Property CANs 2021-22

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# Introduction to Property

**Property:** rights and obligations among persons in relation to things.

* Property is one of three principal branches of private law:
  + Property, contract, and tort.
* Property and **private** law:
  + Property law provides much of the underlying rights structure upon which tort and contract operate.
  + Contract deals in part with consensual *transfer* of property interests.
  + Tort deals in part with *infringements* of properties rights among private parties.
* Property and **public** law:
  + Public law governs relationships between citizens and the state. This branch of law includes criminal law, constitutional law, and administrative law. Much of public law is premised on property interests, i.e.:
    - Criminal law: theft
    - Zoning regulations
    - Regulation of owners of goods

## Entick v carrington (1765)

### Key Take-aways

* Every invasion of private property is a trespass. Does not require harm/damage.
* Property rights are not absolute; can be restricted on the basis of what general good requires by law.
* The judgment established the limits of executive power in English law: the state may act lawfully only in a manner prescribed by statute or common law.

### Facts

* Defendant broke into the plaintiff’s house under the purported instruction/authority from the Secretary of State and took papers/documents.
* Plaintiff sued for trespass

### Issue(s)

* Can a person be held liable for trespass if they are acting on orders of an agent of the state?

### Analysis

* “If a positive law excuse for trespassing is not found, the silence of the books provides a judgment for the plaintiff.”
  + Presumptive ruling for the plaintiff unless there is a statutory reason otherwise.

### Conclusion

* Defendant liable for trespass.

## Jacque v Steenberg Homes (1997)

### Key Take-aways

* Someone who commits an intentional trespass is subject to liability irrespective of whether he thereby causes any harm to any legally protected interest of the other.
  + It was important to set this precedent in this case because the right to exclude others from your property is an important right to all in society. Award of significant punitive damages meant to have a deterrent effect.
* Different types of damages:
  + Compensatory damages – compensate for an actual loss incurred
  + Nominal damages – symbolic awards to signify that a right was violated
  + Punitive damages – intended as a method of punishment

### Facts

* Steenberg Homes wanted to deliver a mobile home to the Jacques neighbour by cutting through the Jacques' property because the route through their field was easier, safer, and faster than the private road.
* The Jacques refused to allow this regardless of offers of financial compensation.
* Steenberg Homes did it anyway.

### Issue(s)

* Whether an award of nominal damages for intentional trespass to land may support a punitive damage award and if so;
* Whether the law should apply to Steenberg or should only be applied prospectively; and if we apply the law to Steenberg
* Whether the $100,000 in punitive damages awarded by the jury is excessive.

### Law

* Barnard rule: in an action for *libel*, there cannot be recovery of punitive damages if only nomimal compensatory damages are found.

### Analysis

* Barnard rule should not apply because there are both individual and societal interests at stake in consideration of the tort of intentional trespass to land.
* Even though the actual harm done was minimal (no compensatory damages), the loss of the individual’s right to exclude others from his or her property is significant enough to warrant punitive damages.

### Conclusion

* Steenberg liable - Jacques awarded nominal AND punitive damages.

## Dwyer v Staunton (1947)

### Key Take-aways

* Doctrine of necessity
* *Salus populi suprema lex*: Regard for public welfare is the highest law.

### Facts

* Defendant drove through plaintiff’s land twice, even after being told not to, because the highway wasn't clear from the snow.
* Plaintiff sued for damages related to crop defendant drove over and the gate he drove through.

### Issue(s)

* Whether Staunton, under the circumstances, had the right to leave the highway and proceed over the land of the Dwyer.

### Law

* From Broom’s legal maxims: *Salus populi suprema lex*: Regard for public welfare is the highest law.
  + Private mischief shall be endured, rather than a public inconvenience, and therefore, if a highway be out of repair and impassable, a passenger may lawfully go over the adjoining land.
* Doctrine of necessity: an interference with private property is obviously dictated and justified *summa necessitate*: by the immediate urgency of the occasion, and a due regard to the public safety or convenience.

### Analysis

* Since the road was impassable and no significant damage was done, defendant was within his legal rights in crossing through plaintiff’s land.

### Conclusion

Defendant not liable – no damages awarded.

# The Properties of Property

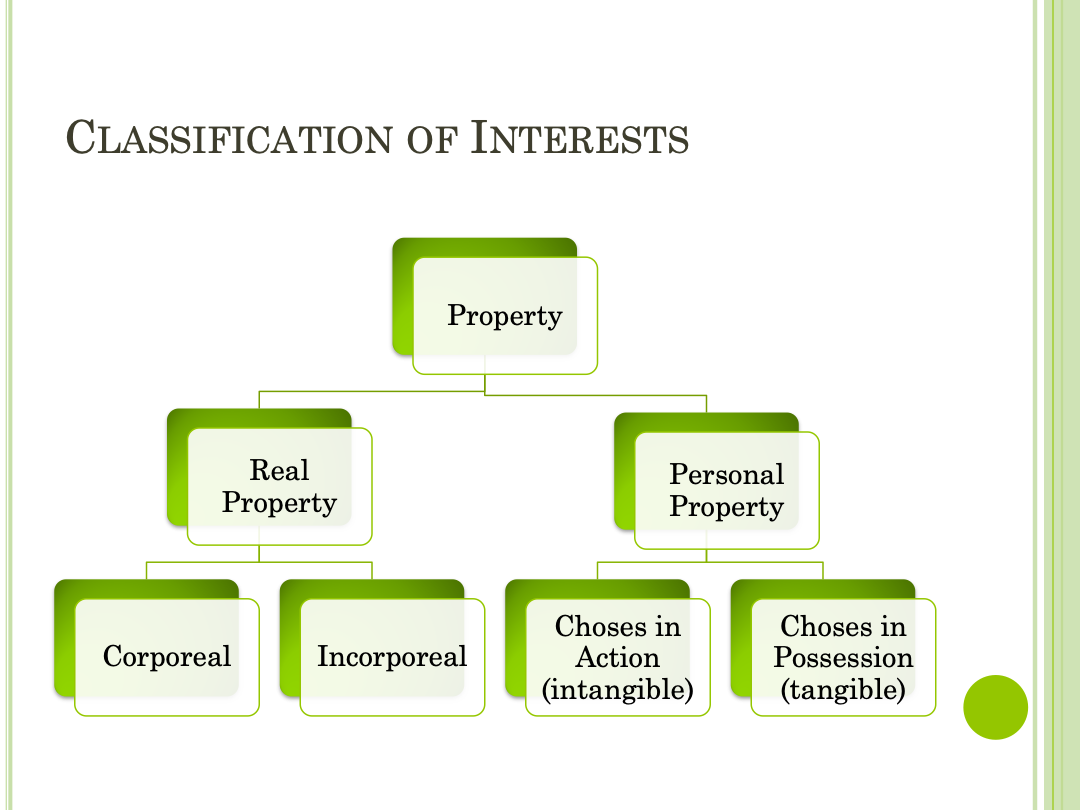
* Property is a **right**, not a thing.
* Property is distinct from possession.
* Property gives rise to enforceable claims against third parties. Usually backed by state enforcement.
* Types of property
  + **Private property** is held by a single entity (person, family, etc)
  + **Common property** is property that you cannot be excluded from, held by some collective group (could be a limited group) e.g. public parks, roads, etc. Limited group access might be something like an apartment gym or a common pasture in medieval Europe.
  + **State property** is held by the state and the state exercises its right to exclude - e.g. military base, PM's office, legislature offices, etc.
* Historical trends in property rights:
  + Western legal conceptions of property have been trending towards singular ownership over a singular physical thing - as opposed to previous conceptions of property where multiple people had property interests in one physical thing (English tenure system). This can cause confusion between the concept of property and a physical thing.
* Conceptions of property:
* **Single Variable Essentialism:** The right to exclude is a **sufficient** and **necessary** condition for property rights.
* *"To the world:*

*Keep off X unless you have my permission, which I may grant or withhold.*

*Signed, Private Citizen Endorsed: the State"*

* **Multiple Variable Essentialism:** Property has an essence, but it is not limited to one thing. Made up of many rights:
  + Right to possess
  + Right to use
  + Right to manage
  + Right to the income
  + Right to the capital
  + Right to security
  + Incident of transmissibility (can be transferred)
  + Incident of absence of term (continues indefinitely)
  + Duty to prevent harm (controversial)
  + Liability to execution (if you are liable for a debt, your property can be taken to satisfy the debt)
  + Incident or residuarity (if you break off parts of your right of ownership you have a residual right - if you lease your property, once the lease ends the property comes back into your possession.)
* **Nominalism (CONTEMPORARY VIEW):** Property is a social context. It does not necessarily have an essence; it is entirely dependent on the sociocultural context in which it exists.
  + Property as "a bundle of rights"
  + Jural relations:
    - Right - duty
    - Privilege - No-right
    - Power - liability
    - Immunity - Disability
  + Property can refer to different bundles of legal relations among persons.
  + The bundles have no necessary content and the meaning of "property" is thus conventional.

## Classification of Property Interests



## Yanner v Eaton

### Key Take-aways

* **Example of nominalistic view of property:** “The very fact that the word is so comprehensive presents the problem, not the answer to it. "Property" comprehends a wide variety of different forms of interests; its use in the Act does not, without more, signify what form of interest is created"

### Facts

* Plaintiff is an Aboriginal person who hunted the crocodile under his Aboriginal right to hunt (Native Title Act).
* Asserts that this is a cultural practice that his people have done since time immemorial.
* Was charged by an officer anyway.
* State says that the Fauna Conservation Act supersedes the Native Title Act

### Issue

* Does the section of the Fauna Conservation Act in question have the effect of extinguishing the Native Title Act?

### Law

* Section 7 of the Fauna Conservation Act states that all wildlife in the state of Queensland is the property of the crown.

### Analysis

* Reasons to conclude the property conferred on the Crown is not full beneficial or absolute ownership:
  1. No specific discussion of whether or not fauna remain property of the Crown if they leave territorial boundaries - migratory birds present a problem - would be absurd to expect that the Crown maintains "ownership" of all migratory birds that ever enter Queensland airspace.
  2. Ownership of a wild animal cannot be conflated with ownership of a domestic animal. No absolute property for wild animals - only qualified property - context-dependant
  3. Possession is the beginning of ownership, and wild animals are generally not in the possession of anyone.
  4. Sections of the fauna act that excuse the Crown from the responsibilities of property.
* Eye to the original intention of the fauna act: "the statutory vesting of 'property' in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource." - The intention was not to make fauna property in the full beneficial/absolute ownership sense.

### Conclusion

* Provision in the Fauna Conservation Act does not extinguish native rights under the Native Title Act.
* The property rights laid out in the fauna act are less than the rights of full beneficial, or absolute ownership. Taken as a whole the effect of the Fauna Act was to establish a regime forbidding the taking or keeping of fauna except pursuant to license granted by or under the Act.
* **Nominalistic view of property**, dependent on context. Dissenting opinion was based on a more essentialist view of property.

## Harrison v Carswell

### Key Take-aways

* Important split in the decision: does the mall owner give a **revocable** license or should the court be involved in balancing interests between property owners and others (in this case, lawful picketers)
  + Revocable license won and is still largely in use today.

