America, the British generally recognized Indigenous nations as self-governing and as holding title to land
  - This recognition was not consistent, especially as power dynamics shifted
- Early relationships somewhat positive
  - However, 1900's technical superiority meant we went back to ignoring them
- Early treaties created a special and sacred bond
  - Indigenous nations entered into a covenant relationship – a partnership with the British Crown
- Application of English legal principles gradually eroded Indigenous land rights

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### Royal Proclamation (1763)

- British Crown needed an allegiance with the Indigenous peoples in North America
- Formally recognized Aboriginal property interests and intended to solidify relationships
- Forbids colonial governments and individuals from negotiating land agreements individually with Indigenous peoples
  - Only the Crown can negotiate treaties with Indigenous peoples

- Purposes to prevent irregularities in the future and stave off claims of injustice and discontent
- Mandated that settlers on unceded Indigenous land must vacate it and prevent future settler encroachment
- However, created an opportunity for reinterpretation by the Crown through wording
  - Focusing on words dismissed the importance of Indigenous oral history
  - Also gave a kind of presumption that the Crown had some control over Indigenous lands

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### Treaty of Niagara

- Formed the basis of the creation of the following treaties with Indigenous peoples
- First Nations were active participants in the Royal Proclamation
- Relationship was based on peace, friendship, and respect where each nation will not interfere with the internal affairs of the other
  - Through use of wampum belt
- However, British officials increasingly looked to written word to find no records of pledges

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### Treaty Number 6 (1876)

- Holds that the First Nations people inhabiting the defined land cede to the government of Canada all their rights titles and privileges to that land
- States that the Crown agrees to lay aside reserve lands after consulting with the Indians
- Gives the First Nations the right to hunt and fish through the tract surrendered
  - Except for tracts taken up for settlement, mining, lumber, or other purposes
- Mandates that First Nations will obey the law, maintain peace and good order, and not interfere with private property or obstruct the administration of justice
- First nations often claim these written agreements failed to reflect the oral discussions that took place
  - Could represent the superior bargaining power of the Crown at the time

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### The Doctrine of Discovery

- Principle of international law under which a European government could claim sovereignty over territory by “discovering” the territory prior to other European sovereigns
  - Regardless of the prior presence of Indigenous groups
- As traditionally understood, discovery gave the sovereign the power to govern the territory, but it did not necessarily give the sovereign a right to possess land already occupied by Indigenous groups
- Indigenous property interest based on an Indigenous groups prior occupation of land is know as Aboriginal title

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### Johnson v M’Intosh (US 1823)

- **Facts:** Plaintiffs relied on title that they bought from the Indigenous nation. Defendant relied on title that they bough from the United States government
- **Issue:** Who owns the land? Who has the legal title to the land?
- **Held:** for M’Intosh. Private citizens cannot buy title from an Indigenous nation
- **Ratio:** First Nations not able to transfer the land because they never owned it in the traditional sense



- Indians have a right of occupancy (which could be extinguished at any time) but not absolute title
- Title to lands must be admitted to depend entirely on the law of the nation in which they lie
- Sets the foundations for the doctrine of discovery
  - Needed for European nations to avoid war
  - Rights of the original inhabitants are not entirely disregarded but necessarily, to an extent, impaired
  - They have a claim to it and can use it according to their own discretion but rights to complete sovereignty as independent nations necessarily diminished
    - As well as their power to transfer/give the land
  - Discovery gave exclusive title to those who found it
- Note that the First Nations were not a party at all in this case

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#### St. Catherine's Milling Co. v the Queen

- **Facts:** Formal treaty between the Saulteaux tribe and the federal government which saw the tribe surrender their right and title to land. Lumber company got licence from the feds to cut trees, but the government of Ontario sued to infringement of provincial jurisdiction
- **Issue:** Who owns the land? Who has the legal title to the land?
- **Held:** for the Ontario government. Permit is void
- **Ratio:** Aboriginal title is merely a "personal and usufructuary (uses property of another) right", not a full-fledged property right
  - Indigenous right to land is not an absolute legal right but they can use and enjoy it based on grace and policy
  - In other words, the Royal Proclamation codified the doctrine of discovery
  - Federal gov had jurisdiction over Indians and their land reserves
    - But since the Saulteaux nation surrendered its title, federal gov no longer had jurisdiction
      - Ontario government gets full propriety of the lands

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#### Calder v Attorney-General of British Columbia (1973)

- **Facts:** Members of Nisga'a tribe sought a declaration that their Indigenous title to lands in BC had never been lawfully extinguished and the Royal Proclamation had no application in BC
- **Issue:** Does the Royal Proclamation apply in BC?
- **Held:** for the government. Rejected on procedural grounds mainly
- **Ratio:** Royal Proclamation does not apply, and although they have lived on the land for centuries, their right (and to continue to do so) was dependent on the goodwill of the Crown
  - This was extinguished due the governments exercised control of these lands which happened when the government got title because BC became a province
- **Dissent:** The proclamation does not apply, and the Nisga'a hold title to their land based on their own customs
  - First time that the Canadian legal system acknowledged the existence of Aboriginal title to land and that such title existed outside of (and not simply derived from) colonial law

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## Aboriginal Title

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### Guerin v the Queen (1984)

- **Facts:** Golf course wanted to build by leasing land in a First nation reserve. Golf course wanted to build by leasing land in a First Nation reserve. They asked the federal government; an agreement was drafted, and the band council agreed orally on a series of terms for the lease agreement. Found that the written contract differed greatly from the oral terms and the band sued the federal government for damages
- **Issue:** Can the First nations sue the federal government for not taking good care of the bands land?
- **Held:** for the band. The government breached its role as a trustee.
- **Ratio:** The Crown holds a fiduciary duty to the band. They have an obligation to act in their best interest.
  - o The band has a *suis generis* interest.
    - Means special characteristics or unique
    - A legal term describing the relationship between the Crown and the Indigenous
  - o Duty comes from
    - Royal Proclamation 1763.
    - Legislation.
    - Indigenous peoples have a “personal and usufructuary right” to the lands they traditionally occupied.
    - They can occupy the land but not sell it. Why? Ultimately Crown is holding it for their benefit.

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### Delgamuukw v British Columbia (1997, SCC)

- **Facts:** Chiefs brought claims to large tracts of land in BC for ownership/ jurisdiction over the land
- **Issue:** Defining Aboriginal title
- **Held:** ?
- **Ratio:** First Nations hold a *suis generis* interest in land
  - o Distinguishing features
    - Inalienability
      - Lands held pursuant to aboriginal title cannot be transferred, sold, or surrendered to anyone other than the Crown
    - Source
      - Title arises because of the prior occupation of land by Aboriginal peoples. Not the Royal Proclamation
      - Before the assertion of British sovereignty
    - Held communally
      - Cannot be attributed to individual persons
  - o Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes which need not be aspects of those aboriginal practices, customs, and traditions
    - Those protected uses must not be irreconcilable with the nature of the group’s attachment to that land

- Eg Cannot have ancestral claims to fishing rights and use the waters in a way that would destroy its value for fishing
      - Must surrender lands here
  - Test for proof of Aboriginal title
    - The land must have been occupied prior to sovereignty
      - Need proof of historic occupation in a variety of ways
    - There must be a continuity between present and pre-sovereignty occupation
      - Does not need to be unbroken
      - Can have been disrupted for a time
    - At sovereignty, that occupation must have been exclusive
      - Does not have to be a specific aboriginal group
      - Can be joint ownership
  - Test for justifying infringement
    - The infringement must be in furtherance of a compelling and substantial legislative objective.
    - The infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples
      - Requires the government to take Aboriginal rights into account and ensures that the allocation of the resource are respected of the priority of those rights
      - Duty to consult
    - Provinces cannot extinguish Aboriginal title
  - Oral evidence was used heavily

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#### Tsilhqot'in v British Columbia (2014 SCC)

- **Facts:** In 1998, during a dispute over a logging licence, the Tsilhqot'in Nation claimed Aboriginal title over a small area of land. The federal and provincial governments opposed the claim
- **Issue:** Should a semi-nomadic Indigenous group have Aboriginal title to lands?
- **Held:** In favour of the First Nation. Established Aboriginal title to land. Government owed a duty of consultation and accommodation, and the planned land use violated this duty
- **Ratio:** The level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right
  - To justify overriding the Aboriginal title-holding groups wishes on the basis of a broader public good, the government must show
    - That is discharged its procedural duty to consult and accommodate
    - That's its actions were backed by a compelling and substantial objective
    - The governmental action is consistent with the Crows fiduciary obligation to the group
  - The strength of consultation and accommodation varies with the strength of the Aboriginal claim
    - If the title claim is strong, the consultation and accommodation level is high
  - Test for sufficient occupation must be considered alongside the perspective of the Aboriginal group (depending on its size and manner of living) might conceive of possession of land in a somewhat different manner than common law

- Found they used these territories for hunting
- Does not have to be straight continuous use
- Exclusivity does not mean only one group can be on the land
  - They could have a group there that was granted permission to be there
  - Must show intention and capacity to control the land
  - Found that they did have control

### Aboriginal Title Today

- Various legislation governs
- Modern treaties and self-governance agreements
- Default land tenure regime still in place on most First Nations reserves Reserve land defined as Crown land set aside for the use and benefit of the “band”
- Band Council presumptively has formal authority over allocation and use of reserve lands
- Council can allocate interests through Council resolutions, or in recognition of Indigenous law and custom. However, Council generally also has the power to revoke such interests.
- Certificates of possession (right of possession) allow for perpetual member-held rights of possession that cannot be withdrawn unilaterally by Council
- Leasehold interests may also be granted to members or non-members
- Numbered 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 favor of First Nations
- Indigenous perspectives:
  - Promises of kinship and alliance
  - An ongoing relationship
  - Role of Indigenous legal traditions

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## Novel Property Claims

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### Victoria Park Racing and Recreation Grounds v Taylor (1937, Australia)

- **Facts:** Plaintiff owned a horse racing course surrounded by a fence. The defendant would stand on an elevated platform to watch the races. The races would be described over the phone and broadcast over the radio. Attendance declined as a result and the plaintiff filed for an injunction under nuisance or right of privacy.
- **Issue:** Does the plaintiff have a property right that is infringed?
- **Held:** In favour of defendant. No right infringed.
- **Ratio:** All arguments rejected
  - Property in spectacle or privacy claim
    - No right at common law
    - Anyone can look over a fence if they are high enough (eg backyard fences, can still see second story)
    - Plaintiff can build a higher fence
    - Can't be quasi-property
      - Material from which a party tries to make a profit that benefits society

- No copyright claim in information
  - Law does not operate to give any person an exclusive right to state or describe facts
  - So the information on the notice boards is free game
- No nuisance claim
  - Difference in enjoyment of land and profit
    - Deprivation of profit is not actionable
  - No right to exclude the defendants from broadcasting a description of occurrences
- Judges did not want to overstep into law making (judicial restraint)
- **Dissent:** Injunction should be granted. Nuisance that it is an improper or non-natural use of land which curtails the neighbour's legitimate enjoyment of his property

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#### International News Service v Associated Press (1918 U.S.)