### Facts

* Sophie Carswell (respondent) was charged under the Petty Trespasses Act with 4 offences for unlawfully trespassing upon the premises of the Polo Park Shopping Centre when she was picketing – she had been requested to enter on or come upon the premises.
* Provincial judge dismissed the case, County Court charged her with 4 counts and fined $10 per count, appellant court overturned this ruling - this case is the second appeal (brought forward by the plaintiff of the original case).
* Carswell states that the right of a person to picket peacefully in support of a lawful strike is of greater social significance than the proprietary rights of an owner of a shopping centre and the rights of the owner must yield to those of a picketer.
* Petty Trespass Act relies on the common law definition of trespass (from Tort). No real definition of trespass given in the Act.

### Issue

* Does the plaintiff have the right to refuse access even though a mall is a publicly accessible place?
  + Also, does the court have a role in balancing public rights and private property rights?

### Law

* *Peters v the Queen* asked whether the owner of the shopping centre had sufficient control or possession of the common areas, having regard to the unrestricted invitation to the public to enter upon the premises, as to enable him to invoke the remedy of trespass. The court said YES.
* *Petty Trespass Act* – Manitoban Act – creates a regulatory offence instead of the tort of trespass.

### Analysis

* *Peters* is indistinguishable from *Harrison*
* A mall owner gave members of the public a “revocable license”. Even though members of the public are presumed to be able to enter the mall, the owner of the mall can revoke that license if they so wish.
* Important dissent: Carswell is entitled, as an employee involved in a labour dispute with a tenant of the shopping centre, and hence having an interest, sanctioned by the law, in pursuing legitimate claims against her employer through the peaceful picketing in furtherance of a lawful state.

### Conclusion

* Defendant liable.

# Novel Claims

* Courts are generally hesitant to create new property rights when compared to torts offences because of the nature of property rights. They are usually ***in rem***, meaning they apply to the whole world. Giving one person a new property right creates a new obligation for everyone else.
  + Property rights are “sticky” – once you recognize a new right is is very difficult to revoke it. People become **reliant** on the rights they have and will lobby hard against any limit legislatures try to put on those rights later.
  + Creates an **information burden** – everyone else now needs to learn what their new duties are.
* More flexibility when the right is ***in personam*** – only creates an obligation for one person or group of people.

## Victoria Park v Taylor

### Key Take-aways

* Courts are hesitant to grant novel claims. Spectacles are not quasi-property.

### Facts

* Plaintiff has a horse racing facility.
* Neighbour (defendant) erects a structure on his land so he can see what is happening in the facility.
* Neighbour broadcasts the races (audio only) over the radio.
* Plaintiff's arguments:
  + He has a "quasi-property" right to the **spectacle** (the horse races)
  + The defendant's actions constitute a nuisance.
    - Unreasonable and substantial interference with the plaintiff's enjoyment and use of land.

### Issue

* Does the plaintiff have a property right in the “spectacle” of his horse racing?

### Law

* *Peters v the Queen* asked whether the owner of the shopping centre had sufficient control or possession of the common areas, having regard to the unrestricted invitation to the public to enter upon the premises, as to enable him to invoke the remedy of trespass. The court said YES.
* *Petty Trespass Act* – Manitoban Act – creates a regulatory offence instead of the tort of trespass.

### Analysis

* The plaintiff has the power to erect a fence.
* The court has not been referred to any authority in English law which supports the general contention that if a person chooses to organize an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see.
* **The mere fact that damage results to a plaintiff cannot be relied upon as a cause of action.**
* "**Spectacle" is not a property.**
* English property rights do not include the right to freedom from view and inspection of neighbouring occupiers and of other persons who enable themselves to overlook the premises.

### Conclusion

* Defendant not liable.

## Moore v UCLA

### Key Take-aways

* Moore evidence (lol) that the court is hesitant to recognize novel claims. In this case, the court was concerned about how the recognition of this claim would affect science – may disincentivize scientific research if scientists are worried about being sued – liability lottery.

### Facts

* Moore was diagnosed and being treated for leukemia at UCLA by Dr. Golde.
* Dr. Golde was aware that blood products and components were of great value in a number of commercial and scientific efforts.
* Golde recommended a splenectomy - Moore consented.
* Golde did not disclose the conflict of interest to Moore and did not tell him his cells would be used for research purposes.
* Golde later patented a cell line from Moore's cells.

### Issue

* Whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in a potentially lucrative medical research without his permission.
  + Plaintiff’s claims:
    - Violates Golde's fiduciary duty to his patient.
    - Moore did not provide informed consent.
    - Conversion claim that Golde took something of Moores (the cells) and used it to profit.
      * **Conversion:** analogous to trespass but relates to personal property. Basically you took something that was mine and used it as your own.

### Law

* *California Health and Safety Code* says that excised cells must be destroyed after scientific uses have been exhausted. This code is silent on whether compensation is owed for excised cells taken without consent.

### Analysis

* **Essentialist view:** states that because Moore doesn't have the right to exclude permanently (because of California statute) it cannot be property.
* **Policy considerations:** must balance the rights of a competent patient to make autonomous medical decisions with the need to avoid threatening civil liabilities of innocent parties who are engaged in socially useful activities.
  + **Liability lottery:** anyone who uses the cell line would be at risk of liability under a conversion claim. This, again, points to the *in rem* nature of property law. The liability does not only extend to those directly engaging in nefarious behaviour, but to everyone who uses the cell line, whether or not they know its origin.

### Conclusion

* Fiduciary duty claim: SUCCESSFUL
* Informed consent claim: SUCCESSFUL
* Conversion claim: UNSUCCESSFUL, to succeed, Moore has to establish that he has a property right in these cells.

## INS v AP

### Key Take-aways

* **Unique case in which a novel property claim was recognized.**
* Held that news, in this case, was quasi-property – could not be held as property as the rights allotted would then be *in rem. In personam* right as opposed to *in rem* right – AP only gained the right to exclude INS from their property for a limited period of time immediately after publication.

### Facts

* INS was taking AP's news content and rewriting it and publishing it immediately – eating into AP’s profits without doing the grunt work.
* AP says they have a property or **quasi-property** interest in the news they publish

### Issue

* Whether there is any property in news?
* Whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news gatherer?

### Analysis

* The news itself is public property, it would be absurd to expect all readers of the news to keep it a "secret" for a specified amount of time after reading it. News cannot be property in the traditional sense.
* BUT, the rights of a purchaser of a single newspaper to spread knowledge are not the same as the rights of competitors who wish to transmit the news for commercial use.
* Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

### Conclusion

News recognized as quasi-property in that AP has the right to exclude INS from “their news” for a short period of time.

*“…postpones participation by INS in the processes of distribution and reproduction of news that it has not gathered and only to the extent necessary to prevent that competitor from reaping the fruits of complainants effort and expenditure, to the partial exclusion of the claimant.”*

# Sources of property Law: Aboriginal Property Law

## Important Legal Instruments

### Royal Proclamation, 1763

* Part of the Constitution, cannot be repealed
* Set out much of the basic framework for Crown-Indigenous relations in Canada.
* Signified a move towards centralization of relations with Indigenous people re: their land.
* Formally recognized Indigenous land rights in part of the territory that became Caanda – also provided that these rights could ONLY be transferred via treaty with the Crown (no private sales to settlers)

### Historic Treaties

* Treaty 6 (1876-1878)
  + Surrender and yield land. Hunting rights. Annual annuity (no inflation). Agriculture (Crown didn’t follow through)
  + Practice of entering into land cession treaties were premised on a recognition of an Indigenous legal interest in lands that Indigenous people occupied and controlled.

## The Doctrine of Discovery

* **The Doctrine of Discovery**: a 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 at common law, discovery gave the sovereign power to govern the territory, but it **did not necessarily give the sovereign a right to possess land that was already occupied by Indigenous groups.**

## Aboriginal Property Law and Canadian Property Law

* Treaties with Indigenous Nations lie at the foundation of land titles in many parts of Canada and AB.
* Treaties denoted the surrender of the interests of Indigenous people, which in principle allowed the Crown to pass land on to settlers (sus)
* Crown perspective on treaties:
  + Nation to Nation agreement
  + Provided for ongoing rights and obligations
  + Treaties are to be interpreted in a liberal and contextual manner, with ambiguities resolved in favour of FNs.
* Indigenous perspective:
  + Promise of kinship and alliance
  + Incorporation and respect of Indigenous legal traditions

## Indigenous Law

### Gitxsan Property Law

* Decentralized legal order - not necessarily a centralized state enforcing legal order.
* Enforcement mechanisms:
  + Feast structure important in having members of the Nation come together and recognize different rights and interests.
  + Sanctions
  + Retribution
* From the iterative reading of these laws a legal order arises which requires no central government to enforce.
  + Informal, decentralized customs are also important in "Canadian" property law, although there is also a centralized enforcement mechanism in the state.
* **Land is not seen as a "thing" to own, property is seen as a relationship to the land with obligations and rights on both sides.**
* "We have seen that, for the Gitxsan, and their neighbours, the idea of property arises only out of reciprocal interaction… In contrast, the concept of property in Western legal systems appears to have at its core the monopolistic barring of others from the thing possessed. The thing possessed is owned by one legal entity. It relies on exclusivity."
* What is meant by the claim that the thing possessed is created in the space between two legal entities. Does Gitxsan property law recognize exclusive property interests? In what way are they different from exclusive interests at common law?
  + Yes. BUT, there are many different parties who may have overlapping rights to use a resource, instead of one owner with a comprehensive bundle of rights over one resource. Makes it more difficult to buy and sell. It is a system of property that isn't about maximizing transactions, but is about preserving relationships between the Chief and the community and the land, between different community members, etc.

# Sources of Property Law: English Common Law

## Tenure

* **Tenure:** a form of land tenure in medieval Europe that was hierarchical in nature. Parties hold land of another person. Obligations and rights flow both ways. One lord may possess land and need to provide knight service to another lord. Lord (higher) Vassal (lower).
* Subinfeudation: infinite layers of property interests to one piece of land.
* Manorial courts are the origin of the term “common law” – legal system for the poors.
* Eventual abolition of most incidents of tenure except escheat.
  + Escheat: if you die without naming an heir your property goes to the Crown.
* From tenure to fee simple – trend towards simple, alienable property interests without layers of feudal obligations.

## Reception

* Body of English law was received by AB in 1870 - Divergence of English law and AB law begins here.
* Subject to the **Applicability Exception:** judicially-developed exception for laws that are specific to England. Strong presumption against its use.

# Protections for Property

## Hierarchy of legal authorities

## rationale for Protection of Property

1. Consequentialist: People will be more likely to invest in land if they know their investment is safe and will not be randomly taken by gov. Also, the gov will use more discretion in its decision-making if it knows it will need to compensate private owners whose land it’s taking.
2. Diffuse the burden for a new development across the population instead of concentrating it on the land owners whose land is being taken.

## Criticisms of Compensation Requirements

1. Property cannot always be “bought” – some people have deeper connections to the land/their home.
2. Large businesses needn’t rely on their legal rights because they can just lobby government.
3. Limits government’s ability to limit development for environmental or other reasons (check this one).