- **Facts:** INS is on the west coast and AP is on the east coast reporting on WW1. INS lost access to news sources so it would buy AP papers, rewrite the stories, and distribute them on the west coast as their own. Did not necessarily plagiarize but it was clear where it came from.
- **Issue:** Is there a property right in the news?
- **Held:** In favour of AP but no general property right in news
- **Ratio:** Majority
  - A company can have a limited property interest in news against a competitor because it has economic value to the parties and is the result the expenditure of money, skill, and effort to obtain it; hence, news is "quasi-property"
    - Only while the news is "hot"
    - Once distributed, the value of "not news" is zero
    - Essential that a news service be allowed to exclude those who did not contribute to the expense of gathering the news from using their information
      - Otherwise, no news service would have incentive to collect news if a rival can just copy and paste
- **Dissent:** Human production such a knowledge, conceptions, and ideas, become after voluntary communication to others, free as the air to common use
  - Need to defer to legislature on this topic

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#### JCM v ANA (2012 BCSC)

- **Facts:** Litigants were in a spousal relationship as lesbians. They each had a child and bought sperm from a sperm bank stored in straws. The relationship ended and JCM started a new relationship. The sperm straws were not included in custody agreement JCM wanted a new child but couldn't get straws, so JCM offered to buy Ana out of her straws. Ana said no and wanted them destroyed
- **Issue:** Are human materials property?
- **Held:** The straws are property
- **Ratio:** The fact that the parties have been treated as property means that they are
  - The straws were purchased for a purpose (and used to their benefit) and as such should be property
  - Treated as property throughout the entire history and all transactions

## Personal Property

### Licence

- A licence is an intangible, but can it be counted as collateral

### Saulnier v RBC (2008 SCC)

- **Facts:** Saulnier held multiple licences for the purpose of fishing. He got a loan from RBC in a security agreement that gave the bank a security interest in “all present and after acquired personal property including intangibles”. Saulnier went bankrupt and his trustee sought to include the fishing licences as property as their market value would have paid off his debts. Saulnier argues that they are not property
- **Issue:** Are these licences property that can be pledged?
- **Held:** In favour of RBC, the licences are property
- **Ratio:** Commercial (reality) fishing depends on the licence being property. Government licence may be property for specific purposes
  - o Bankruptcy and Insolvency Act
    - Property includes money, goods, things in action, land, and every description of property whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property
  - o Personal Property Security Act
    - Intangible means personal property that is not goods, a document of title, chattel paper, a security, and instrument of money
    - Personal property means goods, a document of title, chattel paper, a security, an instrument, money, or an intangible
    - Purpose to facilitate the creation of a security interest to enable holders of personal property to use it as collateral, and to enable lenders to predict accurately the priority of their claims against the assets in question
  - o A licence unlocks the value in the fishers’ other marine assets
  - o Fisher who holds licence has “beneficial interest in the earnings from the use of the licence”
    - Coupled with a proprietary interest in the harvest of fish and their earnings from sale
    - Without the licence, everyone would fish. Which is illegal
    - Unquestionably a major commercial asset
  - o If we don’t allow these licences to be pledged, how would fisheries get a boat?
  - o Not a profit a prendre
    - Right to enter and take something from someone else’s land
    - Fish is a common resource generally owned by no one
  - o Can only be personal property for the purpose of insolvency and personal property security laws
  - o Does not apply to drivers’ licence, taxi licence, licence to practice law
    - These are all specifically individualized
      - Only give this specific person the right
    - Cannot transfer these to other people

- Have to look at the purpose of the licence

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## Right to Exclude

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### Private Property

- One characteristic of private real property is that the owner of the property can exclude whomsoever the owner wishes (subject to other laws)
- Can be owned by an individual or a corporation
- Grey area where property is privately owned but publicly accessed (Eg a shopping mall)

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### Harrison v Carswell (1976 SCC)

- **Facts:** Carswell was picketing in connection with a labour dispute in front of her employer's premises on a sidewalk outside a mall. The protest was peaceful. Defendant was charged for trespassing after having been requested by the owner not to enter or come upon the premises
- **Issue:** Can you be trespassing when you are in the 'public' area of private property?
- **Held:** In favour of Harrison (mall). Carswell was trespassing
- **Ratio:** An owner who has granted a right of entry to a member of public may withdraw that invitation
  - If they refused to leave, they become a trespasser
  - Always there has been the right of an individual to the enjoyment of their property how they see fit and the right to not be deprived thereof
    - If someone trespasses, regardless of reason (picketing) they are guilty of an offence
    - If there is a change it must be made by the enacting institution or the Legislature
    - Manitoba (where charged) has a Petty Trespass Act
- **Dissent:** It does not make sense for a shopping centre owner to order a member of the public to leave if there is no proper reason in that members conduct or activity to justify the order to leave
  - No misbehaviour here

### Case Notes

- Labor legislation may not allow picketing – depends on the province
- House as a private property
  - Can prevent anyone from entering
  - Can also invite and rescind that invitation
- Generally, a shopping mall can operate like the house
  - Carswell wasn't buying anything
- If the dissents view prevailed, then by definition that space is now public and no longer excludable
- What about digital spaces? Facebook and Twitter
  - These companies have terms and conditions you must agree to. So somewhat private, they can ban you.

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## Public Property

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### Committee for the Commonwealth of Canada v Canada (1991 SCC)

- **Facts:** Plaintiff wished to distribute pamphlets at the Montreal airport. Airport authorities prevented this from doing so on the basis of federal regulations that expressly prohibited advertising or solicitation at the airport. Plaintiff challenged under s2(b) of the Charter which is freedom of expression
- **Issue:** Does this violate the Charter
- **Held:** In favour of Committee. Prohibitions violates the Charter
- **Ratio:** Some, but not all government owned property is constitutionally open to the public for engaging in expression activity
  - o Necessary to balance the interests of government and members of the public
  - o If the government has complete discretion to treat its property as a private citizen, it could differentiate based on content or choose to only those whose messages accorded with the government's preferences
  - o If the public didn't had no right whatsoever, then there would be little opportunity if any to exercise their right
    - Only those with enough wealth to own land or mass media facilities
  - o However, the Charter makers did not intend prison cells, judges' chambers and etc to be made available for protest
  - o Thus need to look at the purpose of the location
    - Is it a "contemporary crossroads"
      - Functionally equivalent to other public thoroughfare
      - Like a park or street

### Case Notes

- What about begging?
  - o More akin to commercial than political expression
  - o Does not engage the core values of the Charter under freedom of expression

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### Batty v Toronto City (2011 ONSC)

- **Facts:** Occupy Toronto overnight camp had over 300 tents and other large tent structures in a public park. City of Toronto issued a trespass notice. Protesters wanted an injunction under section 2 for freedom of expression and peaceful assembly
- **Issue:** Does this violate the Charter?
- **Held:** In favour of the city. Trespass does violate section 2, but the infringement is saved under section 1 – subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
- **Ratio:** The Charter offers no justification for the protests act of appropriating to their own use, without asking their fellow citizens, a large portion of a common public space for an indefinite period of time
  - o Cannot take over a public space without asking, exclude the rest of the public from enjoying their traditional use of that space, and then contend that they are under no obligation to leave
  - o The protesters want to create new rules through their general assembly and ignore the existing rules that bind everyone else



- The city's trespass notice sought to enforce two restrictions fell within a range of reasonable alternatives and constituted a minimal impairment of the applicants' section 2 freedoms
  - Toronto is very busy and lots of people want to enjoy the parks
  - Need some balancing of what people can do there or people would be forced out. It would be a competition for use. Stronger could exclude the weaker
  - City must maintain them in good condition
  - Protesters could still be there for close to 19 hours a day
    - Not an absolute ban or eviction
- Need peace, order, and good government (Constitution)
  - When people come together, flexibility must permeate everyone's actions, or we would all be at each others throats with no peace

### Case Notes

- Victoria (City) v Adams
  - City wanted to remove the tents and tent city that the homeless had erected
  - Court said no due to the circumstances
    - Lack of shelter available
    - International human right of adequate housing
  - Temporary overnight shelters allowed

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## Expropriation

- Expropriation is the act of the government confiscation of taking your property for public purposes
  - Constructive taking
    - Effective appropriation of private property by a public authority exercising its regulatory powers
  - De Jure taking (formal expropriation)
    - Taking title to land

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### Manitoba Fisheries Ltd v R (1979 SCC)

- **Facts:** Plaintiff owned and operated a fish exporting business until the federal government enacted legislation giving the exclusive rights to carry on such a business to a statutory corporation. Put Manitoba fisheries out of business and rendered their physical assets worthless. Plaintiff brought an action for loss of good will (establish reputation)
- **Issue:** Did the *Freshwater Fish Marketing Act* amount to a taking requiring compensation?
- **Held:** In favour of the plaintiff. Entitled to compensation equal to fair market value of its business minus residual value of its remaining assets plus 5% interest per annum
- **Ratio:** 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
  - Two-part test must be met
    - What the claimant lost must be property
    - The property must have been acquired by the Crown
  - Goodwill, although intangible, is part of the property of a business just as much as premises and equipment
    - Its an interest in property

- Deprived the plaintiff of its connection to its customers

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#### Mariner Real Estate v NS (1999 NSCA)

- **Facts:** Plaintiffs owned land at Kingsburch Beach. Because the land was designated as a beach, the plaintiffs were denied the necessary health and building permits required to build single-family residences on the lands. Plaintiff claimed that their lands had been de facto expropriated
- **Issue:** While regulation leaves the plaintiff's title to their land untouched, does it nevertheless entitle the plaintiff to compensation?
- **Held:** In favour of Nova Scotia. Compensation not required
- **Ratio:** In order to constitute a de facto expropriation, there must be a confiscation of all reasonable private uses of the lands in question
  - No suggestion that the province acquired legal title or an aspect of it
    - The enhancement of the value of public land is not the same as the acquisition of an interest in land; even if it was, there is no evidence that the economic value of the Crown's land was enhanced
  - Preclusion of residential development is not the extinguishment of the bundle of rights associated with ownership; hence, the plaintiff was not deprived of land
  - In Canadian courts, restrictive land use regulation that leaves paper title untouched have almost without exception been found not to constitute compensable expropriation

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#### Canadian Pacific Railway Co v Vancouver City (2006 SCC)

- **Facts:** In 1886, the Crown granted CPR a corridor of land. In 1902, a rail line was built on the corridor but owing to reduced traffic, CPR discontinued rail operations on the line. CPR wished to arrange a sale of the land for residential and commercial use. The City of Vancouver made it clear that it would not buy the land and designated it as a public thoroughfare, effectively freezing the redevelopment potential of the corridor and confining the CPR to uneconomic uses of the land. CPR argued that this constituted an effective taking of land.
- **Issue:** Does the by-law constitute a de facto taking of land for which compensation is required?
- **Held:** In favour of Vancouver. Compensation not required.
- **Ratio:** Neither requirement for de facto taking is met here
  - The City has acquired no beneficial interest related to the land; they have only gained some assurance that the land will be used or developed in accordance with its vision
  - The by-law does not remove all reasonable uses of the property; it does not prevent CPR from using its land to operate a railway, it does not prevent maintenance from being conducted on the existing track, and it does not prevent CPR from leasing the land for use in conformity with the by-law
  - *Vancouver Charter*, which specifies that property affected by a bylaw should not be deemed to have been taken; since the *Expropriation Act* only guarantees compensation in the case of a taking, no compensation is required here.
    - No actual taking here
    - By-law is not invalid in the absence of a plan to acquire the land

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## Concept of Possession

### General

- Property interests are always relative

- Someone who holds a possessory interest may still have a superior claim than someone who subsequently interferes with that possession
  - Eg theft
- A person's possession of a chattel or land may, by itself, create a proprietary interest
- Modern theory of first possession brings together two theories
  - Labour theory
    - The original owner is the first person to combine his or her human labour with the thing that comes to be possessed
  - Societal constant theory
    - Holds that people engage in an agreement within a community to define what any individual possesses
- Common law's clear act theory
  - Combines an act of labour with an act that clearly alerts society with respect to a claim to possession of property
  - First possession is the root of title

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### Finders and First Possession

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#### Armory v Delamirie (1722 England)

- **Facts:** Plaintiff is a chimney sweeper that found a jewelled ring. He took it to a shop to get it valued and weighed. The jewellers apprentice took the jewel out and his master valued it at three half pence which the plaintiff refused. The plaintiff wanted the jewel back, but the defendant returned the ring without the jewel. Boy sues the jeweller
- **Issue:** Who owns the Jewell?
- **Held:** In favour of the plaintiff.
- **Ratio:** The finder of an object has a property interest that will enable him to keep it from anyone but the rightful owner
  - Not an absolute right
  - The action can be against the master jeweller as he is answerable for the apprentice's neglect
  - Unless the defendant can produce the jewel, the damages are equal to finest jewel that fits in the ring socket

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#### Parker v British Airways Board (1982) England

- **Facts:** Plaintiff was in an airport lounge and found a gold bracelet. He gave the bracelet to an official of the defendants and gave the official a note of his name and address and asked for the bracelet to be returned to him if it was not claimed by the owner. The official then gave it to the lost property department. The owner never claimed it, but then the defendants sold it and kept the \$850 it received
- **Issue:** Is British Airways in possession of the ring already when Parker finds it?
- **Held:** In favour of the plaintiff.
- **Ratio:** The claims of the finder are found to be superior to those of the occupant of the premises
  - Rights of a finder
    - Has no rights unless the product found is lost or abandoned and he takes it into his care and control
    - Acquires very limited rights if he takes in with dishonest intent or in the course of trespassing

- Acquires a right to keep it from all but the true owner
- Any employee who finds something does so on behalf of his employer unless otherwise agreed
- Finder has an obligation to take reasonable measures to notify the true owner of the chattel and care for it in the meanwhile
- Rights of an occupier
  - Occupier has superior rights to a finder in the case the occupier is aware of the presence of the chattel
  - Occupier only has rights superior to the finder if they have manifested an intention to exercise control over the building and the things which may be upon it
    - Relevant if the premises were private or open to the public
  - Must take reasonable steps to notify and return lost chattels to the true owner
- Application
  - Plaintiff had finders' rights that were not displaced
  - The defendant did not manifest an intention to assert custody and control over lost articles on their premises

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## Joint Possession

### Keron v Cashman (1896)

- **Facts:** Five boys found money in a stocking that broke open when they played with it. One kid claimed it was all his because he first found the money, the rest claimed equal division
- **Issue:** Is there joint property?
- **Held:** Money belongs to all five jointly
- **Ratio:** There was common possession of the stocking by all defendants
  - None of the boys treated the stocking as an article over which possession was intended until it burst open
    - They all treated it as a plaything
  - No evidence a boy picked it up with the intention of examining its contents
  - Also not a wallet which is clear what intended purpose is

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### Edmonds v Ronella (1973)

- **Facts:** Two boys found some money in a trashcan. An older friend that was with them (sort of) took the cash to give it to the police. No true owner found, so older friend claimed the cash
- **Issue:** Is there joint property?
- **Held:** Money belongs to all three jointly
- **Ratio:** Joint possession found as the first boys did not abandon it when they handed it over
  - The lost property was not found, in a legal sense, until the parties have removed it from the parking lot

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### Popov v Hayashi

- **Facts:** Two fans trying to get Barry Bond's HR record ball. The ball went into Popov's glove, but he was instantly mobbed by people and thrown to the ground. Popov intended at all times to establish and maintain possession of the ball. At some point the ball was knocked out. Hayashi was involuntarily forced to the ground near Popov. As he went to the ground, he saw the loose ball and pocketed it

- **Issue:** Is there joint property?
- **Held:** Ball or proceeds of its sale belong to both jointly
- **Ratio:** An award of the ball to either would unfairly penalize the other. Each has an equal claim against the other
  - Ball first owned by the MLB
    - When it was hit, it was intentionally abandoned property
  - Hence the first finder is the owner
    - But who is that?
  - Popov did not establish he would have retained control of the ball after the mob
    - Therefore, he did not achieve full possession
    - But he was attacked. As a matter of fundamental fairness, and a desire of rule of law instead of rule by force, he should have had the opportunity to try to complete his catch unimpeded by unlawful activity
      - Thus he has the right to possession
      - He has a pre-possessory interest
        - Took significant by incomplete steps to achieve possession and his effort was interrupted by the unlawful act of others
        - Not a full right of possession
  - However, does not dislodge the interests of Mr. Hayashi
    - He was not a wrong doer
    - He got control of the ball
  - Possession requires full, physical control

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## Equity

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### General

- Developed as a separate form of justice from the common law courts
  - The courts were later fused
  - Today, principles from both are used
- Equity typically acts on a person
  - Doesn't deal with money, but instead commands a person to do something
- Primarily concerned about the loss to the plaintiff
- Equitable remedies
  - Unjust enrichment – restitution
    - The defendant is enriched, and the plaintiff suffers a corresponding deprivation
    - The absence of any juristic reason for the enrichment
  - Trusts
    - Legal owner the trustee and the person they give it to creates an equitable interest
  - Disgorgement
    - Basically, just give the object back
  - Division
    - Split the object / proceeds

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### Bird v Fort Frances (1949 Ontario)

- **Facts:** A kid found money in a can on someone else's property. He took it home
- He eventually gave it up to the police who questioned him after some generous spending habits. They said they kept it for safekeeping until they could find the true owner. The police gave it to the city who are not giving it back (says it is the owner's property). The executor of the dead property owner laid claim to the money but did not want to participate in the litigation, so his claim was dismissed
- **Issue:** Whose property?
- **Held:** in favour of the kid. Finders' possession holds
- **Ratio:** Felonious intent does not matter to property in which a party asserts no legal rights to
  - o The money was put there deliberately and the kid is a wrongful taker of the property
  - o However, that property is abandoned, and the owner assumes no legal rights
  - o When unable to find the true owner, the police officer ought to have returned the money to the custody from which it came
    - The defendant can have had no higher right to the property than the police officer had and thus is liable for the money to the plaintiff
    - Did not take it as a due process of law
  - o Finder cannot assert title against original owner, if original owner did not intend to abandon the property

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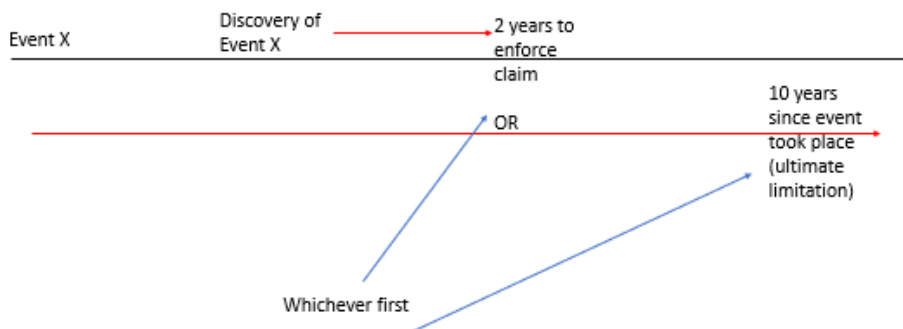
### Adverse Possession

- A person has possessory *title* to land when they enjoy the rights attached to it; they must have an intention to possess and demonstrate the requisite physical occupation
  - o Possessory title is good against the world except the rightful owner
- Effectively looks to extinguish the rights of the true owner in the land
- In January 2023, Alberta abolished adverse possession completely
  - o Not clear if old claims of old adverse possession still survive
  - o Effectively, this is not an issue any more
    - For exam purposes, could just say this is not an issue any more
    - However, he may ask for the old claim so know it
- The claimant must establish
  - o Actual possession
  - o Possession was to exclude the owner
  - o Discontinuous of possession by the owner during the period
- Possession must be open and notorious, peaceful, adverse, exclusive, actual and continuous
- Defines an endpoint after which a true owner can no longer succeed in negative a possessory title

### Statute of Limitations

- Alberta Statute of Limitations Act
  - o 3(1) if a claimant does not seek a remedial order within
    - 2 years after the date on which the claimant first knew, or in the circumstances ought to have known
      - That the injury for which the claimant seeks a remedial order had occurred

- That the injury was attributable to conduct of the defendant
  - That the injury, assuming liability on the part of the defendant, warrants bringing a proceeding or
    - 10 years after the claim arose
    - Whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim
- First, identify the event
  - Second, how long has lapsed since the vent
  - Third, how long since you discovered the event



#### Perry V Clissold (AC 1907)

**Facts:** Clissold moves to land that his not his. He puts up a fence, pays taxes and acts like the land is his

- The government wanted to expropriate it to use as a school site
- Clissold dies but his estate demands government compensation based on a possessory interest in the land
- Government argues he is a trespasser without interest

**Issue:** Adverse Possesion

**Held:** in favour of Clissold

**Ratio:** A person in possession of land in the assumed character of owner and exercising peaceable the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner

- Clissold established possessory title

#### Asher v Whitlock (LR 1865)

**Facts:** Williamson squats on land for over twenty years. Writes a will that says land will go to his widow as long as she is alive or if she remarries. If she remarries, the land goes to the daughter

- Widow remarries a few months after he dies, but then her and the daughter dies
- New husband continues to live on the land and Williamsons granddaughter wants him out
- New husband argues that Williamson had never gained any proprietary interest and there is no interest that can be passed on

**Issue:** Whose property?

**Held:** in favour of Clissold

**Ratio:** Possession is good title against all but the true owner

- Thus, Williamson established a longer possessory interest, and it transfers to the granddaughter
  - o New husband had not right to interfere against wife and thus, no right to interfere against granddaughter

- Both are squatting but granddaughters interest (by Williamson) is older

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#### Re St Clair Beach Estates v MacDonald

**Facts:** MacDonalds had used a part of the land purchased by St. Clair's without objection from the previous owner

- MacDonalds initiated an action to obtain legal recognition of their possessory title to the portion of land they have used for some years
- MacDonalds used the section of land for various activities, it was not used by the owner
  - o Generally, the use of the land in question was in the nature of a neighbourly acquiescence by the previous owners
- Appellants tried to buy the land multiple times

**Issue:** Whose property?

**Held:** in favour of Clissold

**Ratio:** The smallest act by the owner would be sufficient to show that there was no discontinuance of his possession

- Occasional use of the disputed land by the titleholder in a manner consistent with the use to which such land may be put is sufficient to deprive the claimants of exclusive possession
- Owner of a farm cannot be said to be out of possession of a piece of land merely because he does not perform positive acts of ownership all the time
- Previous owners occasionally picked cherries there, so they were never out of possession of the land

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#### Keefe v Arillotta

**Facts:** Original owner divided the land in question and sold part of with a right of way on the disputed land strip

- Plaintiff used the area for multiple things
  - o Main uses was a driveway and garage. Had put down gravel on several occasions
- Respondents used it to access to an ice house for their store
- Plaintiff argues that they have acquired the land through adverse possession

**Issue:** Whose property?

**Held:** in favour of respondents except the part with the garage

**Ratio:** A possessory title cannot be acquired against the original owner by depriving him of uses of his property that he never intended or desired to make of it

- The use an owner wants to make of his property may be a limited uses and an intermittent or sporadic use
- A person claiming a possessory title must have ... an intention to exclude the owner from such uses as the owner wants to make of his property
- Evidence shows that the Keefers never intended to oust the Defendants from the limited use they wanted to make of it
  - o Good neighborly relationship where each party tolerated the use of the land by the other
- The defendants did not discontinue their possession of any part of the strip of land other than the portion at the rear occupied by the respondents' garage
- Inconsistent use test: The claimant's intention to exclude the true (paper title) owner from possession or use to which the true owner intended to put the land during that period



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## Wood v Gateway

**Facts:** Plaintiffs enjoyed the use of two-acre parcel of land for almost 18 years, honestly believing it belonged to them

- Neighbors did not know it belonged to them, also believing it belonged to the Woods
- Gateway purchased land close to this parcel, a survey revealed who it belonged to
- Plaintiffs have the land partially fenced, maintained a driveway, and also farmed half the parcel
  - o Also used for a lumber business
- All previous owners and current defendants were aware of and did not complain about Woods activities on the parcel
  - o Thought it belonged to them

**Issue:** Whose property?

**Held:** in favour of Wood

**Ratio:** Evidence of a mutual mistake may still justify an inference that the party seeking possessory title did in fact intend to exclude all others

- o Trier of fact must look at all evidence
- o In the absence of any to the contrary, evidence of mutual mistake could alone justify such a finding of intent to dispossess true owners
- True owners did not know that they were the rightful owners at the time, thus hard to determine their intended use for the property when they at no time even contemplated its use
- Beyond any doubt that the applicants have established possessory title by way of adverse possession.
  - o Simply put, the possession of the applicants of the two-acre parcel has been open, notorious, constant, continuous, peaceful, and exclusive of the rights of the true owners for almost 18 years. The applicants not only intended to exclude the true owners for this period of time; they in fact did so

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## Estates

- Types of ownerships of land
- History
  - o Evolves from King William the Conqueror giving land of England to barons and knights
    - They then further subdivided
  - o King wanted tax revenue from the land
  - o Understand from this perspective: want certainty of title and land that has good usage and value
- Types of estates
  - o Fee Simple: Own the land forever
    - When you die, your heirs get it
  - o Fee Tail: Limited use today and non-existent in most provinces
    - Old way of keeping land in your family tree by giving it specifically to male heirs
  - o Life Estate: You can live in the house for as long as you live
    - When husband died, the spouse gets it, then the wife
  - o Leasehold: rent property for a fixed duration
- Two aspects for classifying estates
  - o The land itself

- Time
- Eg House for rent
  - Owner always has a property interest in the house
  - Tenant only has an interest while they are renting
- Terminology
  - Possession: You actually own or have control over the property
  - Interest: You don't have it yet but will get it one day
  - Vested: Certain people will certainly receive the property upon the ending of the previous possession
  - Contingent: someone might receive the property upon the satisfaction of a condition
    - Springing: you get the property if you do something but original owner loses it
    - Shifting (divesting): You get the property if you do something but someone else loses it

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### Fee Simple

- Most common form of ownership
- If A owns the land, he owns the land forever. Potential indefinite form of ownership
  - When he dies, it goes to his heirs by will or intestacy
    - Intestacy is about who inherits it if a will is not create
  - Only exception is if he has a spouse
    - Spouse then gets a life estate in the property
- If a fee simple is given as a gift or sold, the land will go to their heirs when they die
  - Used to have to specify this but not anymore
- Historically, the eldest son got the property and everyone else got nothing
  - Even if no will, the land is divided more equitably
- The owner of a fee simple can do anything he wants with the property subject to laws
  - Right to manage and control, profit form the land and alter the land physically
  - Right to voluntary dispose of the property
- X grants to A and his heirs
  - Fee simple to A (vested in possession and interest)