## Common Law Background

* Except in [military] emergencies (the ROYAL PREROGATIVE), property can only be taken pursuant to authority granted under a statute.
* In interpreting legislation, there is a presumption that the legislation does not intend to take property without compensation – but this presumption can be rebutted with clear language as per Authorson.

## Statutory Protections

* Due process protections: “except by due process of law” – fair procedures applicable to a deprivation of one of these rights, including the right to property.
  + Canadian Bill of Rights: federal laws are not to be construed to be infringing the Canadian Bill of Rights unless the statute clearly says otherwise (interpretive rule)
    - Mostly superseded by the Charter, but not the bits about property rights.
    - Does not apply to provincial leg
    - ORDINARY FEDERAL STATUTE, not the constitution
  + AB Bill of Rights
    - Very similar to the Canadian version.
* ***Authorson*** limits the application of these documents by finding that the due process requirement does not apply to the procedures followed by Parliament.
  + In *Authorson*, the court ruled that “The *Bill of Rights* does not protect against the expropriation of property by the passage of unambiguous legislation.”
  + The due process only applies if there is an individual determination to be made.
* Requirement of compensation (Expropriation Act)
* Constitutional property protections limited in Canada – only when an individual’s Charter rights are implicated and there is an incidental effect on property (e.g. unreasonable search/seizure of possessions, equality and non-discrimination, etc.).
  + Indigenous people have some constitutional property protections: s. 35 requires justification of interference with right.
  + US Constitution provides for more protection of property.

## Formal Expropriation

* **Expropriation:** the taking of property from a private owner by a public body for a public work
* ***Marks v Westlock:***In calculating compensation courts can consider the highest and best use of the land at the time of the taking but CANNOT consider any increase in value that results from the specific development in respect of which the expropriation was made.

***S. 45 of the Expropriation Act:***

*In determining the value of the land, no account may be taken of:*

1. *Any anticipated or actual use of the land by the expropriating authority at any time after the expropriation.*

*….*

1. *any increase or decrease in the value of the land resulting from the development or the imminence of the development*

***Personal Property Bill of Rights:*** Similar to the Expropriation Act but relates to tangible personal property. If the government is taking your car or computer (but not an intangible interest like IP or entitlement to be paid for a debt)

## De-facto Expropriation

* **De-facto expropriation:** instances in which there is no forced formal transfer of ownership to the state but rather substantial or incomplete restrictions on a property interest through government regulation.
* US Context – mostly developed under the fifth amendment.
* ***Pennsylvania Coal Company*** (1922) – first case to rule that regulation can be tantamount to a taking.
  + Coal company owned interest in land – transferred surface rights to other parties
  + Gov passed legislation that prevented mining that impacted surface of land
  + So, coal company would have to repurchase the lots to continue mining.
  + Ruled in favour of coal company. Effect analogous to a taking.
* ***CPR v Vancouver*** clarified Canadian law re: de-facto expropriation. CPR says to have de-facto expropriation at common law you MUST have:
  + - 1. An acquisition of a beneficial interest in the property or flowing from it.
         1. Beneficial interest has a legal right requirement – value or collateral interest is not enough.
      2. Removal of ALL REASONABLE USES of the property.
* Canada-China Investment treaty creates different rules for foreign investors, takings considered based on economic impacts, alignment with “investment-backed expectations”, the character of the measure or series of measures.
* ***Manitoba Fisheries Ltd v the Queen (PRE-CPR):*** Government’s monopolization of commercial fishing (Crown Corp) ruled as a taking of Manitoba Fisheries Ltd. Property (the goodwill of its customers).
  + Nuanced view of property: the right to exclude doesn't necessarily apply here. It certainly wouldn't apply if the goodwill was taken by a different company by simple competition.
  + Plaintiff is a freshwater fish distributor who purchases fish from fisherman and sells them.
  + Statute insists that all freshwater fish be sold to the Crown Corp
  + Clause provides mechanism of compensation – framework is not silent, but compensation does not get paid.
  + Hints that there is a common law right to compensation in the case of a constructive taking.
* ***Lucas v South Carolina Coastal Council******(pre-CPR, American, not binding)***
  + **Ratio:** When the owner of real property is called upon to sacrifice all economically beneficial uses in the name of common good, he has suffered a taking and this is compensable.
  + Ownership of land on coastline with development potential – local council prohibits development.
  + Two Brightline rules for a regulatory taking:
    - Permanent physical invasion (infringing on right to exclude)
    - Denial of all economically beneficial uses. (Infringing on right to use and benefit of the land)
      * Exception, not a taking if its already illegal in the common law.
* ***Mariner Real Estate Ltd v Nova Scotia (PRE-*CPR)**
  + **Ratio:**Where land use regulation limits the use of property, the holder must establish that the regulation virtually eliminates or extinguishes the property interest. The loss of economic value is insufficient.
  + Suggests the government must receive a legal interest in the land in question.
  + Suggests a virtual extinction of the interest is required.
* ***R v Tener (PRE CPR)***
  + ***Ratio****:* A right to compensation must be found in the statute. If land has been expropriated, the statute will be construed in light of a presumption in favour of compensation but no such presumption exists in the case of injurious affection simpliciter (injurious affection in the absence of a taking)
  + BC gov put a provincial park on top of mining lands. Paper right to mine but they couldn’t act upon it because the BC gov owned the surface.
  + Suggests that a public value or benefit may constitute a “beneficial interest”.
  + Suggests a substantial deprivation of value is sufficient to constitute a taking.
* ***Delgamuukw v British Columbia***
  + **Ratio**: Affirmed Aboriginal title, but Aboriginal title can be infringed upon if the infringement:
    - (1) is in furtherance of a legislative objective that is compelling and substantial;
    - (2) is consistent with the special relationship between aboriginals and the Crown
* ***Attorney General v De Keyser’s Royal Hotel Ltd*. (PC – PRE CPR)** 
  + Property that had been taken during WWI.
  + **Ratio:** In interpreting legislation, there is a presumption that the legislature does not intend to take property without compensation (though this presumption can be rebutted with clear language)—aka interpretive presumption

*Statutory Provisions:*

* ***Canadian Charter of Rights and Freedoms ss. 1, 7, 8, 15***
* ***Expropriation Act ss. 1(g), 3, 42(1)***
* ***Canadian Bill of Rights (CBR) s. 2***
* ***Alberta Bill of Rights s. 1(a)***
* ***Alberta Personal Property Bill of Rights (APPBR) s.2, 3***
* ***Constitution Act 1982, s.35***

## Civil Forfeitures

***Victim Restitution and Compensation Payment Act:*** Basic purpose is to allow for the seizure of property that has been implicated in criminal activity. Government can seize property that was (1) acquired by illegal means or (2) an instrument of illegal activity.

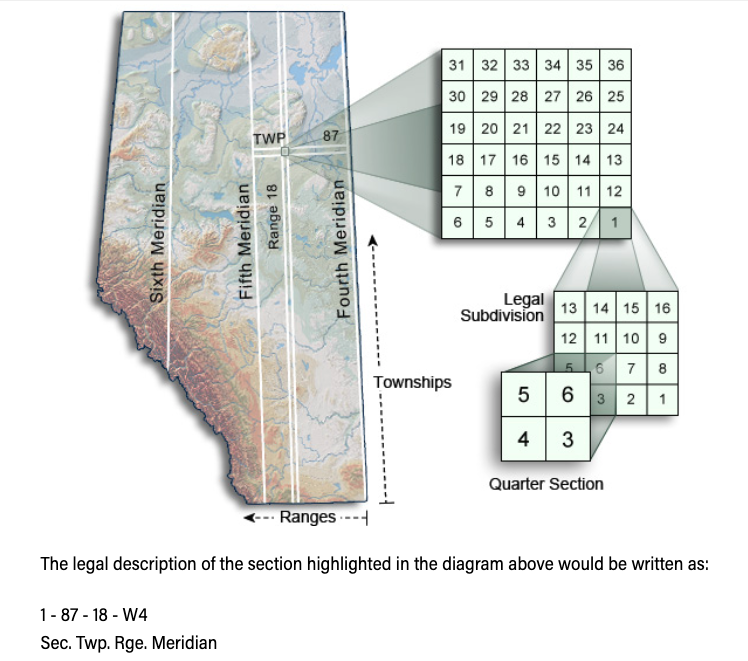
* Issues:
  + Property can be taken away before you are convicted and regardless of whether you are convicted. Civil standard (BOP) not criminal (BRD).
  + Can have negative effects on innocent third parties.
  + Has been abused as a revenue generating tool.
* ***Alberta v Echert***: Judge holds AB strictly to its burden of proof.
* Minister's case here suffers from evidentiary deficiencies in two respects:
  + The connection between the subject motor vehicles and illegal activity rests upon irrelevant (and undemonstrated) claims by Constable Sauve of "experience". Constable Sauve is not an “expert”.
  + The source of Constable Sauve's information regarding the searches is not specified, nor does he depose to his belief in such information.

# Boundaries

## Lateral Boundaries

**Lateral Boundaries:** the borders of the surface of a plot of land.

* **Land Surveys:** In Alberta, the location of most land is described by reference to a system of township surveys. There are 4 vertical meridians - within each meridian are vertical ranges (range roads) and horizontal township lines (township roads), which create box-shaped townships. Each township is divided into 36 sections, which can be further subdivided into legal subdivisions and quarter sections.



* **Metes and Bounds**: When land doesn’t neatly fit into the land survey units, for example if development predates surveying, metes and bounds may be used. This involves providing a detailed description of the perimeter. All descriptive elements are not equal, if there is a discrepancy between two elements, the following ranking is presumed to apply:

1. **Natural boundaries**
2. **Artificial markings made at the time of the grant**
3. **Boundaries of adjacent properties**
4. **Distances listed in the description**

* **Horizontal Right of Support:** “a landowner has a right to enjoy his own land in its natural state, unaffected by any act done by way of excavation on the adjacent or subjacent land.”
  + ***Blewman v Wilkinson (*1979) NZLR 208 (CA)**
  + **Ratio:** Where a subdivision has been created by excavation, the owner is not under a strict duty to a subsequent owner if interference occurs because of that excavation.
* **Vertical Right of Support:** if exploration of a subsurface mine owned by B damages owner A’s land, there is a cause of action.
  + ***Fuller v Garneau* (1921), 61 SCR 450**
  + **Ratio:** The right of support can be waived with an agreement. Reservation of mines/minerals in a grant does not waive this right and does not allow the owner of the subsurface mines to destroy/damage the surface of the land.
* **Conventional Line Doctrine*:***Elements needed for application:

1) Adjoining land owners;

2) Disagreement regarding the dividing line;

3) Agreement between the parties on a line;

4) Recognition of the “conventional line” as a common boundary.

* + ***Robertson v Wallace + Bea v Robinson***
  + **Ratio:** You cannot have a conventional line unless there is some actual ambiguity about the property - it can’t contradict the actual registered title of the property

## Airspace Rights

* Before the advent of airplanes, the ***Ad Coelum*** rule was in effect. This rule stated that if you own the surface of the land you own everything above it and everything below it.