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### Life Estate

- Can grant property to X for life
  - When X dies, reversion to original owner
  - If the land ends up going to someone else, then we call this remainder
- A life estate can be given to anyone regardless of relationship with the owner of the property
- Spouse automatically gets a life estate when the owner of the property dies
  - Regardless of will or estate
  - Under the Dower Act, section 18
- If the owner wishes to sell the property while the spouse is still alive, then the spouse needs to consent
- Can be timed for the duration of another person's life
  - Life estate *pur autre vie*
  - X to Y for the life of Z
    - When Z dies, the house goes back to X

- If it is for the life of the grantee, then called life estate *pur sa vie*
- Example: Giving house to X but she dies, goes to Z
  - X to Y for her life, remainder to Z in fee simple
- Example
  - X grants to A for her natural life
    - A has vested in interest and possession a life estate. X and heirs has a vested interest (reversion)
- Life estate owners have a responsibility against waste
  - Must look after the house an any other land associated with the house
  - Do not have a right to physically alter the land in a significant way
    - Voluntary waste: Acts that damage the property
    - Permissive: Tenant fails to maintain the property in a passive way
      - Not liable for this waste unless the instrument creating the estate imposes an obligation
    - Ameliorating: Waste that alters the property for the better
- Life estate owners can do anything with the house except sell the house in fee simple
  - Can lease it
  - Can sell the life estate interest even
- Ambiguity of language
  - Courts rule is first come first serve. If you create a fee simple at the start, there is nothing left to give
  - Example
    - I give and devise unto my said wife all my real and personal property saving and excepting thereout as follows namely my gold watch and chain I give to my nephew John Noble Walker .... and also should any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided as follows ...
    - Front of will he made a fee simple and at the back of the will he made a life estate with the remainder. Cannot do this and have both.
  - Example
    - I Give, Devise and Bequeath all my real and personal estate of which I may die possessed to my wife Kathleen Augusta Edith Taylor, to have and use during her lifetime.  
Any Estate, of which she may be possessed at the time of her death is to be divided equally between my daughters namely ...
    - This is a life estate
  - Example
    - X grants to A for her natural life. One month later X grants to B and his heirs
    - This is a life estate to A, remainder to B in fee simple

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### Fee Tail

- Abolished in most North American jurisdictions
- Old way of keeping land in the direct family
- A fee tail today is converted to a fee simple

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## Conditional Estates

- Absolute estate
  - o One that has no conditions of any kind attached to it
- Conditional estates
  - o Allow the creator of an estate to control how the estate will be used in the future and to provide for eventualities that are unknown at the time the estate is created
- Two types of conditions
  - o Forfeiture conditions
    - If something happens, you may lose the property
  - o Eligibility conditions
    - You get the property if something happens
    - Also know as condition precedent
- Conditions can be added to any state
- Essential requirement of any condition is that must refer to an event or state of affairs that may or may not ever happen
  - o If an event is certain, it cannot be the subject of a condition
    - Eg to A, and upon his death to B
      - A's death is certain, merely marks the end of his estate
- Conditions restrict alienation (disposal of land)
  - o Therefore, there are strict restrictions on conditions
  - o If a restriction is uncertain or vague, the condition may be read out

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## Re McColgan

**Facts:** Dealing with the will of McCologan

- Gave Mary a home until her death or until she is not residing therein personally, whichever shall first occur
  - o Afterwards, it goes to Carrie until her death or until she is no longer residing therein personally
    - After that, then shall fall into and form part of the residue of his estate
- Mary moved into the house given but had to move back to her original residence for health reasons
  - o She wrote to the solicitors that she is not surrendering her rights to make her home at the house given to her

**Issue:** Conditional estate

**Held:** Life estate to Mary clear of any condition

**Ratio:** Need to put meaning to the words in the will which the testator intended

- The interest created is a life interest
  - o The language of the will goes far beyond what one would deem appropriate to the creation of a mere personal licence
- "Until he death" is another way of expressing the intention that the estate created was to endure for the term of her natural life
- "Or until she is not residing therein personally, whichever shall first occur" are external to the limitation and creating an interest upon condition
  - o They mark at event which, if it takes place, will defeat an estate already granted
  - o However found this condition was void for uncertainty

- Thus, life estate to Mary, then life estate to Carrie, then fee simple to McCoughlans heirs

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### Conditions of Forfeiture

- Defeasible estate
  - o Interest may be terminate prematurely if person breaches a condition
  - o Eg O grants land to C in fee simple, but if she ceases write mystery novels, I may re-enter
    - Note that ceasing to write mystery novels does not automatically terminate C's estate
    - Terminated only if O exercises the right of re-entry
      - O can choose not to get the house back but cannot wait forever, statute of limitations applies
    - C has a vested in possession and interest defeasible fee simple
    - O (or heirs) has possible of reversion: contingent interest
      - Also a shifting contingent interest
  - o Eg Harlan dies. In his will he leaves his house to Hugh, but if he throws wild parties, Linda and Walt may re-enter the House.
    - Hugh has fee simple defeasible
    - Linda and Walt have contingent (shifting) interest
- Determinable Estate
  - o Grantee takes a modified fee simple, and the grantor retains an interest known as a possibility of reverter
  - o Eg O grants land to C in fee simple until she ceases to write mystery novels
    - C has a vested in possession and interest determinable fee simple
    - O (or heirs) has possible of reversion: contingent interest
      - Also a shifting contingent interest
  - o On the happening of the forbidden event, C's estate automatically ends immediately and the fee simple reverts to the grantor
    - Absolute and automatic
  - o Eg Harlan dies. In his will he leaves his house to Hugh as long as he doesn't party in the house. Linda and Walt are the other siblings of Hugh. Assume they would inherit the house if Hugh was not named the heir.
    - Hugh has a fee simple determinable
    - Linda and Walt have contingent (shifting) interest

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### Conditions Precedent

- Conditions of eligibility
- O grants to B in fee simple if he solves the murder mystery
  - o O has a fee simple subject to divestment by B
  - o B has a springing contingent interest
- Usually associated with future interests rather than present interests

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### Unenforceable Conditions on Land Transfer

- We want land to move, part of the capitalist system
  - o The "sillier" the restraint, the more unrelated the restraint is to the land, the more likely it is to be struck down
- Three types

- Impermissible restraints on alienation
  - Basically seeks to prohibit people from losing an interest in the land
    - Goes against free market principles
- Uncertainty
- Contravenes public policy

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### Blackburn v McCallum

**Facts:** Chisholm died and left land to his two sons on the condition that they were not allowed to sell or transfer it for 25 years

- Also states that they are not allowed to create a mortgage on the land, and that no other ordinary debts will allow creditors to seize the land
- One of the sons mortgages his interest and defaults on the payments
- Creditors seize the land and sell it at auction
  - Question of if the new purchaser takes good title or if the conditions were still valid

**Issue:** Restraint on alienation. Can conditions be placed on an absolute transfer of land?

**Held:** Fee simple to Hugh, condition is void

**Ratio:** No substantial restraints can be attached to an absolute gift of property

- Placing a time-restriction on when absolute rights come into effect is not allowed
- Son took a fee simple in the land so is allowed to do with it what he wishes

### Notes:

- Numerus Clauses
  - Legal concept: real property has certain legal characteristics that cannot be altered by will/grant/devise/bequest
    - Only legislature can do that
    - Too hard to reverse
  - Conditions provide property owners with considerable flexibility to regulate grantees behaviour, it does not allow them to alter the basic characteristics of estates
    - Eg cannot create a fee simple without the ability to dispose of it by will

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### Sifton v Sifton

**Facts:** Father dies and leaves some property to daughter

- Trustees are to make annual payments for her until she turns 40 and they are entitled to decide what she gets until then
  - When she is 40, she gets the entire income for the remainder of her life
- There is a clause at the end that the payments are only to be made so long as she continues to reside in Canada
  - Question is if this clause is void for uncertainty
  - Will doesn't say what happens to the income of the estate if she ceases to reside in Canada
- Daughter left for about a year to study abroad

**Issue:** Uncertainty

**Held:** Life estate determinable, condition is void for uncertainty

**Ratio:** If there is any doubt whether a condition be precedent or subsequent, the Court prima facie treats it as subsequent

- If there is an estate that is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be able to be defined clearly from the beginning upon the happening of what event it was that the vested estate was to determine
- This condition seems long and lingering with no expiry date

**Notes:**

- Conditions that are precedent, (this must happen before you get the land), usually the courts will uphold
  - o Easier to enforce (one time deal, figure out when the condition is satisfied)
- Generally, courts don't like conditions that are hard for them to verify

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**Re Canada Trust Co and Ontario Human Rights Commission**

**Facts:** Leonard foundation created a trust for the purposes of educational scholarships

- The trust deed have some recitals saying who could get the trust
  - o White race is best qualified to be entrusted with the development of civilization
  - o Progress of the world depends upon the maintenance of the Christian religion
  - o Peace of the world and advancement of civilization depend upon the prosperity of the British Empire
  - o Exclude people who are not Christians of the white race and British nationality
- OHRC said these violate public policy of Ontario and the Foundation said they are administering a private trust which does not offend the Human Rights Code

**Issue:** Public Policy

**Held:** Conditions void for public policy

**Ratio:** The trust is so couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest

- The document must be read as a whole
  - o The recitals cannot be isolated from the balance of the trust document
  - o Equality rights are constitutionalised in Canada and these tenets obviously go against these rights
  - o The widespread criticism of the foundation goes to show how offensive tis terms are to fair-minded citizens
- The freedom to dispose of property (the trust) must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality

## Estates Examples

Grant	Analysis
X grants to A and his heirs so long as he remains on the farm	<ol style="list-style-type: none"> <li>1. A gets fee simple determinable.</li> <li>2. BUT the condition subsequent is (most likely) uncertain, so void.</li> <li>3. A gets fee simple</li> </ol>
X grants to CNR, its successors and its assigns for so long as the land continues to be used for railway purposes, and subject to the understanding that, if the land ceases to be used for such purposes, the fee simple shall revert to the grantor and he shall be entitled to enter thereon.	<ol style="list-style-type: none"> <li>1. CNR gets fee simple defeasible on condition subsequent (land not used for railway) subject to right of re-entry.</li> <li>2. Is this uncertain?</li> <li>3. No</li> <li>4. Note: might be void for other reason (rule against perpetuity which we will cover soon)</li> </ol>
X confirms that the "acre of land granted to the Village of Caroline Community Hall this day, shall revert back to the Thomas Roper Estate if used for other than a community <u>centre</u> ."	<ol style="list-style-type: none"> <li>1. Is this defeasible or determinable?</li> <li>2. Contradictory language.</li> <li>3. BUT intention is clear: fee simple determinable</li> </ol>

Grant	Analysis
X devises to A, "if and when she shall attain the age of twenty-one years, provided that upon the attainment of such age she shall then be resident in one of the countries of the British Commonwealth of Nations.	<ol style="list-style-type: none"> <li>1. Fee simple subject to condition precedent.</li> <li>2. Not uncertain.</li> <li>3. If she is living in any commonwealth country when she is 21, she gets the estate in fee simple.</li> </ol>
X devises fund to trustees for medical students provided they are protestants.	<ol style="list-style-type: none"> <li>1. Devise is conditional on (subject to) condition precedent.</li> <li>2. Is condition void as against public policy?</li> </ol>
X devises to A in fee simple if he has graduated from law school.	<ol style="list-style-type: none"> <li>1. Devise subject to condition precedent.</li> <li>2. Condition fine</li> </ol>
X grants to A in fee simple provided that the land shall be used as a gold course; if not, their interests shall cease.	<ol style="list-style-type: none"> <li>1. Fee simple determinable.</li> <li>2. Second sentence redundant.</li> </ol>

Grant	Analysis
X devises to A for her natural life during widowhood.	<ol style="list-style-type: none"> <li>1. Life estate determinable.</li> <li>2. Condition void for being against public policy (restraint on marriage)</li> <li>3. Result: life estate</li> </ol>
X devises to A in fee simple, but if she remarries, my executors may reclaim the property and transfer it to my daughter if, in their opinion, she is in need.	<ol style="list-style-type: none"> <li>1. Fee simple defeasible subject to right of reversion/re-entry.</li> <li>2. Condition void as against public policy (most likely today).</li> </ol>
X devises to A in fee simple, but he shall not be permitted to mortgage the land within ten years of my death, otherwise it is to pass to his brother B.	<ol style="list-style-type: none"> <li>1. Is this restraint on alienation?</li> <li>2. Fee simple determinable on (subject to) condition subsequent.</li> <li>3. Answer depends on whether <i>Blackburn</i> applies.</li> </ol>

## Rule in Shelly's case

- Transferring land which attempts to give a person a life estate, with a remainder to that persons heirs, will instead give both the life estate and the remainder to that person



- Example
  - o Phil leaves estate to Stu for life, remainder to the heirs of Stu in fee simple
  - o Stu actually gets a fee simple
    - Heirs get it in fee simple when he dies
- This rule abolished in Alberta

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### Legal and Equitable Interests

- Example
  - o Arnold wants to leave the land to Tanya but doesn't trust that she can take care of herself. Wants Nicole to look after the land and pay income to Tanya
    - Legally, would be Arnold to Nicole in fee simple and politely ask Nicole look after to Tanya for life
      - This is insufficient. Tanya gets Nothing while Nicole gets a fee simple
  - o Go equity route
    - Arnold leaves land to Nicole in trust for the benefit of Tanya
      - Nicole has a legal fee simple, Tanya an equitable fee simple
    - Arnold is the settlor, Nicole the trustee, Tanya the beneficiary
    - Nicole 'owns' the land, but cannot do anything with it except look after it for Tanya's benefit
    - Tanya doesn't 'own' the land but has the right to receive benefits from the land (including rents)
- Any property can be the subject of trusts
  - o Except things that are personal and not capable of being sold like a drivers license
- Trustee must look after assets following a "prudent investor" standard
- Trustee is also a fiduciary
  - o Must take utmost care in looking after assets
  - o Higher standard than ordinary (tort) duty of care
  - o Must follow trust's instructions and are strictly liable for failure to do so
- Examples

Grant or Devise	Analysis (X is settlor in all of these)
1. X grants unto and to the use of A in fee simple in trust for B in fee simple.	A: trustee has legal title in fee simple B: Beneficiary has equitable fee simple
2. X grants to Canada Trust in fee simple in trust for A in fee simple.	Canada Trust: trustee has legal title in fee simple A: Beneficiary has equitable fee simple
3. X grants to A in fee simple to collect the rents and profits for the benefit of B in fee simple.	A: trustee has legal title in fee simple B: Beneficiary has equitable fee simple
4. X grants unto and to the use of T in fee simple in trust for my wife W for life and after her death in trust for my daughter upon her admission to the Bar of Ontario.	T: trustee has legal title in fee simple Wife: Beneficiary has equitable life estate Daughter: Beneficiary has equitable contingent (springing) remainder in fee simple
5. X devises to P when she reaches the age of 25 (P is 15 at the time of X's death).	Executor/heirs: trustee has legal title in fee simple subject to divestment (or fee simple determinable) P: has contingent (springing) legal and equitable fee simple Who has equitable title before P turns 25? (Resulting trust for X's heirs)
6. X devises to T in fee simple in trust for A for life, then in trust for B, but if B is ever disbarred, then in trust for C.	T: trustee has legal title in fee simple A: Beneficiary has equitable life estate B: Beneficiary has equitable fee simple defeasible (maybe determinable) C: Beneficiary has contingent (shifting) equitable fee simple
7. X devises to T in fee simple in trust for A for life, then 10 years after A's death, in trust for B in fee simple.	T: trustee has legal title in fee simple A: Beneficiary has equitable life estate B: Beneficiary has vested equitable fee simple 10 years after A's death.

### Rule Against Perpetuity

- Does not allow for infinite titles
  - o Eg X grants land to Y for his life, then Y's children for their life, then Y's grandchildren for their lives, and then to all the descendants of Y
  - o If after centuries, no descendants of Y, then the title reverts back to X's heirs
  - o No one owns a fee simple because there are infinite life estates
- No interest is good (valid) unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest
  - o No interest is valid: the interest is valid unless conditions fulfilled
  - o Unless it must vest: the interest must vest within
  - o Not later than 21 years after some life in being
    - 21 years of life in being mentioned in the will/sale/gift/instrument
    - Life(s) must be humans and cannot be too numerous to be impossible to keep track of
  - o At the creation of the interest: when the interest starts (eg death of person who made the will, execution of the sale of land contract)
    - RAP operates on the people alive at the instrument
- Example
  - o X bequeaths to wife for life, then daughter for life, remainder to first of daughters children to reach age 25
    - Widow life estate is vested in possession at the time of the death of X

- Daughter has vested in interest in a life estate
    - If daughter does not have any current children, and has children after X's death, these children will not be 25 within 21 years of X's death
      - She may also have children that are younger than 4 and they will still not be 25
  - This is invalid
    - In this case, the remainder is stricken out
    - Widow for life, daughter for life then remainder to X and X's heirs
- Example
  - X to B in fee simple so long as the land is farmed; if land is not farmed, then to C and C's heirs
    - B has fee simple determinable
    - C has contingent interest
      - This could vest hundreds of years after C's death
    - This is invalid
- Example that looks like it violates the rule but does not
  - X grants land to A for life, remainder to B if B becomes a doctor
    - A's life estate is vested in law and equity and time of sale from X
    - If B is a doctor when X dies, B has a vested interest in fee simple
    - If B is not a doctor when X dies, B has a contingent interest in fee simple
      - If B ever becomes a doctor, it will happen within B's life
  - This is valid
- Example
  - A leases B the land. A and B sign a lease for twenty-five years with an option for B to purchase the land at the end of that time
    - Option might be exercised more than twenty-one years from date of lease
  - Invalid
- Example
  - A leases B the land. A and B signed a lease for fifty years with an option for B to purchase the land at any time within the period of the date hereof and ending on the twenty-first anniversary of the death of the longest lived descendants now living of Queen Elizabeth
  - This is valid
- Example
  - X devises to T in trust for A for life, then in trust for A's nephews and nieces when the youngest shall have reached 21 (A has 5 nieces and nephews, all under 21; all A's siblings have died, as have A's parents).
    - T: trustee holds legal fee simple
    - A: life (equitable) estate
    - A's nephews and nieces will reach age 21 within 21 years of A's death (A is the life in being).
    - There are NO other possible nephews and nieces that can be born, so will be VALID.
    - Nephews and nieces have contingent remainder in (equitable) fee simple.

- Example
  - X devises to T in trust for A for life, then in trust for A's nephews and nieces when the youngest shall have reached 21 (A has 5 nieces and nephews, all under 21; all A's siblings have died, but A's mother is still alive).
    - T: trustee holds legal fee simple
    - A: life (equitable) estate
    - Will A's nephews and nieces reach age 21 within 21 years of A's life?
    - NO: A's mother could have another child (new uncle or aunt) and have children (new nephews or nieces).
    - The new class of nephews and nieces will NOT necessarily vest within 21 years of A's death.
    - INVALID – after A's death, remainder goes back X (and heirs)
  - Remote possibilities are always considered
- Example
  - 5. X devises to T in trust for the first child of B to be called to the Bar of Ontario (B has 4 children at the date of X's death).
    - When will B's children (current or new) be called to the bar?
    - Could be more than 21 years after B's death.
    - Invalid.
    - The trust goes back to X (and heirs)

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#### Alberta Approach to RAP

- Wait and see
  - We can wait to see if the interest will vest within 21 years of a life in being
  - So we can wait and see if someone will become a lawyer within 21 years of B's death (last example)
- Age reduction:
  - If the interest will vest at a time longer than 21 years within a life in being, shorten the time in the will to 21 years.
    - Example: X bequeaths to wife (widow) for life, then daughter for life, remainder to first of daughter's children to reach age 25.
    - AB approach – we make the age to attain for daughter's children 21 years
- Class splitting
  - If theoretic possibility may deprive whole class of property just because a new member may come later, we can exclude the late comers
    - X devises to T in trust for A for life, then in trust for A's nephews and nieces when the youngest shall have reached 21 (A has 5 nieces and nephews, all under 21; all A's siblings have died, but A's mother is still alive).
    - Recall – invalid under common law.
    - Under AB approach, the existing nieces and nephews will get the land when the youngest reaches 21.
- Realistic assumption
  - Age for when children can be had are specified

- X devises to T in trust for A for life, then in trust for A's nephews and nieces when the youngest shall have reached 21 (A has 5 nieces and nephews, all under 21; all A's siblings have died, but A's mother is still alive and is 80).
  - Recall – invalid under common law.
  - Under AB approach, all the existing nieces and nephews will get the land when the youngest reaches 21, because A's mother cannot have any more children.
- Cy Pres: give effect to intention of testator
  - Special flat perpetuity period of 80 years for “commercial interests” (not wills or gifts). So commercial option to buy – maximum time to exercise is 80 years if not specified.
  - Special perpetuity period of 40 years for:
    - Right of re-entry on breach of condition subsequent
    - Possibility of Reverter on determination of a determinable fee
    - Possibility of Resulting Trust on determination of a determinable interest

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## Bailment

- Owner (A) lets someone (B) borrow (posses with permission) an item that belongs to A
  - A is the bailor
  - B is the bailee
- Applies to personal property (goods)
- As a bailee, you have a minor property interest
  - You have superior title against everyone except the true owner
  - In a narrower sense, even have the highest title (more than owner) for the time you agreed you could have it because the owner willingly gave it
- Bailor retains the right to get the item back from the bailee
- Types of Bailments
  - Consensual: Agreement to lend you my car for the day
    - Usually by contract even if implicit
  - Non-consensual: Finding a lost item until you locate the true owner
  - Mistaken: Taking your coat from the coatroom on accident
  - Involuntary: I leave my coat in your house
- Bailee has a duty of care towards the item
  - General negligence duty of care
- Duty of bailor
  - Inform bailee of defects in item, especially if bailment is voluntary
- Depositing cash into a bank account is not a bailment
  - They do not keep your specific \$100 bill
  - However, depositing items into a safety deposit box is
- At common law in the past, inn keepers and common carriers are strictly liable
  - Innkeepers are hotels and motels
  - Common carriers are railways or FedEx
- Today, these are governed by statute usually to a negligence standard

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### Heffron v Imperial Parking

**Facts:** Plaintiff left his car in a parking lot

- Ticket had a clause that said they were not responsible for theft or damage, however cause
- Parking lot attendant lost his key and the car was found damaged

**Issue:** Is this a bailment or a license?

**Held:** In favour of the plaintiff, bailment found

**Ratio:** Certain factors of control makes this a bailment

- Possession of keys and car, custody of keys/cars, supervision attendant, system for moving cars as well as getting keys back
- Disclaimer held to be not applicable

## License

- Owner of real property, the licensor, agree to permit another, the licensee, to enter onto the property
  - o Eg owner of a movie theatre allowing a moviegoer on the property
- Licensee gets very few rights compared to a tenant
- Licensor has a very low duty of care, usually disclaimed by contract
  - o Parking a car at a meter with no attendant, just getting a ticket. Usually a contract on the back for an exclusion clause

## Leases

- Owner of the property, the landlord or lessor, agrees to lease his property for a period of time to another person, the tenant or lessee
  - o Technically a version of bailment
- Applies to real property
  - o Real property is property that doesn't move. Land and houses
- Landlord has title in fee simple (could be legal or equitable)
- Tenant has leasehold for a period of time
  - o Can be defined or opened ended
- Statute governs in a way in which it gives tenants more rights than what property/contract law gives
- Lease vs license
  - o Lease is a grant of exclusive possession, creates an interest in the property itself
  - o A license is a contractual right to use the property, but does not create an interest in property

## British American Oil Co V Depass

**Facts:** Parties signed two separate documents. One to operate a service station for vehicles and another for gas station

- The documents had many contradictory terms that restricted the tenants use of the property
  - o Eg restrictions on storage, signage

**Issue:** Is this a license or a lease?

**Held:** Lease

**Ratio:** There must be a reversion in the landlord, the creation of an estate in the tenant, and a transfer of possession and control of the premises to the tenant

- Does the occupier have exclusive possessions?