***Didow v Alberta Power Limited*, 1988 ABCA 257**

|  |  |
| --- | --- |
| **Facts** | Alberta Power Limited constructed a power line (made up of 4 power poles) on the municipal road allowance along the east side of the appellants’ land. The crossarms conductors and attaching wires at the top of each pole protrude six feet into the airspace above the appellant’s land. The appellants consider the overhangs to be unsightly and expressed concerns about the danger associated with the lines and the location and operation of tall machinery and equipment. Additionally, the appellants state that the overhang will restrict the use of aerial spraying and seeding on the land, as well as a reluctance to plant trees under the overhang. At trial, the judge determined that there was no trespass because the appellants were not making use of the space and had no intention to do so, and as such did not possess the area in question. |
| **Issue** | * 1. Whether the overhangs installed by the respondents trespass the airspace of the land that the appellants own.   2. What part of the airspace does Didow own? |
| **Ratio** | **The ratio of this case lies in the balancing criterion formulated by Griffiths, J. Haddad J. adopts this test and views it as saying: “a land owner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land. This amounts to trespass.” [para40].** |
| **Reasoning** | Haddad, J. establishes through Wandsworth Board of Works v. United Telephone Co. (1884) 13 Q.B.D. 904 that a land owner has the right to the airspace above their land despite not explicitly stating the extent of those rights. He then cites Kelsen v. Imperial Tobacco Co. (1957) 2 All. E.R. 343 which Haddad, J. uses to discredit the trial judge’s reasoning that the appellants were not making use of the airspace and thus no trespass occurred. Haddad, J. proceeds to attack the respondent’s “strongest” submission, which is that the appellants were not making any use of the land, and a trespass can only occur if it materially interferes with the use or enjoyment of that space. Haddad, J. looked to the “balancing” criterion formed by Griffith, J. in Lord Bernstein of Leigh v. Skyviews & Gen. Ltd., [1977] 2 All E.R. 902 at 907 and found that to be most persuasive in discrediting the respondent’s argument whilst also providing a “logical compromise to the rights of the landowner and the general public” [para40]. |
| **Holding** | * + The cross arms installed by the respondents interfere with the appellants potential and actual use and enjoyment, and thus interfere with their airspace which amounts to trespassing.   + You own as much airspace as you can potentially and reasonably enjoy and use. |

## Subsurface Rights

* ***Edwards v Sims***
* **Ratio:** *Cujus est solum* applies to subsurface rights. Edward’s best use of land doesn’t matter. Private property (such as Sim’s private property interest) allows for owners to be pointlessly selfish
* ***Cuius est solum:*** property holders have rights not only to the plot of land itself, but also the air above and the ground below.
* Logan J dissents --holds that survey should not be allowed because ad coelum rule doesn't apply.
  + Reasoning:
    - "Edwards owns the cave through right of discovery, exploration, development, advertising, exhibition, and conquest"
    - It would be unfair to give Lee a piece of this cave, because he did not put in the labour and putting in labour gives you an entitlement to the land (Locke-based).
    - Fairness and practicality. You should only own as much as you can make use of
    - Idea of occupation/possession: if you own land with a natural entrance that no one knows about, then it is presumed that you have taken occupation of this cave. If there is no natural entrance, then by creating the entrance and going in there, you are the first to take actual possession of it.
  + The Logan rule is based on what you can use **productively** on your land above and below it
  + How you can use your land changes with time (e.g. technological advancements) but property rights can't change with time
  + Potential problems with Logan's rule: multiple natural entrances and the issue of co-ownership
  + Logan's holding is more contextual as opposed to a more general approach

### Mineral Rights

* Common law rule: minerals except gold and silver are part of the land and belong *prima facie* to the landowner (not an absolute rule)
  + Three main tests in mineral law:
    - **The Vernacular Test:** To decide if a substance is a "mineral", test uses the vernacular of miners, people in the industry, and landowners of the time to see how it was regarded
    - **The Purposes and Intentions Test:** In construing a reservation of mines and minerals, regard must be had not only for the word(s) used to describe the thing reserved, but also the leading purpose or object that the deed or statute embodies
    - **The Exceptional Occurrences Test:** The word "minerals" in a reservation does not include the ordinary rock of the district, but rather exceptional or rare substances (in use, character, value, or occurrence) (This test is on the decline and perhaps best taken as an offshoot of the second  test)
* In Western Canada, the practice has generally been for the Crown to reserve minerals in grants of interests in land.
* As a result of statutory change, Crown grants of surface interests are now PRESUMED to reserve mineral interests in AB, but this does NOT apply retroactively to grants before the mid 20th century***. (Public Lands Act)***
* In AB, legislation now deems “pore space” to be held by the Crown ***(Mines and Minerals Act)***

**History of Mineral Rights in Canada**

* Since early 1900's, mineral rights no longer come with the surface rights.
* Mineral rights are government-owned and not available for purchase - only lease by some individuals or companies
* As a result, mineral rights on 90%+ of Canada's land are owned by the Crown
* Privately owned mineral rights may be sold separately from surface rights
* Regulation of mining activities on public leases falls under provincial jurisdiction
* General Mineral Tenure Rules for Exploration and Development
  + In 7 provinces/territories, you need a prospector's licence to engage in exploration of minerals
  + In the other 5 (incl. AB), you can prospect/explore without licence, but need one to acquire mineral rights ("stake claims") to protect what you've discovered
  + Mining claims have maximum limits, larger where "map staking" is used ‣ No competitive bidding for mineral exploration rights except O&G
  + In disputes, person who marked the claim by stake (based on #1 stake) obtains the claim

***Law of Property Act*:** surface owner without mineral interests can excavate or disturb the surface for the purpose of construction, farming, or any operations he's entitled to conduct

***Mines and Minerals Act*:** details all minerals included or excluded, Crown grants do not include gold, silver, or pore space unless otherwise expressed

***Surface Rights Act*:** surface owner consent (or right of entry from the Surface Rights Board) is required for removal of minerals or construction connected to mining/drilling operation, pipelines, power transmission lines, or phone lines

## Water Boundaries

* ***R v Nikal:*** application of ad medium filum aquae (as far as the middle of the stream) maxim in Canada. Owner of adjacent land owns up to middle of the stream of non-tidal waters in England. Not received into Canadian law due to the importance of non-tidal waters to transport systems.
  + *R v Nikal* interprets this maxim to apply only to non-navigable, non-tidal waters. If navigable – Crown owns.
* ***Public Lands Act*** expands Crown’s rights over riverbeds significantly – gives all title to beds and shores of all permanent, naturally-occurring bodies of water “on, before, or after May 31, 1984”.

### Accretion and Avulsion

* ***Robertson v Wallace*** – title originally listed the river as the boundary, but the river moved over the years.
* **Accretion:** gradual, imperceptible change
* **Avulsion:** sudden change
* When **accretion** occurs, the boundary changes with the gradual change. When **avulsion** occurs, the boundary does not change. Reasoning:
  + Perhaps because it would be extremely administratively complex to survey every year and say "okay now you own 3 inches more land and 3 inches less water" every year." Easier to keep the boundary at the river. But in avulsion it would be a) less administratively burdensome and b) more fair to landowners who have reliance interests and expectations in their property.
* ***Robertson v Wallace*** was avulsion so the boundary did not change.

## Fixtures and Transformation

### Fixtures

* **Fixture**: When a chattel becomes fused with and part of an interest in land then it becomes a fixture. When a chattel becomes a fixture, it ceases to be personal property and it becomes real property.

**Test For Fixtures (*Stack v Eaton* Factors)**

* + - 1. If not attached by other than own weight, assumed to be chattel (unless expressly otherwise)
      2. If affixed, even slightly, they are part of land (Unless expressly otherwise)
      3. To alter the prima facie nature, you look at the degree of annexation and the object of annexation
         1. What is the purpose of it being there, is it to enhance the value of the building or to enhance the chattel?
         2. How much damage would need to be done to remove?
      4. Intent of the person who affixed the object is necessary only to the degree it speaks of annexation
* **Note: A contract between two parties relating to fixtures can alter the rights of the parties (i.e. reserving fixtures in a grant of real property)**
* **Registration is a means of providing notice to third parties of interest in fixtures (i.e. *Personal Property Security Act regime*)**
* ***La salle recreations v Canadian Camdex Investments Ltd.***
  + **Facts:**
    - Carpeting in hotel is bought with carpet vendor retaining title as security until paid
    - Carpet is secured interest if they don’t pay debt
    - Building containing carpet is subject to mortgage
    - Carpet is not properly registered in land registry office, although the loan is registered under Personal Property Security Acts.  When building is sold, is the carpet considered a fixture?
  + **Issue**:
    - Is carpet considered a fixture and thus subsumed in the realty?
    - Does the security interest in the chattel or mortgage take priority?
* **Analysis/Holding:**
  + The Court goes through the *Stack and Eaton* Principles
    - The carpet was determined to be a fixture by its nature of having been annexed for the better use of the building as hotel (object of annexation), albeit the degree of annexation was slight due to its ability to be removed without causing damage
* Would have been a different outcome if it had been registered under the PPSA – would be registered on the land title so bank would have known about it.

#### Lending:

* **Security Interest**: Some form of guarantee for a loan, a right to take assets if the lendee defaults on the loan. \*\*Interest of secured lendor takes priority over others.
  + Real property security interests come in the form of a mortgage
  + Disputes can arise when someone has a security interest in a chattel that has become a legal fixture of real property, but there is legislation to deal with this issue:
    - ***Personal Property Security Act*:** If you have a chattel that may become a fixture, and have ongoing interest in the item, you can register it in under this act, as well as land titles office against land involved...
    - **Property interests > normal debts.**

### Transformation  of Chattels

* **Three issues may affect ownership of chattels:**

|  |  |  |  |
| --- | --- | --- | --- |
| **Issue** | **Definition** | **Example** | **Who gets title?** |
| **Confusion** | Fungible goods from two sources combined in such a way that they cannot practically be separated. | *Glencore (*oil*)* | Divided based on amount and quality. |
| **Accession** | Chattel belonging to one party is attached to a chattel belonging to another party. | *Jones (*furcoat*)* | Ownership granted to principal chattel; minor chattel accedes. |
| **Transformation** | Nature of chattel is fundamentally altered (transformation based on a spectrum of *how much* the thing is transformed). | Even turning corn into whiskey wouldn’t constitute a transformation. | Original chattel owner may be unable to follow their interest. |
| **Note:** conduct of parties may also be relevant beyond above issues (e.g., good faith action?) | | | |

***Glencore International AG v Metro Trading International Inc*** (CONFUSION; mixing oil case)

Key Principles:

* Confusion results in ownership of a share proportional to the value of the contribution from each source, including from wrongdoers, where the resulting bulk can sensibly be divided.
* Once established, willful wrongdoers are still entitled to their share in confusion, but they bear the burden of discrepancies should they arise.

***Jones v De Marchant*** (ACCESSION; wife’s fur pelt to mistress’ fur coat case)

Key Principle:

* Accession results in title being held by the owner of the principal chattel, though the conduct of the parties may also be a relevant factor where the resulting chattel cannot sensibly be physically divided.