- In contrast, a licence is a mere permission to occupy the land of another for some particular purpose
- Transmission of an estate to the tenant is an essential characteristic
  - o No estate passes in a license
- Look at the intention and wording of the document
  - o The agreement gave them in substance the rights and obligations of a tenant and vice versa of the landlord
  - o Intention to give them exclusive possession subject to certain conditions which are not extraordinary

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### Metro-Matic Services Ltd v Hulmann

**Facts:** Owners of a building entered into a 'lease agreement' with the operator of washing machines that were to be installed and operated in the building for a tenants lease

- The building was sold, new owner requested plaintiff to leave
  - o If a lease, then the lease follows the building
  - o If a license, then a person interest between first owner and washing machine company

**Issue:** Is this a license or a lease?

**Held:** Lease

**Ratio:** Parties wanted it to be a lease based on the language and terms of the agreement

- Absence of contrary statement of parties intentions
- Why would a washing company want it to be a license?
  - o They want long-term business

### Notes

- Are kiosks in the mall licensees or leaseholders?
  - o Probably licensees. They don't get to do anything with the tiny bit of land they operate on

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### Assigning and Subletting

- Leases are both contracts and interest in property
  - o As such, the lease can do things with the property you might not be able to do with a simple interest
- Assignment transfers rights under the contract
  - o Assignor gives rights to the assignee
  - o It is not a new contract between the original two parties
  - o Example: A signs a contract with B. B then assigns the contract to C
    - A still has to do whatever the contract says but C gets the rights
    - B is not off the hook unless the contract stipulates that B can assign rights
      - B may be liable to A if C doesn't keep the original bargain that B was obligated to do
- Landlords can assign leases as well
  - o They have privity of contract and estate with the tenant they signed the lease with
  - o If assigned to a new owner, the tenant continues to pay rent but to the new owner
    - The tenants contract is with the old landlord so tenant has privity of contract with the old landlord
      - Can sue them if certain obligations not met

- By contrast, new landlord has privity of contract with the tenant
- Tenant assigns the lease
  - Landlord now has privity of estate with new tenant but still privity of contract with old tenant
  - Landlord's contract is with old tenant (unless lease says new tenant takes over) – so old tenant has privity of contract with Landlord.
  - Landlord can sue either if rent is not paid (unless Landlord disclaimed old contract once assigned)
- Subletting: tenant rents all or part of property to new tenant
  - Technically a contract between the two
  - Landlord has privity with original tenant only.
  - Original tenant has privity with new tenant.
  - But landlord does not have any privity with new tenant unless lease allows new tenant to come onto lease
    - Usually lease doesn't allow new tenants – will require new lease with new tenant.
    - Landlord could go after original tenant for damages and missed rent by new tenant

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### Types of Leases

- Tenancy for years
  - Specify how long the lease lasts
- Periodic tenancy
  - Month to month (or any other periods) until one side gives required notice (as required by statute or lease)
  - Sometimes at the end of a tenancy for years, lease just says rented can stay month to month
- Tenancy at will
  - No stated duration – stay and pay rent until either side ends it or one side dies
- Holdover Tenancy or Tenancy at Sufferance
  - Tenant stays on after lease ended (usually for commercial)

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### Breaking Commercial Leases

- Old Common law options (Eg Tenant breaks 10 year lease at year two.)
  - Sue every time the rent is due until lease is up
    - Sue at year 3,4,5...
  - End the lease so you can rent again and sue for unpaid rent until then
    - Landlord ends lease at year four. Can sue for two years rent in between
  - Find a new tenant on behalf of the old tenant (an assignment or sublet) and sue the old tenant for the difference at the end.
    - Note this is not a new lease (that's option 2)
    - This is a forced assignment
      - Would sue in year 10 for the difference the new tenant paid
- Fourth option from Highway Properties Ltd v Kelly, Douglas and Co



- Sue for the total remaining unpaid rent, but in present value
  - Lease is no longer operative
- Can sue now for future anticipated damages (lost rent minus any new rent) in present value
  - Don't have to wait till the end of the term
- Present Value
  - Essentially what is the value of \$1 today vs \$1 in a year
    - Typically, people want money now. Thus people would accept a smaller amount now rather than the full amount in a long time
  - The more distant the income, the less we value it
    - Would have to wait longer so would take less and less money now rather than wait longer and longer time
  - Need to discount the future

$$PV = FV \frac{1}{(1 + r)^n}$$

- FV is future value, r = rate of return, n = number of periods
  - For a three-year lease would need to do this three times and add them together
    - N changes (1,2,3)
    - FV would be the amount of rent per year
- Duty to Mitigate
  - If tenant breaches lease contract and leaves early, landlord needs to try to find another tenant even if at a lower rent (with good faith effort) before suing for damages.
    - Courts are mixed on this
  - Cannot leave the building or give it away
    - Common law generally does not like waste
    - Must try to rent at prevailing market rates

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### Residential Tenancies

- Governed by statutes (Alberta Residential Tenancies Act)
- Separate dispute resolution
- Rules are very narrow for both landlords and tenants
- Housing is a social issue that goes beyond narrow legal issues

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### Gifts

- Giving property an asking for nothing in return
- Elements of a gift
  - Intention
    - Most important element
    - Need to look at the actions and the context
  - Delivery

- Acceptance
- Recipient does not have to actually know it's a gift
  - But once they find out, they can repudiate the gift (return it)
    - If they accept it, it is theirs
    - If they reject it, it is the donors
- There are no magic words
  - Does not have to be expressed
- The gift does not have to be motivated by altruism
  - Just need to have the intention to give it away
  - Motivation of any kind doesn't matter. Motivation does not equal intention
- When a gift is given for the wrong reasons, the asset is frozen by law

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### Gift Inter-Vivos

- Inter-vivos: "while alive" or "between the living"
- Giftor
  - Deliver deed (for real property) to recipient and intention to be bound immediately (or whenever the date of the gift is)
- Example:
  - On January 1<sup>st</sup>, A says B "I want you have my house and the land on it as a gift. Here are the title documents and a letter saying you own it." B takes a few days to register the paperwork at the land titles registry. When did B receive the gift?
    - January 1<sup>st</sup>.

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### Gifts of Personal Property

- Giftor must deliver the gift with the intention of the item being a gift
- Physical delivery can signal the transfer of a gift but is not required
- Gifts have no consideration
  - Transfer regardless of what the recipient paid or did it
- A promise to give a gift is not enforceable
  - No consideration given
- Delivery
  - Can deliver control of the item
  - Must be clear intention that it is yours and I cannot take it back
  - Actions can tell us what you intended
  - Example
    - Donor giving keys to daughter for a car but retains a duplicate set of keys
      - No change in the donor's control over the car and thus not a gift
      - If only set of keys given, then that's a valid gift
- Can attach conditions to a gift
  - Eg there are 5 envelopes in the box, you get the two blue ones and I have the three red ones. Giving the key to the box doesn't signify total gift
- Cheques
  - Not cash, thus delivery cannot take place
  - Cheques are an instruction to deliver cash to the recipient
  - Example

- Alban promises Jim a gift of \$1,000. He gives him a check. Jim takes the check to cash it at his bank. Jim's bank tells him he needs to wait five days for the check to clear. When Jim's bank contacts Alban's bank, they are told there is no money in Alban's account. Then Alban dies.
- Jim is not entitled to the \$1000
  - There is no contract because no consideration so cannot get cash by breach of contract claim
- A loan is not a gift
  - It would be a bailment
    - Need to look at the intention
    - Bailee would then have to take care of the object
  - If it was truly a gift, then the receiver could do whatever they wanted with it

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#### Re Cole

**Facts:** Man furnishes apartment he owns with fancy furniture worth a lot of money. His wife comes to London later, and he shows her the furniture. He says, "look – it's all yours".

- He goes bankrupt, and the trustee in bankruptcy wants to take his furniture to sell, so the proceeds can pay off his debts.
- The wife says that is her furniture
  - She gets to keep it if it's a gift

**Issue:** Is this a gift? Can the bank take the furniture?

**Held:** Not a gift, bank can take the furniture

**Ratio:** Statement of words is not enough

- Not deed, delivery or acceptance
  - There was intention but not the other two requirements
  - Held that physical delivery and some formal acceptance is required
- Furniture was even insured in the husband's name
- Other reason
  - Might look like the man is avoiding his creditors and court wanted to avoid that

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#### Times v Times Book

**Facts:** Author of play lost the original script. He told a BBC representative that if he found the original script, he could keep it. He told the representative where he might have left the original script (half a dozen pubs or a taxi), and the representative eventually found it. The author went to the USA and died

- Widower wants the original back

**Issue:** Is this a gift?

**Held:** Yes

**Ratio:**

- Delivery was done by going to the multiple locations described and retrieving the manuscript
  - More of a "if you find it, that is so great. For going through that effort, you can keep it"
- Author was known as a kind and generous person
- Representative and author had a working relationship for more than six years and a gift between the two would not be out of the question
- Representative told people about the gift before author died

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### McNamee v McNamee (ONCA 2011)

**Facts:** Father executes an “estate-freeze”

- Owner of company exchanges his shares (ownership) of company with family members in exchange for preferred shares (shares that guarantee fix payments – like a pension for the owner
  - o Usually also has tax benefits and creditor protection
- Father “gifted” 500 shares to the son
- Son and wife divorced, and wife wants half of the shares

**Issue:** Is this a gift? Are these the sons or common property?

**Held:** Yes, a gift

**Ratio:** Motivation does not matter for gifts

- Trial judge held this was not motivated by law or love, but by commercial motivations and is thus not a gift
- Court of Appeal reversed saying that the trial judge confused motivation and intention

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### Gift of Trust

- Donor can gift equitable title but keep (or give away) legal title
- Example
  - o Alice gifts Sam her new rattle to be held in trust for John
  - o Sam is the trustee – he must hold and look after it.
  - o John is the beneficiary – he can play with it but can't sell it or destroy it
- Resulting Trust
  - o Arises when there is a transfer of property without an intention to create a gift—that is, there is a deed (or other valid instrument of transfer) or act of delivery, but no intention of gift
  - o Does not have to be stated explicitly
  - o Example
    - Absalom gives Alice his house as a ‘gift’ with no intention of it really being a gift. Rather, Alice is just holding it to avoid it being seized if Absalom is sued.
    - Alice is NOT a recipient of a gift. She holds the house as trustee of a resulting trust. Not an express/explicit trust but created by law to prevent fraudulent results.
  - o Presumption that parents who give gifts to children are true gifts
    - What if the child is over 18?
      - Need more evidence to show it was really a gift and not an advance on their inheritance
    - If a true gift, the child gets it
    - If not a true gift, then the property
- Constructive Trust
  - o Where a person without title to property has made a significant contribution to acquiring or maintaining it, thus preventing the “unjust enrichment” of the titleholder.
  - o A remedy to prevent unfair results

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### Watt v Watt Estate

**Facts:** Deceased had given recipient (unrelated) a document dated May 10, 1980, stating that the boat “is now owned jointly by myself R.J. Watt and Mrs. Shirley Watt.”

- Ms. Watt wants the boat but the estate is refusing delivery

**Issue:** Is this a gift? Are these the sons or common property?

**Held:** Yes, a gift in trust

**Ratio:** Document signifies existence of trust and right to one half interest in the boat

- Long-time friends who had worked on the boat
- He said he wouldn't sell it without discussing it with the plaintiff
- She had a set of keys
  - o Only a minor factor as other members of the deceased family had other sets

---

### Donatio Mortis Causa

- Gift made in contemplation of death
  - o Gift is transferred by someone who is about to die
  - o The gift is subject to revocation if the donor recovers (does not die)
- Elements
  - o Must be in contemplation of death
    - Not necessarily expectation of death
  - o Must be delivery to the receiver of the subject-matter of the gift
  - o Gift must be made under circumstances that require the thing is to revert to the donor in case they should recover

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### Re Zachariuc

**Facts:** Deceased told his best friend that he wanted him to have the cash he had hidden. He gave him a key to the house and told him to bring a witness so he could leave the cash in writing to his friend.

- The deceased died before any document was created/signed/witnessed.