Potential tests for determining whether accession has occurred:

* + - 1. Injurious removal: can items be removed without serious physical injury to principal chattel?
      2. Separate existence test: has the separate identity of the acceded chattel been lost? (e.g. a plank added to a ship)
      3. Destruction of utility test: would removal of the combined items destroy the utility of the principal chattel? (e.g. taking tires off a truck?)
      4. Fixtures test: consider degree and purpose of annexation.

***Law of Property Act, s69***(improvements in good faith error; barn example in class)

Act deals with improvements made on someone else’s land in a good faith error.

Key remedies:

1. Court can grant lien onto the land that’s been improved (i.e., guarantee a monetary payment by the true owner of land to the individual that made the good faith error).
2. Person who wrongly improved the land could get title to the land. Compensation provided to the party that loses part of their land.

### Intellectual Property

* IP is FEDERAL jurisdiction, not under 92(13).
* Similarities with physical property:
  + Exclusive rights (right to exclude)
  + *In rem* in nature
* Differences from physical property:
  + Unlimited number of people could listen to a song, read a book, etc, but you cannot have an unlimited amount of people in a house or on a parcel of land.
  + Physical things tend to have relatively clear boundaries - not the case in IP.

#### Copyright

* **Copyright:** The protection by statute of the works of authors and artists giving them the exclusive right to “publish” their works and to determine who may so publish. The *Copyright Act,* provides that copyright subsists for the life of the author, the remainder of the calendar year in which the author dies, plus fifty years after the end of that calendar year. There is no copyright in ideas or information; only the expression of the idea is protected. The *Copyright Act* also gives the author certain moral rights, such as the right to the integrity of his or her work.
* Tragedy of anti-commons

*NOTE:* The legislative power/jurisdiction over copyright is expressly assigned to **Parliament**. One of the few areas of property law that is of federal jurisdiction.

* **Purpose**: Copyright protects economic and moral interests in creative works (interpreted broadly):
  + Public policy justification: incentivizes the creation of art and other works.
  + Fairness: artists deserve to be compensated for their labour. (Lockeian)

**Economic Rights**

***Theberge v Galerie d’Art du Petit Champlain Inc* [2002] 2 SCR 336**

**Ratio:** Transfer from one medium to another does not constitute a copyright infringement as it does not reproduce the work and therefore does not change the copyright holder’s economic interests. There was also no modification of work so no infringement on copyright holder’s moral rights.

Copyright law must strike a balance between the rights of the artist/copyright holder and the rights of the possessor/licensee.

**Moral Rights**

***Snow v Eaton Centre* (1982) 70 CRP (2d) 105**

**Ratio:** Modification of a work of art can affect the integrity of a work of art and can therefore constitute an infringement on moral rights.

### Patents

* **Patent:** The statutorily-protected privilege of a patentee in their own invention. Differs from traditional ownership in that the owner is required to hand it over to the public after a 20-year period. A patent may be granted for invention of any new and **useful** art, process, machine, manufacture, or composition of matter. No patent can be obtained for a scientific principle or abstract theorem. The inventor must apply for a grant of a patent (differs from copyright) and, upon application, there is a presumption of novelty (may be challenged and disproved).
* **Purpose**: The design of the patent law is to reward those who make substantial discovery or invention that adds to our knowledge and advances the useful arts.
* ***Patent Act:*****42** Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall, subject to this Act, **grant to the patentee and the patentee’s legal representatives for the term of the patent, from the granting of the patent, the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used, subject to adjudication in respect thereof before any court of competent jurisdiction.**

***Monsanto Canada v Schmeiser* [2004] 1 SCR 902**

**Key Take-aways:**

* Genes, cells, and genetic modification processes are not classified as “higher life forms” in the context of patent law. Therefore, they are patentable.
* The “use” of patented genes/cells is not limited to their isolated form. Use of patented genes/cells is equivalent to the use of patented machine parts.
* Ownership is not a valid defence in breach of patent.
* Deprivation of the patent-holder’s monopoly upon a patented invention constitutes a breach of the *Patent Act*.

### Trademarks

* **Trademark**: a mark used for the purposes of distinguishing the goods or services prvided by one party from those provided by other parties.
* Must be REGISTERED. Registration is “use it or lose it” but is permanent if continuously being used (no expiry like copyright and patents).
* Unlike patents and copyright, governed by both common law (tort of passing off) and statutes (the Trademarks Act).
* In a conflict between two registered marks, the earlier one prevails. Conflict occurs when two companies using similar marks would create confusion in the marketplace (Mattel).
* ***Mattel***:
  + Utilized s 6(5) of the ***Trademarks Act*** to determine whether confusion was likely:
    - 1. The inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known.
    - In Mattel – “Barbie had already been a popular nickname for Barbara”

1. The length of time the trademarks or trade names have been in use
   * 1. Mattel’s TM older.
2. The nature of the goods, services, or business
   * 1. Doll business is significantly different from restaurant business – different customers with different tastes.
3. The nature of the trade
   * 1. Distinct and different channels of trade.
4. The degree of resemblance between the trademarks or tradenames in appearance or sound or in the ideas suggested by them.
   * 1. There is considerable resemblance between the marks.

* Also considered the “fame” of a mark that may transcend a particular industry (not the case in Mattel)
* **DOES NOT** consider the subjective intent in using a particular mark.

#### Trespass to Chattels

* ***Intel v Hamidi***
  + Facts: former employee sent out email criticizing Intel’s employment practices to numerous employees on plaintiff’s mailing list. No breach of security barriers.
  + Ratio: To constitute an actionable trespass against chattels, there must be an interference with the possessor’s use or possession of, or any other legally protected interest in, the chattel itself. Digital communications that do not cause damage to computer infrastructure do not amount to trespass to chattels.
  + **This is distinct from the strict liability seen in trespass to real property. ACTUAL DAMAGE is required.**

# Possession

* At its core, there are two components to possession:

*Animus possidendi:* an intention to possess

*Factum:* physical control

* Functions of possession:
  + Justify property claims.
  + Proving property claims:
    - A possessor is the presumptive property holder.
  + A long-term possessor can oust the claim of the original title holder **(adverse possession)**
  + Setting the priority of property claims (RELATIVE NATURE OF TITLE)
* ***Popov v Hayashi*** 
  + **Qualified pre-possessory interest:** where an actor undertakes **significant but incomplete steps to achieve possession** of a piece of **abandoned** personal property and the effort is interrupted by the **unlawful** acts of others, the actor has a pre-possessory interest in the property. QUALIFIED right to possession which can support a cause for conversion.
  + **“He who comes into equirt must come with clean hands”:** If Hayashi had been found to bite the kid he probably would not have received the 50% of the cash he did.
* ***Pierson v Post*** 
  + Physical control for the purposes of possession is CONTEXTUAL.
  + Fox hunting – Post in pursuit of fox, Pierson intervenes, kills the fox and takes it.
  + Did post have sufficient possessory interest in this case? NO.
  + Chasing isn’t enough, mortally wounding or capturing would have been different. Chasing is not a certain enough standard.
  + If an animal escapes you have lost title UNLESS it has a habit of returning (a trained hawk)
* ***Cliff v Kane*** 
  + Seal pelts piled up on the ice and the ice drifted away.
  + Is the possessory title maintained? YES
* Wild animal cases are about the interests of the hunters, not necessarily the world/animal/environment.

## Adverse Possession

* **Adverse possession** arises when no action has been commenced against a trespasser during the statutory period of time allowed for a suit to be filed.
* Limitations periods under the ***Limitations Act***. Once period runs out the squatter’s title is superior and the original title is extinguished. Reasoning: prevent stale evidence.
  + Land = 10 years
  + Chattels = 2 years
    - For chattels, statutory period restarts every time possession changes. (***Babary:*** Motorcycle)
* In a claim for adverse possession the claimant must establish:

Actual possession for the statutory period by themselves and those through whom they claim;

That such possession was with the intention of excluding from possession the owner or persons entitled to possession;

Discontinuance of possession for the statutory period by the owner and all others, if any, entitled to possession (***Keefer, Teis***)

* Possession must be:
  + Open and notorious: must send some kind of signal that a reasonable owner would see. Possession cannot be clandestine.
  + Peaceful: not by use of force
  + Adverse: no permission given by true owner.
  + Exclusive:
  + Actual: you have to actually be in possession (animus + factum) – constructive possession is an exemption to this.
  + Continuous: need to be continuous for the statutory period BUT can be contextual i.e., if it is farming land continuous use may be intermittent based on growing season.
* ***Keefer v Arillota***
  + Two parcels of land that had changed hands a few times. Previously one parcel, but at one point was divided into two parcels – store and house - and there was a right of way (NOT right of possession) granted to the owner of the house parcel for use of the driveway. House owner tried to make a claim over the driveway under adverse possession as they had been parking cars, using grassy area, and built a garage.
  + **Test of inconsistent use**: whatever the possessor is using the land for must be inconsistent with the use intended by the owner. **\*\*NOT ACCEPTED IN AB AT ALL\*\***
  + Owners of the store had very limited intended use of the strip of land. Entire claim failed EXCEPT where the garage was because that was inconsistent with any othe use the store owners could have possibly wanted.
* Relative nature of title:
  + ***Jewett v Bil:*** inaccurate paper title to land so had no real right to it but had been in possession of the land. Brings forward an action in trespass against someone who has NO right to the land. Successful claim. True owner was not part of the proceedings so it doesn’t matter.
* ***Teis v Ancaster (Town)***
  + Mutual mistake about Teis boundary. Thought 2 strips of land belonged to the Teis, so they plowed, farmed, and built a laneway on it. Made a claim under adverse possession.
  + Claim succeeds, adverse possession met. Caveat that members of the public can continue to utilize the laneway as needed.
  + **Inconsistent use test cannot be applied in instances of mutual mistake.** 
    - Claims for adverse possession would never succeed in situations of good faith but would in situations of bad faith.
* **Constructive Possession:** if possession is pursuant to some defective title or defective deed, you can make a claim to the entirety of the property that you believe yourself to be entitled to, not just the part you have been possessing (as would be the case if you did not have any sort of title document.) (***Bently v Papard***)

## Finders and Abandonment

### Finders

General rules for finders:

If found in a public place, finder has better rights than ALL EXCEPT THE TRUE OWNER.

If found in a private place, possession depends on:

* + - * + Where the finder was a “true” (honest, non-trespassing) finder
        + Whether the owner/occupier of the private place exercises strong control over the place.

If the finder was an agent/employee who found the object in the course of their work duties. In this case, employer has superior rights.

* ***Armory v Delamirie:*** chimney sweep who finds jewel in chimney.
* Ratio: the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, has such a property as will enable him to keep it against **ALL BUT THE RIGHTFUL OWNER.** As long as there is no true owner, he has good title (unless there is evidence of theft).
* **Abandoned Property:** object left in a place with the INTENTION of relinquishing ownership of it.
* **Lost Property:** COMPLETELY UNINTENTIONAL separation from owner. E.g., wallet falls out of bag.
* **Mislaid Property:** INTENTIONAL placement of something, but UNINTENTIONAL separation. E.g., putting your wallet on a table at a restaurant then leaving it by accident.
* **Hidden/cached Property:** INTENTIONAL hiding of object to keep safe, for an indefinite period.
* ***Parker v British Airways:***Parker found bracelet in lounge at airport. Gave to BA staff with instructions to return to him if true owner not found. BA sold it instead.
  + Court held in favour of Parker because:

Parker was honest and had every right to be in the lounge.

BA had not manifested an intention to exercise control over the building and things found in it. (Bank vault example of sufficient exercise of control.)

* ***Hannah v Peel:***Hannah was a soldier stationed in hospital operating from a mansion. Peel owned mansion but had never occupied. Hannah found hidden brooch in window frame that Peel was unaware of, brought to police, rightful owner never located. Police gave it back to Peel, who sold it. Hannah sued and was successful because:
  + Peel was never physically in possession of these premises at any time. “It is clear that brooch was never his, in the ordinary acceptation of the term, in that he had the prior possession. He had no knowledge of it, until it was brought to his notice by the finder.”
* ***Bird v Fort Frances (Town):*** 12-year-old boy found $1430 in a can under a private building. Police took it and deposited it into a bank account until the true owner could be found. Even though boy was trespassing and money was found HIDDEN on private property, Bird still had a superior title compared to the cop. He gets the money until/unless true owner comes forward.
* ***Clark v Maloney:*** Subsequent finders. Log harvesters harvest logs and tie up. Storm comes and breaks them away. Clark finds and reties. Another storm comes and breaks them away. Maloney finds and reties.
  + Holding***:*** Both Clark and Maloney were finders, but “first in time is better in right” so Clark has superior title unless true owners come forward.
* Quasi-bailee status: holding onto a chattel for the true owner, does NOT necessarily translate into ownership. Expected to hold onto them until prescriptive period (***Limitations Act***) is over.

### Abandonment

* **Abandonment**: Requirements similar to possession: *animus* to break all claims to the object and **physical abandonment** of the object.
* Geography important to determining status of abandonment:
  + If it’s in the middle of the road, probably abandoned. If it’s in a nook/cranny, probably hidden.
* Value also important, presumption that valuable things aren’t abandoned.
* ***Charrier v Bell:*** plaintiff “amateur archaeologist” who dug up graves of Indigenous people and claimed everything he found had been “abandoned”. Court said no bitch burying something implies you don’t want it to be found (hidden, not abandoned). Historians said also consider colonization and Indigenous people being forced from their lands.
  + Who owns the goods? There is no true owner – current Tunicas have best title to objects that have already been unearthed (collective possession), but they do not have the right to go unearth other buried goods from their ancestors.
* Cultural property: If you happen to own something with cultural significance, can you destroy/harm it? If not, who has rights to it? State? Church? Museum? Lots of controversy here.
  + Lots of property taken from Greece, Egypt, the Middle East and held in European museums. Do contemporary governments have rights to the objects from previous civilizations that existed on the land they now occupy?
  + Alternatives to cultural property:
    - Automatic state property
    - State institutions for buying cultural property (e.g., Ontario Heritage Trust)
    - Limitations on owner’s autonomy (e.g., obligations of care, limited transferability, right of first refusal by state institutions (if you try to sell state is entitled to buy at whatever price you list it at)
    - Complete non-ownership and non-possession (e.g., *res sacrae* (nobody owns it leave it in the ground)
* ***Alberta Historical Resources Act*** (p. 136) vests property of all archaeological resources and paleontological resources in the Crown.
* **Negative Property:** useless to everybody, no market for it, unpleasant and/or dangerous to have around. Not neutral like rocks, people are willing to pay for someone else to assume possession/ownership of the thing. Abandonment generally illegal. (e.g., waste removal)
  + Result of transition from circular (ashes to ashes) to linear (industrial) economy. Waste products cannot be reused/recycled. End of the line.

### Gifts

* **Gifts:** donative transfers. Carry out benevolent urges in the context of family (generally). Divergent legal requirements when compared to transactions that require consideration on both sides.
* The law is generally very ready to allow transactions with consideration without any formality – but not donative transfers/gifts. Delivery and seal requirements exist to ensure the parties contemplate the significance of what is happening in the context of their legal rights.
* **Gifts may be affected through:**

A valid will

A deed (document under seal) – no consideration needed because the formality implies that both parties are aware of the significance of the transaction.

A declaration of trust (to the effect that the initial owner holds the property in trust for a beneficiary.)

***Inter vivos:*** gift between the living

***Donatio mortis causa:*** a gift made in the contemplation of death.

* *Inter vivos* gifts require:

Intention to make a gift on the part of the donor

Intention to receive the gift on the part of the done

**\*\*Gift can be retracted any time before delivery\*\***

Delivery

* + - “Valid delivery marks termination of the donor’s dominion” (***Nolan***)
  + ***Nolan v Nolan:*** Australian paintings. Claimant relied on ex post facto evidence that the donor considered the paintings to have been gifted to the donee.
    - **Intent:** Considering both donor and donee were dead, the courts used extreme caution in assessing the intention and found the **donative intention had not been proven.**
    - **Delivery:** No delivery occurred. Paintings weren’t in matrimonial home. Some paintings were never in the possession of Cynthia and others were in her possession without the knowledge or consent of Sidney.
    - Note: this case held that words of gift are not essential as long as intention is present.
  + ***Re Bayoff Estate:*** deathbed gift of contents of safety deposit box to Ms. Simard.
    - **NOT DMC** because the intention was for the gift to take effect immediately, not after death. If the intention had been for the gift to take effect upon death it would have been contemplated in the will.
    - **IV:** 
      * + Intention of donor was clear (“everything in there is yours”, witnessed by lawyers)
        + Intention of donee clear, she went to the security deposit box and attempted to empty before Bayoff’s death.
        + Before death, only delivery of the KEY had been successful, contents not. BUT, fortuitously, Simard was the executor of the will and therefore gained access to the box after Bayoff’s death. Perfected gift through delivery.
* *Donatio mortis* *causa* gifts require:

Impending death from an existing peril

Delivery

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

* NOTE: for both IV and DMC all three requirements must exist upon delivery. If intention of donor is revoked and donee goes and takes the gift anyway (delivery) the gift is not valid.
* ***Alberta Evidence Act*** codifies what was already in the common law – evidence that is self-serving that the donor is no longer around to confirm or challenge must be corroborated.

# -------------------------------------------------------SEMESTER TWO--------------------------------------------------------

# Common Law Estates

## Introduction to Estates (Plenary)

* The doctrine of **estates** defines the duration of any landowner’s tenure and defines property rights over time.
* Freehold estates: the owner of a freehold estate has seisin (someone must always hold seisin, there can be no abeyance of seisin (***Stuartburn***)
  + **Fee simple:** Maximum ownership – absence of any temporal limits on your interest. Owners may come and go but the estate remains.(*Gray*)
    - Can be created through an instrument (grant or devise) or by operation of law (*Dower Act)*
    - In Alberta, fee simple interests can end by escheat or forfeiture. [*Unclaimed Personal Property and Vested Property Act*](https://open.alberta.ca/publications/u01p5)
  + **Fee tail:** Property ALWAYS stays in family. Could be specialized to transfer to heirs of certain genders or from certain relationships. (ABOLISHED IN ALBERTA – *s. 9 of LPA*)
  + **Life estate:** An estate that is co-extensive and co-terminous with the life of its grantee. A life interest cannot be unilaterally transformed into any interest of greater duration.
* The language of estates:
  + **Grants:** denotes inter vivos transfer
  + **Devises:** denotes transfer in will (death)
  + **In reversion:** An interest is transferred in reversion where it will revert back to the original grantor (or their estate). I.e. A grants life estate to B. A retains a fee simple in reversion so when B dies the interest will revert to A.
  + **In remainder:** An interest is transferred in remainder where it transfers to a third party after the temporally-limited estate is up. I.e. A grants life estate to B (widow) with remainder to C (child) – when B dies the interest will transfer in fee simple to the child.
  + **Words of purchase:** identify who acquires the interest “to A”
  + **Words of limitation:** signifies the quantum/duration of the estate
    - “and her heirs” denotes fee simple
      * + These were required under common law – no longer required in AB under the ***Law of Property Act s. 7(1)*** and the ***Wills and Succession Act s. 9(2)(b).*** Fee simple now presumed.
    - “to A for life” denotes a life estate.
      * + Language connoting a life interest can also “to A for as long as she wishes”
        + Life estates were presumed under common law (not true in AB)
        + Life estates can also be created by operation of law (Dower Act)
        + *Pur sa vie*: one’s lifetime – *Pur autre vie:* someone else’s lifetime.

## Common Law Estates II

### Interpretation of Wills in the Context of Estates

* ***Re Walker:*** The dominant intention of the testator must prevail as much as is legally possible. Walker’s intention was clearly to give his wife a fee simple interest with full benefits of ownership but he also wanted the remainder to go to his children. This was repugnant because it created both a fee simple and a life estate. Fee simple prevailed here.
* ***Re Taylor:*** “I give, devise and bequeath… to my wife to use during her lifetime.” Clear language affecting a life estate here, but wife also retains power of encroachment during her life.
  + “Where the testator uses plain language to indicate an intention to give a life interest only, that interest is not enlarged to an absolute interest because the testator has declared that the done is to have the right in her discretion to encroach on capital for her own proper maintenance. There is nothing in such a provision which can have the effect of displacing the clear intention of the testator.”
* ***Christenson v Martini Estate:*** “When she no longer needs… that she gives the property to the Christenson’s”. Judge identifies 5 possible interpretations:

Fee simple/absolute gift like Walker

Determinable fee: interest granted but will revert if a particular event takes place (wife no longer needs it)

Conditional fee: condition needs to be met for the gift to remain in effect (wife must still need it)

**Life estate without power of encroachment with remainder to Christenson’s (OUTCOME)**

License of occupation to wife, fee simple interest to Christenson’s

* Key distinction from Walker – **not drafted by a lawyer**. Court will do more to assess drafter’s intention where a lawyer wasn’t there to include words of limitation.
* Power of encroachment: power to reduce the capital, potentially until there is nothing left for the person with the remainder interest. Without a power of encroachment the person needs to live off the returns, cannot diminish the value of the capital.

|  |  |
| --- | --- |
| Policy Considerations | |
| Arguments for limiting transfers | **Arguments against limiting transfers** |
| Limiting dead-hand control | Property owner autonomy |
| Creating certainty + clarity | Preserving connections with the land (Indigenous, homesteaders, Hutterites) |
| Supporting alienability |  |
| Market efficiency |  |
| Social equality |  |

## Doctrine of Waste

* **Waste** – any act or inaction that causes physical transformation of the land (CAN BE POSITIVE)
  + **Only applies to life estates** – no need in fee simple, perpetual interest enough incentive.
* **Waste Law**: System of rules required to **balance interests of those in present possession versus the interests of those who will/may become** entitled to possession in future; reconcile the interest of life estate holder and the holder of reversion/remainder interest. Waste law addresses the fact that a life tenant has little to no incentive to maintain the property before they die (assuming the person holding the reversion/remainder interest is not close to them).
* **4 categories of waste:**

**Ameliorating waste:** results in benefit rather than injury (ex: renovations)

* + - 1. Liability unlikely but not impossible (ex: a developer tears down a historic site for luxury condos – economically beneficial but can still be liable.)

**Permissive waste:** failing to act to maintain the property (ex: overgrown weeds)

* + - 1. Life interest holder is presumptively not liable but this can be rebutted if there is an express clause requiring positive action.