**Issue:** Is this a gift in contemplation of death?

**Held:** Yes

**Ratio:** Delivery by giving him the key

- Gift meant to be received at death
- Could be revoked if the donor did not die

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### Conveyancing

- Process of transferring property from one owner to another
- Sale of land
  - o Contract between seller (vendor) and buyer (purchaser)
  - o Conveyance of the land (estate) to the buyer
- Steps
  - o Purchaser makes offer with deposit
  - o If seller accepts, seller keeps the deposit
  - o Then the details are hashed out detailing conditions and closing date when balance of purchase price is delivered, and possession date
  - o Seller then transfer title to the purchaser

---

### Statute of Frauds

- Certain contracts must be in writing, including sales and leases of land that are longer than three years
- Must be signed by party to be charged (the party against whom the claim is being made)
- Contract must specify the parties, the description of the land, and the price – at the very least to even be considered for enforcement by the courts

---

### Specific Performance

- Normally, when a breach occurs, the plaintiff receives monetary damages
  - o Legal remedy
- Specific performance is an equitable remedy that enforces the performance of the parties primary obligations
  - o Only when money damages are inadequate
    - Item is so unique that damages are not a substitute
- In property, the presumption is specific performance
  - o Land is unique, money cannot buy a substitute
  - o Case of Semelhago now suggests that not all property is unique
    - Plaintiff now needs to argue that there is something about the piece of property they wish to buy
- Contract for sale creates an equitable interest that attaches to the land prior to the conveyance

	<i>Before contract</i>	<i>Contract</i>	<i>Conveyance</i>
<i>Law</i>	Vendor (fee simple)	Vendor (fee simple)	Purchaser (fee simple)
<i>Equity</i>	Vendor (fee simple)	Purchaser (fee simple)	Purchaser (fee simple)

- o Risk of damages is now shifted to the purchaser during the middle period (during contract and conveyance)
- If the purchaser has equitable interest in the land after the contract is signed, then they can enforce their interest by specific performance
- What if the land was sold to a third party?
  - o Depends on if the third party did not know (had no notice)
  - o If so, they are bona fide purchasers with no notice.
    - Then they keep the land
  - o Purchaser only gets money damages

---

### Part Performance

- What happens if there is no contract signed but the parties act as if there is one?
  - o Usually an issue with leases
- Can result in equitable enforcement of sale/lease even if not valid contract exists
- There must be evidence that an agreement had been made over a specific piece of property

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### Deglman v Guaranty Trust Co of Canada

**Facts:** Aunt told nephew that if he worked on the farm and looked after her, she would leave him some land. When she died, she had no will. Executor refused to give him the land

**Issue:** Specific performance

**Held:** ?

**Ratio:** The part performance relied upon must be unequivocally referable to the contract asserted. The acts performed must speak for themselves, and must point unmistakably to a contract affecting the ownership or the tenure of the land and to nothing else

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#### Starlite Variety Stores v Cloverlawn Investments Ltd

**Facts:** Plaintiff wanted to lease a store from a shopping mall for a franchisee to operate a corner store

- The plaintiff and representatives (but not the senior person in charge) agreed orally to a lease
- There was a written offer from the plaintiff, but no signed acceptance was given
- A deposit check was delivered to the mall
- Franchisee started to buy shelving and taking steps to move in
- Senior person signed a deal with Mac's to allow them the store, better offer
- Defendants claimed no deal because no lease was signed (Statute of Frauds)

**Issue:** Specific performance

**Held:** Agreement was reached, damages awarded

**Ratio:**

- Mere payment of money will not qualify as part performance
- The preparation of the plaintiff to meet its requirements, the conduct of the plaintiff throughout the period of construction, actions to purchase advertising signs and shelves and payment of various expenses are all acts of part performance
- Remedy of specific performance is no longer available because Mac's is already in the space
- Note – it is not enough to send a document signed by one party and some deposit or payment.
  - o There still must be evidence by conduct of the side being sued that they also did something to indicate there was a deal

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#### Erie Sand v Tri-B Acres Inc

**Facts:** Plaintiff wishes to purchase an adjacent piece of farmland from the vendor Seres Farms

- The farmland has an existing right of first refusal from Tri-B
  - o Tri-B has a right to make a matching offer
- Plaintiff hashed out all the terms of the contract with Seres before making an official offer that would trigger the right
- Seres said plaintiff would get the south side property unless Tri-B matched its offer
- Tri-B made an offer that was not identical to Seres that Seres accepted
- Plaintiff sues for specific performance

**Issue:** Specific and part performance

**Held:** Agreement was reached, specific performance enforced

**Ratio:**

- The property has a particular quality (the presence of a specific resource) the plaintiff needs to operate its business
  - o This business heavily depends on this resource
- Thus there is no readily available property and Erie gets it by way of specific performance
- There was an agreement on all essential terms of the sale and thus an agreement was found

**Notes:**

- What happens if the land is not unique?

- See *Southcott Estates Inc v Toronto Catholic District School Board* (p. 537): Supreme Court awarded damages of \$1 when purchaser could not buy land from vendor due to their failure to obtain permission to sell
- The Court did not think the building the purchaser wanted was unique and imposed a 'duty to mitigate' – i.e. look for another building.

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## Mortgages

- Security
  - o Property given/pledged to secure the fulfillment of an obligation, usually the repayment of a debt
    - Not quite a legal or equitable interest, has features of both
- Bank lending money to purchase a house while taking a security interest in that house is a mortgage
  - o Allows the bank to seize the house and to sell it in order to get the money owed
  - o If the sale of the house doesn't raise enough cash
    - In theory can sue Allan for the outstanding balance – recourse mortgage.
    - In Alberta – mortgages are default non-recourse (bank can't sue you personally for balance)
      - But if you want an insured loan, bank will ask for you to agree to recourse loan
- Registration
  - o Torrens system – government takes care of registration
  - o Mortgages, liens and leases longer than three years are listed on the title

---

## Concurrent Interests

- Joint Tenancy
  - o Each owns an undivided share in the house
    - Technically, they both own the house in its entirety
  - o If A dies, B gets the whole house (right of survivorship)
- Tenants in Common
  - o Each owns ½ share in the house
    - Does not mean divided title
  - o If A dies, B gets ½ and A's heirs get the other ½ (still undivided)
- Tenancy by entirety
  - o Joint tenancy but between spouses. Irrelevant
- Default presumption today that if two or more parties hold a property, it is a tenancy in common
  - o Must specify if you want a joint tenancy

---

## McEwen v Ewers

**Facts:** Testator died. Will made provision for the remainder interest in lot 18, after his wife's death, as follows:



“[T]he said lot 18, that is the property fronting on Beckwith Street is to become the property of my daughters Bertha V. McEwen and Janet I. McEwen jointly and should they decide to sell the said property each of them is to have an equal share of the proceeds of the said sale.”

**Issue:** Is this tenancy in common or joint tenancy?

- Say Bertha dies
- If joint: Janet gets the entire lot
- If tenancy in common: then Bertha's half goes to her estate. In this case, chose to leave it to her brother

**Held:** Tenancy in common

**Ratio:** Unless explicit, assume tenancy in common

- Language can be interpreted the other way but if any ambiguity, resolve in favor of tenancy in common
- Joint tenancy needs four unities. Without one, then tenancy in common
  - o Possession
  - o Interest
  - o Title
  - o Time
- Tenancy in common can have all four, but it only needs possession unity

---

### Joint Ownership

- Grant to A for life and to B in fee simple.
- No unity in interest. So A has life estate as tenant in common with B.
- When A dies, B has the rest of the title.
- This is not joint tenancy – why? Because if B dies first, A stays only as long as A is alive. B's heirs are now tenants in common with A.

---

### Severance

- Four ways to change to tenants in common
  - o Anyone can create a severance with respect to their share (unilaterally acting)
  - o Mutual agreement
  - o Course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common
  - o Operation of law
- Say Bahman, Kalim, and Samira are joint tenants in a house.
  - o Bahman can convey his share to Jamil.
    - Now Jamil is a tenant in common with Kalim and Samira (who are still joint tenants). Jamil has 1/3 undivided interest in the house. Kalim and Samira hold 2/3 of the house as joint tenants.
      - If Jamil dies – his heirs get 1/3 share of the house. Kalim and Samira hold the 2/3 as joint tenants.
      - If Kalim dies: Jamil still has 1/3 share of the house. Samira holds the remaining 2/3.
      - If Samira dies: Jamil still has 1/3 share of the house. Kalim holds the remaining 2/3.

- They can all just agree to switch to tenants in common and all own 1/3
- Say Samira is a drug dealer
  - Government wants to seize her house
  - Technically, she owns the whole house (as a joint tenant). So the government would seize the whole house.
  - Today – most likely the state will seize one third of the share of the house
- Termination of joint estates
  - If two or more joint owners want to end the joint ownership, then usually two choices:
    - Partition – easier for land/commercial property (and is default) but harder for house.
    - Sale – proceeds are divided among the owners. Note one of the owners can pay the other(s) and stay.

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### Condominium

- Two or more own separate property but also jointly hold common property.
- The owner of separate property is subject to common rules.
- Usually must pay fees to maintain the common area

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### Non-Possessory Rights in Land/Encumbrances on Title

- Non-possessory right
  - Person A has a right to claim something from property, even though A has no possession of the property
- Types
  - Profits
  - Easements
  - Covenants
- Examples
  - You allow your neighbor to come and pick your strawberries and raspberries from your backyard
  - Utility company has the right to come and check your meter monthly
  - You let your neighbor park their car on your driveway, and neighbor pays for that.
  - You promise your neighbor not to build any large building at part of your land that is adjacent to the neighbor's even if you are allowed to

---

### Profits

- Profit a prendre: a right to take something of another's land
  - Includes things such as timber, minerals (including oil and gas) or wildlife
  - Does not include domestic animals or water
    - However does include letting domestic animals graze
- Sound similar to a license but different?
- Terminology
  - Profit in gross: belongs to a specific person
    - Can be sold/given to another person

- Servient tenement: property subject to profit
  - Has the obligation
- Profit appurtenant: profit belongs to nearby land (called dominant tenement)
  - Right to do something
  - Belongs to the land and doesn't depend on the person
  - If the dominant tenement is sold (so long as the profit is still valid), the new owner has the right to come onto the servient tenement
- Profit in gross vs appurtenant
  - Look at the context
  - Expiration
    - Usually, profit appurtenant expires when the dominant tenement no longer needs to use the resource on the servient tenement
  - Appurtenant are usually registered against the state the profit is for
- Example
  - Farmer split his land into two lots. He gave away the small lot to a relative, but reserved to himself, "his heirs and assigns the right and privilege to enter upon the said land from time to time for the purpose of removing hay or other crops."
  - This is a profit appurtenant
    - The resource doesn't depend on the person
    - The hay is used to feed cattle
    - Belongs to the dominant tenement as long as there is cattle to feed
      - If no cattle, no profit
- Do Indigenous fishing and hunting rights amount to profits?
  - Not really. Tend to be recognized as special principles applicable to Aboriginal rights

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## Easements

- Two distinctions for profits a prendre
  - Easements give rights to use the land that do not involve taking of resources.
    - E.g. 'right of way', i.e. the right to enter, park, walk etc. on the land.
  - Easements cannot (in Canada) be in gross – so there must be another piece of land that benefits from the easement.
- Examples
  - Right of access, park vehicles, drainage, light, maintain and service utilities, project eaves and guttering over a property boundary, etc
- Four conditions for creating an easement
  - 1. there must be a dominant tenement, which enjoys the benefit of the easement, and a servient tenement, which is burdened
  - 2. the easement must accommodate the dominant tenement;
  - 3. the dominant and servient tenements cannot both be owned and occupied by the same person (but this is not as strict today); and
    - This requirement is abolished in Alberta
    - Why? Maybe developer who wants to sell pieces of land pre-arranged with easements etc
  - 4. the easement must be capable of forming the subject matter of a grant

- Easement applications
  - o Say A signs an agreement with B that they can park on land that belongs to B
    - If C negligently destroys the driveway
      - If an easement exists, both A and B can sue
      - If no easement, and just a license, A just has to look for another parking spot
    - If A sells the land to D
      - If easement, D can now enforce the right to park D's car on B's land
      - If license, then the right to park cannot be sold as well unless B consents
  - o Even if an agreement is signed
    - It has to be clear that this is meant for Property A and not just that individual owner at that time &
    - There must be an intention that the agreement is land-specific (runs with the land).
      - Otherwise just a license (personal right)
- The easement must confer a "significant benefit on dominant land as distinct from offering some merely personal advantage or convenience to the dominant owner
  - o Look at context
  - o What does the agreement do?
  - o Does it benefit the land regardless of who owns it, or does it benefit a person?
  - o Also relevant to determine if the easement has expired
- If you are on the dominant tenement, you can do whatever is reasonably necessary to enjoy the easement

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#### RE Ellenborough Park

**Facts:** Park was large piece of property that saw parts of it sold off over time to build houses.

- The sale contract gave each house owner (and successor in title) the right to enjoy the usage of the park left over
- Many years later: the owner of the park asserts that the home-owners have a license and no easement.
  - o Note: the owners of the park and the houses are not the original seller/buyer(s), so no privity of contract
- Some house not connected to the park, some were further away and did not have direct access