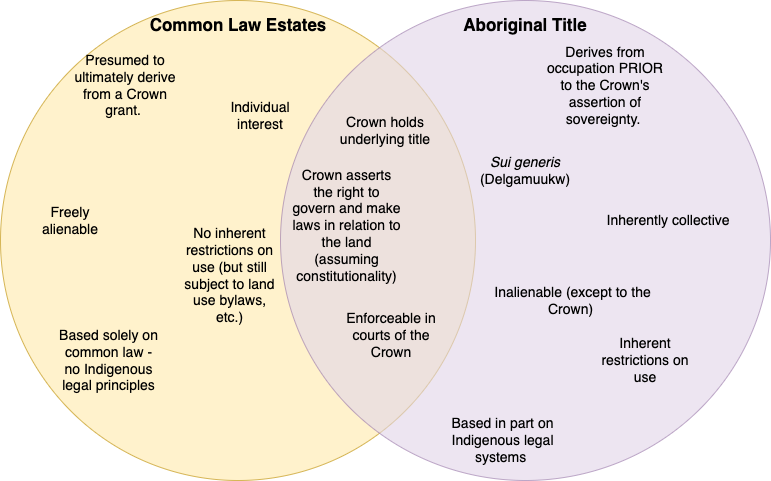
**Voluntary waste:** positive acts that diminish the property value (ex: damages walls by hanging shelving).

* + - 1. Life tenant is presumptively liable for this kind of waste but this can be rebutted if there is express language in the grant saying the tenant is “unimpeachable for waste)

**Equitable waste** (aggravated voluntary waste): wanton act that diminishes property value (ex: smashing a window on purpose.)

* + - 1. Life tenant almost certainly liable for waste unless there’s a really clear clause that says “unimpeachable for all waste including equitable waste” – highly unlikely).

# Aboriginal title



## The Doctrine of Discovery

* The doctrine of discovery was a principle of international law under which a **European government could claim sovereignty over a territory by discovering the territory prior to other European sovereigns** (regardless of the prior presence of Indigenous groups)
* As understood at common law, discovery gave the sovereign the power to govern the territory as well as the underlying (or radical) title to the land, but it did not necessarily give the sovereign a right to possession of land already occupied by Indigenous groups (***Johnson v M’Intosh***).
  + The Aboriginal property interest that burdened the Crown’s underlying title was known as “Indian title” (today Aboriginal title).

## Terra Nullius

* ***Terra nullius* means land belonging to no one; unoccupied or uninhabited**
* Most British territories first settled in the 17th and 18th centuries , were not treated a*s* ***terra nullius*** 
  + However, some British territories settled in the 19th century were treated as ***terra nullius*** including British Columbia and Australia
    - **The Crown asserted a claim to both sovereignty and full beneficial ownership of the land, despite prior Indigenous occupation of the land.**
* ***Terra nullius* has since been repudiated by courts** in both Australia (*Mabo*) and BC (*Calder*).

## History of Aboriginal Title

* Aboriginal title as been recognized by common law courts for at least two centuries (Johnson v M’Intosh, 1823), but it was recognized prior to that in the colonial practices of the British, in colonial statutes, and in imperial legislation (***BNA***).
* The practice of entering into land cession treaties with Indigenous people can be traced to the early days of British settlement in the 17th century.

### Recognition of Aboriginal Title in canada

* ***St. Catherine’s Milling v The Queen (1888):*** Dismissive of Aboriginal title, called it a “personal and usufructuary right” – something short of a true property right.
* ***Calder (1973):*** left open the possibility that the doctrine of Aboriginal title applied in BC and that title had not been extinguished through legislation. Repudiated the doctrine of *terra nullius*. This raised the prospect of title claims through vast swaths of unceded territory in BC.
  + Eventually resolved through the **Nisga’a Final Agreement** (modern treaty)
* ***Constitution Act of 1982*** was ambiguous, but constitutionally protected Aboriginal title.

## Outstanding Aboriginal Title Claims

* Many Aboriginal title claims remain unresolved, what now?
  + Treaty negotiations like the ones that led to the Nisga’a Final Agreement and other modern treaties.
  + Litigation to have Aboriginal title declared by the courts (***Delgamuukw***)
    - ***Delgamuukw:*** Aboriginal title claim brought forward by Gitxsan and Wet’suwet’en peoples. Dismissed due to procedural issues but still gave plenty of information about Aboriginal title (below).
    - ***NOTE:*** even if a title claim exists, the group may still have Aboriginal rights associated with the land under the ***Van der Peet*** test.

### sources and content of Aboriginal Title ***(Delgamuukw)***

**Aboriginal title is *sui generis*:** a unique estate. Informed by common law and Indigenous perspectives.

It is based on occupation by an Indigenous group prior to the Crown’s assertion of sovereignty. The Royal Proclamation recognized this interest but did not create it, which is relevant in BC where the Royal Proclamation may not apply.

Aboriginal Title comes from

* + - 1. Occupation of land; and
      2. The relationship between the common law and pre-existing principles of Indigenous law; BUT

The Crown holds underlying title, as it does with any estate in Canada, on the basis of “asserted title”. This is controversial.

Aboriginal title is inherently collective in nature, held by the Indigenous nation as a whole.

Aboriginal title includes the right to exclusive use and occupation, subject to unique features and restrictions:

* + 1. Inalienable EXCEPT to the Crown;
    2. Inherent limit on use: uses must not be “irreconcilable with the nature of the occupation of the land and the relationship that the particular group had with the land”
       - So, Nations cannot use a traditional hunting ground for strip mining, nor can they build a parking lot on culturally significant land. (Paternalistic) BUT – uses are not restricted to those uses that the group traditionally engaged in. Aboriginal title has a modern, economic component.

### Establishing a claim to aboriginal title ***(Delgamuukw)***

* Test for Aboriginal title:

1. Occupation of land **at the time** the Crown asserted sovereignty over the land. Consider:
   1. Indigenous laws in relation to the land.
   2. Physical occupation (dwellings, cultivation, regular use (hunting, transpo))
2. **Continuity** of occupation (if present occupation is relied on as proof of pre-sovereignty occupation)
3. Occupation must be **exclusive**.

#### Application of this test in ***TsilhQot’in***

1. **Occupation of the land:** 
   1. **Oral history:** SCC said the courts must consider oral evidence – would be unjust to require written records from Indigenous groups that rely on oral history.
   2. **Rejection of site-specific approach:** Must consider the size of the group and the manner of life – nomadic peoples may use a broad swath of land regularly even if they don’t technically live on it full-time or continuously.
   3. **Character of the land:** more inhospitable land may force groups to make use of larger tracts.
2. **Continuity:** Seasonal use of tracts of lands sufficient to ground claim in some cases – nomadic peoples, inhospitable tracts of land.
3. **Common law relating to occupation:** Adverse possession not the right doctrine – **General Occupancy:** “intention to occupy and hold land for the purposes of the occupant.”

### Theory: Why is Aboriginal Title Inalienable?

* Ensures settlers receive title from the Crown (certainty, clarity) (***Delgamuukw***)
* Ensures Indigenous people are not dispossessed of their entitlements. (***Delgamuukw***)
* Reflects the relationship and connection an Indigenous group has with the land. (***Delgamuukw***)
* Protects interests of future generations of Indigenous people. (***Tsilqhot’in***)
* Other reasons?
  + Crown military and diplomatic relations with Indigenous peoples
  + Outdated paternalism
  + Some Indigenous legal systems do not treat land as an alienable commodity.
  + Ensuring the maintenance of a collective land base for self-government.

## Contemporary Issues

* Government decisions related to Crown lands that are subject to asserted but unproven title claims (Haida Nation) (i.e. Trans Mountain and Northern Gateway pipeline projects).
* Government decisions relating to Crown land that is later recognized to be subject to Aboriginal title (Tsilhqot’in)
* Common law Metis title
* Asserted Indigneous authority over land prior to a declaration of title or land claim settlement.
* Aboriginal title claims to private lands. (OPEN QUESTION in Canadian Law)

# Other Indigenous Interests in Land (Plenary)

## Framework for Aboriginal Property Interests in Canadian Law

## Indian Act Land Tenure

* Tenure under the Indian Act is the default land regime on most FN reserves.
* Crown defines “reserve land” and sets aside for use by the band council, who has the formal authority over land use:
  + Can grant and revoke interests in land through resolutions (colonial law) or through Indigenous legal traditions.
* Certificates of possession allow for perpetual member-rights of possession that CANNOT be withdrawn unilaterally by council.
* Leasehold interests may be granted to members OR non-members

### Processes under the Indian Act

1. To issue a grant of a right of possession (Certificate of Possession) to an individual on reserve land band **council** must issue the certificate after it has been approved by the **minister** (***20(1)***). This is fundamentally different than non-Indigenous land transfers – paternalism.
   1. Certificates of possession may ONLY be granted to bandmembers.
2. If a band wants to sell or lease land to a private party for more than one year, it must first be approved by the minister.

## Non-Indian Act Land tenure

* ***First Nations Land Management Act (FNLMA)*** 
  + Crown continues to hold underlying title (***5(a)***)
  + Allows FNs to opt out of the IA by enacting a land code.
  + Still cannot provide for individually held fee simple titles, but allows for other types of interests – leaseholds and allotments.
  + Minister enters into agreement but then their role ENDS – divergence from the Indian Act.
  + Individual nations create any restrictions regarding transferring interests under the land code. Some options:
    1. Freely alienable
    2. Strict title registries
    3. All transactions must be approved by council
    4. Probably cannot make a perpetual possessory interest that is freely alienable to non-members.
  + No AB nations have done this yet.
  + Ex: Lleidli Tenneh Land Code
* Modern treaties and self-gov agreements with the Crown:
  + Ex: Nisga’a Final Agreement: permits fee simple interests subject to Nisga’a Nation jurisdiction.
  + Nisga’a agreed not to assert Aboriginal Rights and Title in exchange for the Crown’s recognition of Nisga’a fee simple ownership of defined land.
  + Far-reaching self-gov powers – created legislation to allow individual members to receive fee simple title to parcels of land. This allows for free alienability and ease in mortgaging (because the bank can take the land as security if the borrower does not pay.
    1. Potential to attract capital and investors
    2. But also potential for land to accumulate under a few more wealthy/influential members or for the community to eventually lose control of the land if lots of outsiders move in. Cultural impacts: this land base may no longer be the locus for this distinctive culture and way of life.
* ***Komoks v Thordarson:*** non-Indigenous renters on Indigenous land covered by the Komoks Land Code (entered into under the FNLMA). This case confirmed that Land Codes are FN legislation, part of Canadian law and enforceable in non FN courts. Therefore, parties engaged in land transactions on a reserve covered by a land code should be aware of applicable law, which may vary Nation to Nation.

# Equitable Interests

## Origins of Equity

* Parties that thought the common law's rigidity had failed them would ask the King to remedy these injustices. The King eventually started delegating these decisions to the Lord Chancellor. These were the courts of equity and decisions were based on discretion and what "should be done."
* 2 aspects of feudal land tenure that made equity important in property law:

1. Before the wills act you could not direct who you wanted to inherit your land. It went through primogeniture - automatically to the oldest son.
2. Certain obligations under feudal system, including paying onerous amounts of money whenever a tenant died and their child inherited.