**Issue:** Is this an easement?

**Held:** Yes

**Ratio:** Just because a house is not right next to it does not mean it does not enjoy the right of easement

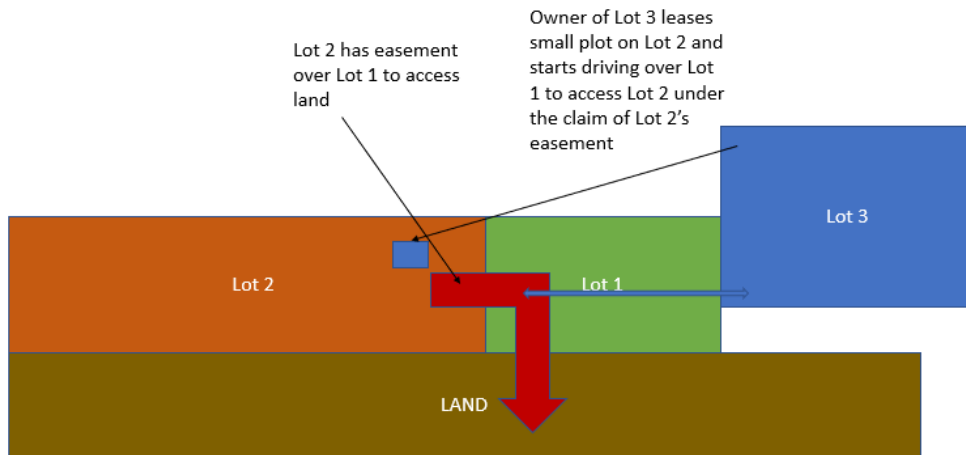
- Court holds the park functions like a garden
  - o Can be a normal use of enjoyment for a house
  - o There is a sufficient nexus of this purpose to house that are a bit further away
    - It is a real and intelligible purpose
- Park owner argued that one can own a house and not need access to the park – the park doesn't add much anymore than the right to visit a zoo
  - o No sufficient nexus between the enjoyment of the right and use of the house

- Court rejects this argument. These are wholly extraneous and independent of the use of a house

### Jengle v Keetch

**Facts:** Two lots of adjacent land. Lot 2 has an easement over Lot 1 to access the land beyond

- Lot 2: dominant tenement; Lot 1: servient tenement
- Lot 3 is next to Lot 1 but has no access to the road. Owner of Lot 3 wants access to Lot 1 to get to land, but the owner of Lot 1 refused.
- The owner of Lot 3 rents a small bit of land from Lot 2, so he can drive his car over Lot 2



**Issue:** Is this allowable?

**Held:** No, can't do the blue arrow between lot 3 and red arrow

**Ratio:** Lot 2's easement is for the benefit of those on Lot 2 only

- To use the easement, the person using it has to originate from Lot 2
- Can't backdoor access to Lot 1

### Notes

- Say the owner of Lot 1 buys Lot 2
  - At common law, the easement disappeared
  - Today, in Alberta, the easement stays

### Subject Matter

- Requirement that the easement must be capable of forming the subject matter of a grant
- Easements cannot be
  - Too vague;
  - A claim to joint occupation of the land, or would substantially deprive the owners of proprietorship or legal possession
    - This would just qualify as an ownership or a lease
  - Just for "mere recreation and amusement" but must have some "utility and benefit."
- In general, easements are expressly created by way of grant or by reservation
  - Grant:
    - A vendor sells part of a larger parcel of land to a purchaser, granting the purchaser a right of way—for example, over the land retained by the vendor. In this example, the purchaser holds the dominant tenement, and the vendor holds the servient tenement

- Reservation
  - If the vendor sells the parcel to the purchaser, with a reservation of a right of way over the purchaser's land in favour of the vendor, the purchaser's land is the servient tenement, while the vendor holds the dominant tenement
- Grants and reservations must comply with the Statute of Frauds
  - Must be in writing
  - In AB, must be registered on title
- Part performance can be used to infer existence of easement
  - Hill v ND
    - The government split farm into two when highway was constructed through farmland. A ramp was constructed to allow both sides of the farm to access each other. Many years later, a new expansion of the highway resulted in the ramps being removed
    - Supreme Court held that the government owed farm owners compensation for expropriation of the ramp, because the ramps were easements over the highway
    - Conduct of parties including government indicates an intention to create an easement. Equivalent to estoppel
    - Equitable easement – not explicitly created but created in equity

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#### [Mihaylov v 1165996 Ontario Inc](#)

**Facts:** One piece of land granted easement to another so that water pipe from lake can be buried underground. Water goes from lake under servient tenement to dominant tenement

- Pipe leaked and needed repairs
- The dominant tenement to replace it installed an above ground pipe with no permission

**Issue:** Can the dominant tenement fix it without permission?

**Held:** No, need to ask permission

**Ratio:** Documents specifically said right to repair the pipe with permission

- Also the easement related to the pipeline in its present position, which was underground
  - Cannot install an above ground pipe
- Not too wide or vague

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#### [Shelf Holdings v Husky Oil Operations](#)

**Facts:** Husky Oil paid a farmer a sum of money in return for an interest in the farmer's property

- Gave Husky the right to do lots of things

**Issue:** Is this an easement or a grant of an interest in land yielding exclusive rights consistent with ownership?

**Held:** Easement

**Ratio:** Need to look at how much of a burden has been imposed. If it substantially interferes with the servient tenement's use of the land, then it might be more than an easement.

- "Easement" and "right of way": used in instrument but not defined anywhere in statute
- The tenor of the grant is such that it reflects the intention of the parties that the grantee Husky acquire a benefit subject to its compliance with certain terms and conditions.

- The right of Shelf as the servient owner to use the land free from interference has been curtailed to the extent only of prohibiting it from interfering with the subsoil or to erect works on the strip comprising the right of way
- “but otherwise the Grantor shall have the right fully to use and enjoy the said right-of-way except as the same may be necessary for the purposes herein granted to the Grantee

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### Easement by Necessity

- Usually when a plot of land is divided into two and one (the landlocked plot) is sold. If there is no access to the highway except through the unsold plot – an easement by necessity is implied
- Landlocked plot has an easement over plot adjacent to highway or road.
- Subsequent purchasers get the easement
- The land has to be really useless without access
  - o The law doesn’t like to force people to use property a certain way
  - o If there’s an inconvenient way, then still use that way
    - Water access does not count as sufficient access
- What if the landlocked plot was never part of the other plot? What happens to subsequent purchasers?
  - o Either original plot was landlocked, and no easement was negotiated with plot adjacent to highway
    - Then subsequent purchaser is on notice
  - o Or original plot was part of Crown land that was broken up
    - Then this may be considered as an original owner who sold off pieces of land. Easement by necessity may be implied
- If a public road is built, the easement will likely disappear

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### Easements by Prescription

- Similar to adverse possession
- Example
  - o If Person A on Plot A uses Plot B to access the public highway (assume there is another way to get to the public highway) because of convenience, Plot A may acquire an easement over Plot B by prescription
    - Do not acquire a title to Plot B, just the right use Plot B for access
- In Alberta, this is abolished

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### Negative Easements

- Divest another land owner the right to do something on their property
  - o Gives the easement holder the right to prohibit the owner of a servient estate from using his own property in a specified manner
- Generally, negative easements are not recognized
  - o Except air, light, support, and water in an artificial stream
    - Eg cannot block a scenic view
- These easements that have to be negotiated and expressly granted
  - o They might be implied but need some compelling evidence for necessity or evidence of part performance
- Example

- Fontainebleu Hotel Corp
- Court denied adjacent hotel an easement of light or view when hotel was expanding thereby casting a shadow on the adjacent hotel's pool earlier in the day

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## Covenants

- A promise to do or not do something with respect to the land
- Example
  - A and B enter into an agreement that A (or any of A's heirs/assignees/etc.) will keep the fountain on Lot 1 clean and in working condition for the visual benefit of those who live on Lot 2
    - A is a covenantor or sometimes the servient tenement
    - B is a covenantee or sometimes the dominant tenement
    - Ability to enforce the covenant in able to enjoy the sight of the fountain is called the benefit of the covenant
- If the undertaking is related to the land, then the covenant touches and concerns the land
  - If not, then a personal covenant
    - Eg A undertakes to sing Good Morning outside every morning that B can hear
- There can there be mutual covenants where both sides agree to some burden and benefit for each other
  - A and B agree that A will keep the fountain working and B will keep the lights on Lot 2 working
- Generally speaking, only a benefit runs with the land to the covenantee assignees
  - A burden only binds the covenantor's assignees under certain conditions
- For leases
  - The Lessor can assign the lease. The assignee has privity of estate with the tenant
  - The lessee can also assign their lease. This gives the lessor a privity of estate with the assignee
  - In both cases, the burden and benefit are enforceable by and against all parties that have privity of estate if the covenant 'touches and concerns the land'

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## Non-lease Covenants

- Benefit of covenant can pass to assignees under two conditions
  - 1. The covenantee (the landowner for whom the covenant provided a benefit) must have a legal interest in land.
  - 2. The benefit of a covenant can pass at law only if it "touches and concerns" the land - "it must be shown that the covenant was entered into for the benefit of the land owned by the covenantee and not merely for his personal benefit."
- Example
  - A owns Plot 1. B owns Plot 2.
  - A and B enter into an agreement that A will maintain wall between the two plots of land.
  - B sells land to C. C sells land to D.
  - Can D enforce requirement of wall maintenance against A? Yes
- General rule



- Positive covenants
  - Obligation to do something never runs with the land
  - Does not run with the land because it is a burden (time, money etc)
  - Example
    - A owns Plot 1. B owns Plot 2.
    - A promises to maintain a clock tower that allows people on both plots to tell time. This requires constant maintenance and expenditures.
    - A sells Plot 1 to C.
    - Can B force C to maintain the clock?
    - No! Positive covenants do not run with the land.
- Negative covenants
  - Obligation do not do something runs with the land in equity under certain conditions
  - Does not cost anything directly
- Exception to rule that positive covenants do not run with the land
  - If the same piece of land benefits and is burdened by the same covenant (mutual covenant) – then can enforce positive covenant (rule in *Halsall v Brizell* p. 702):
  - Example
    - A owns Plot 1. B owns Plot 2. A and B agree to maintain a garden in front of the two plots. Whoever lives on plot 1 and 2 can use the garden but must also pay into a fund or work on the garden.
    - If A sells Plot 1 to C, then C is still obligated to maintain the garden.
    - Why? C is also benefitting from the garden. C gets a benefit-burden covenant
  - Other exceptions
    - Legislated requirement that land-owners allow municipalities and municipal corporations to enforce obligations against the land
    - Condominiums and their governance
- Requirements for negative covenants to run with the land
  - 1. notice on the part of the assignee of the covenantor;
  - 2. a negative or restrictive covenant, in substance;
  - 3. land benefited by the covenant retained by the covenantee;
  - 4. a covenant that touches and concerns the land and not merely a personal covenant; and
  - 5. intention on the part of the covenantor to bind successors and not just the covenantor personally

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#### Tulk v Moxhay – Negative Covenants

**Facts:** T had agreed with E that E would maintain a square garden on E's land in a certain manner

- E sold the land to M. M was aware of the covenant
- T wants M to maintain the garden, M wants to get rid of it

**Issue:** Negative covenant, can it be enforced?

**Held:** Can be enforced in equity (injunction)

**Ratio:** Enforceable because M had notice

- Price of land reflects restrictions. If M can ignore covenants, then M got a better bargain
  - o A negative covenant means there are restrictions on what you can with the land.
    - When land is sold – it is almost as if not all the land is sold OR more accurately, not all the uses are sold.
      - So price will reflect that less than full-sale of rights
- Must not remove sounds negative
  - o Must maintain sounds positive
  - o The landowner wanted to change the nature of the square, so the court stopped him from doing that. The maintenance seems to be secondary issue
    - So more negative than positive
- Today, notice is done with registering the covenant on the land's title
  - o Homeowner association
    - Basically enforced negative covenants

---

### Covenant Principles

- There still must be a property that benefits from the covenant
  - o Can't be a person right – must touch and concern the land
- Does the land benefitted have to be adjacent to the land upon which the restriction is placed?
  - o No but the restriction must be plausibly related to the land
    - Example: A owns a house in Edmonton and Calgary. A sells B the house in Calgary and puts a restriction that the house should not have a pool in the backyard. If B sells the house to C, can A enforce this covenant against C?
      - No, the pool restrictions do not benefits A's house in Edmonton

---

### Canada Safeway v Thompson

**Facts:** Owner of mall signed agreement with tenant that it would not rent to another supermarket in any land the owner of the mall purchased close by

- The owner of the mall purchased piece of land and then sold the land to the city.
- The city wants to rent some of the land to another supermarket

**Issue:** Is the city bound?

**Held:** Yes- negative covenant

**Ratio:** Land is valuable when used

- Too much competition would diminish the commercial value of the land
- Notice that Safeway was a lessee (renter or leaseholder). They have privity of estate and contract with original owner who sold the land to the City. They can also enforce the covenant
- A covenant touches and concerns the land when it relates to the land itself
  - o Still could be struck down for violating other laws
    - A and B agree never to sell their houses (and register a covenant on their titles that are intended to run with the land) to lawyers? To hipsters? To people other than UofA graduates?
      - Possibly violates human rights laws