* To get around this, landowners would assign the legal title to a group of their friends but would tell them that the land was for the "use of" the landowner's son. This kind of inheritance of use interests and NOT legal interests did not trigger the same feudal obligations. Basically a form of tax evasion.
* Sometimes, this would not go well and the legal title holders would try to maintain use of the property. The common law courts could not remedy this - in their eyes the use and enjoyment of the land went to the legal title holder. To remedy this, the beneficiary (use holder) would go to the courts of the Chancery. The Lord Chancellor was willing to recognize use holders and provide remedies in these situations.
* Created a system in which one court recognized one party’s interest (legal) and the other recognized the opposite party’s interest (equitable). King Henry VIII brought forward the Statute of Uses to put a stop to this nonsense, but it was not successful.
  + The Statute of Uses put both legal and equitable title in the hands of one beneficiary (B, the equitable holder). The Statute of Uses could only execute one use, so lawyers eventually started layering uses to get past the Statute of Uses”
    1. *"To A and his heirs to the use of B and his heirs to the use of C and his heirs."* - Statute of Uses would consolidate the title into B after the [green] portion of the text, at which point the Statute of Uses would be "spent". Then, the orange part could come into play and C would have a use interest.

## Modern trusts

\*\* These people can be all different or partially the same.

* Procedural fusion: Parliament fused the courts in the 1870s. A single court system applied to both law and equity. However, bodies of law still considered to be distinct. **Equity prevails over common law (*Judicature Act s. 15*).**
  + However, good faith purchaser for value without notice is an exception to this rule.
  + A has a legal interest and B has an equitable interest – A sells parcel to C.
    1. If C knew that B was holding this land in trust then there is no good faith purchase and they are bound by that interest. BUT, if C did not know and bought from A without knowledge of B's interest, C has made a good faith purchase and will not be bound by B's interest. Reflects the idea that equity acts on a person’s conscience.
    2. Regardless, A continues to owe the fiduciary duty to B. So B can sue A for monetary compensation.
    3. NOTE: If an interest is registered in the land titles registry that is deemed to provide notice, there can be no good faith purchase for value without notice in this case.
* Examples:
  + To the use of A, in trust for B.
    1. Legal fee simple to A, equitable fee simple to B.
  + To the use of A in trust for B for life with the remainder in trust to C in fee simple.
    1. Legal fee simple to A, equitable life interest to B, equitable fee simple to C.

## Resulting Trusts

* **Resulting Trust:** A trust arising by implication of law when it appears from the nature of the transaction that it was the **intention** of the partiesto create a trust. It is therefore to be distinguished from a constructive trust in that it arises **automatically** out of certain circumstances by **operation of law**, while a constructive trust is a remedy that equityapplied in order to prevent injustice or in order to do justice. (*Barron’s Canadian Law Dictionary*)

A resulting trust may occur in the following situations:

1. **Incomplete disposal:** Beneficial entitlement under a trust has not been fully or properly disposed of by the settlor. I.e., Grant from A to B in trust for the life of C - what happens after C’s death? Resulting trust resolved in favour of the settlor (A)
2. **Gratuitous transfer:** There is a presumption against giving something away for free unless there is a clear intention to gift. If this is not present, resulting trust resolved in favour of settlor.
   * In situations of gratuitous transfer, a presumption of resulting trust is the general rule. However, in some situations the opposite presumption arises: **a presumption of advancement.** Whether this will arise depends on the relationship between the grantor and the grantee; often will arise in parent and minor child relationships.
   * ***36(1) of the Family Property Act*** limits the application of the presumption of advancement. Cannot apply in a transaction between spouses.
3. **Ineffective deed of trust:** May occur where the trust contravenes public policy or was created through fraud or duress. Resulting trust resolved in favour of settlor.

* ***Pecore v Pecore:***In cases involving adult children, the presumption of advancement **does not** apply regardless of the financial dependence of the child on the parent. The presumption of resulting trust must be applied and there must be clear evidence (on a balance of probabilities) that the grantor intended to gift the property to the grantee.

## Constructive Trusts

* **Constructive trusts** are created where there is no intent of the parties to create a trust, but good conscience requires it.

### Remedial Constructive Trusts

* **Remedial constructive trust** - a judicial remedy, often used in situations of unjust enrichment. These used to be commonly used for division of assets of unmarried spouses, but this has been replaced by reforms to the [*Family Property Act*](https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-f-4.7/latest/rsa-2000-c-f-4.7.html) in 2021.
* **Unjust Enrichment** occurs when no party has committed a wrong, but an unjust outcome has occurred. Ex: a mistaken payment.
* ***Moore v Sweet*** is an example of unjust enrichment resulting in a constructive trust. Ms. Moore had a contract with ex-husband (Mr. Moore) that she would pay life insurance payments and he would have her as the beneficiary. Ms. Moore holds up her end of the bargain, but Mr. Moore changes beneficiary to Sweet (his new spouse). Moore would have been able to sue Mr. Moore for breach of contract, but he’s dead. Instead she sues Sweet for unjust enrichment (as a result of the breach contract). Sweet has done nothing wrong, but was enriched by the breach. Even though the test is not met, the court orders a constructive trust, basically because it is easier. If it were a monetary remedy Sweet would need to take the money and then pay it to Moore. This is risky because Sweet could spend the money. Moore would still be entitled to sue her but if the money doesn’t exist she's screwed. A constructive trust says "this money belongs to Moore.
* Requirements of unjust enrichment:
  + Enrichment of the defendant (Sweet received insurance payout)
  + Corresponding deprivation suffered by the plaintiff (Moore had a contractual right to the payout)
  + Absence of a juristic reason for the enrichment and corresponding deprivation (Insurance Act militates to Sweet, but the court says for the juristic reason to be valid, it must account for both the enrichment **and** the deprivation, but the statute here only accounted for the enrichment. So no valid juristic reason found)

**Test for creating a remedial constructive trust (*Moore v Sweet*):**

1. A monetary remedy would be inadequate (ie. Property has sentimental value; AND
2. A causal connection exists between the plaintiff’s contribution and the property

NOTE: residual discretion exists to impose a constructive trust for other reasons, like administrative efficiency.

### Institutional Constructive Trusts

* **Institutional constructive trust** - arises in situations where property is acquired through wrongful conduct in breach of an equitable duty (ie: fiduciary duty) – enrichment NOT necessary.
  + During interim period between signing an agreement to buy a house and the actual transfer of title the to-be land is held in a constructive trust. A court could order the equitable remedy of specific performance. More likely than damages for breach of contract for purchase of land because all parcels are “unique” (Presumption against the adequacy of damages).

**Criteria for creating an institutional constructive trust (*Soulos*):**

1. The defendant must have been under an **equitable** obligation in relation to the activities giving rise to the assets in his hands (ie: **fiduciary duty**)
2. The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff
3. The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties (deterrence); AND
4. There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case. (equity shouldn’t be used to create injustice)

* ***Soulos:*** Realtor negotiates with seller re: a property. Once he secures a good deal, instead of buying the property on behalf of his client he arranges a transaction where he ends up holding the property. BUT, unjust enrichment does not apply because the property value decreased and the original buyer dodged a bullet. Court’s still finds a constructive trust because such conduct needs to be deterred and the agent shouldn’t be able to keep the products of poor conduct.
* ***Bulun Bulun:*** Indigenous man in Australia was given permission by his Nation to use their traditional knowledge to make art. Under the statutory copyright regime the artist has the sole interest in this work. The community argues that it too has an interest in the work, in that it is represented in the traditional laws and customs regarding stories and knowledge. Court says that these Indigenous laws are not directly part of Australian law, they have been displaced by statute (Copyright Act, in this case)
  + Under the terms of the Act, an entire community cannot hold the copyright. So how can the community's interests be reflected in law? A fiduciary duty. The court says that if the copyright holder (artist) had breached the fiduciary duty there may have been a finding of a constructive trust (this did not happen, because the copyright holder did the right thing.) If there were a breach of fiduciary duty, the parties to the constructive trust would be:
    - Legal title (trust) would be held by the artist
    - Beneficial title would be held by the community.

# Qualified Transfers and Future Interests

## Terminology

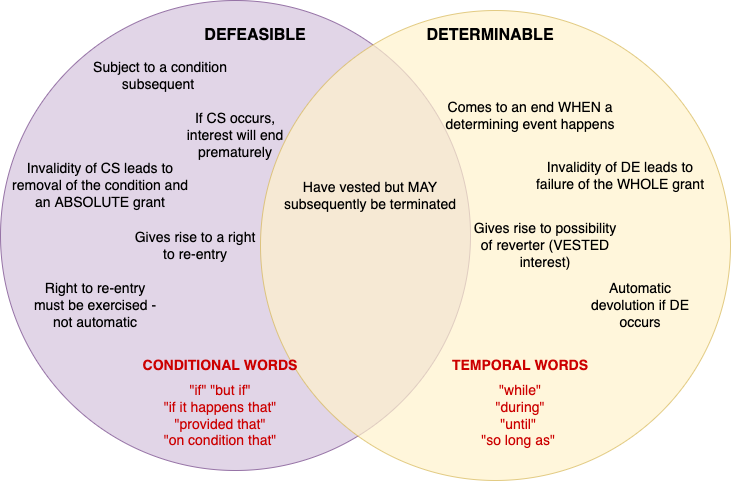
* **Reversion:** if a party transfers a life interest but not a fee simple, the property will “revert” to the grantor at the end of the grantee’s life.
* **Remainder:** if a party transfers a life interest to one party then a fee simple to another, the property will go to the fee simple owner in remainder after the death of the life interest holder.
* **Vested interest:** an interest NOT subject to a condition that must be satisfied prior to enjoyment. Presumptively alienable.
  + **Vested in possession:** gives rise to a present right of use and possession.
  + **Vested in interest:** gives rise to future use and enjoyment.
    - A fee simple in reversion or remainder subject to a life estate is generally seen as vested in interest because the death of the life tenant is inevitable (***Stuartburn***).

## Presumptions

* **Presumption against intestacy:** “if the will is capable of two interpretations, the court will prefer the interpretation which disposes of the whole state in preference to that which results in an intestacy.” (***McKeen Estate***)
* **Presumption in favour of early vesting:** When the words of a grant are ambiguous, courts will tend to avoid interpretations that give rise to contingent interests (defeasible).

## Grounds of Invalidity

* Impossibility
* Uncertainty: *ex: “family”* *(****Fennell****) “residency” (****Hayes****)*
* Contrary to Public Policy: *ex: racist scholarships*
* Impermissible restraint on alienation: *ex: “members of the family must be able to stay whenever they want” – most people would not want to buy this house with this condition. (****Fennell****)*
  + Can be direct or indirect – indirect would affect the marketability of the property to the point that it affects alienation.
  + Mechanisms of restraint:
    - Mode: “this property must be sold to Trinity College for $9375.00.” – restrains the estate’s ability to sell the property at market value. Would be permissible if amount wasn’t noted.
    - Class: “this property must be sold to a member of the Lamb family.”
    - Time: “this property cannot be sold for 50 years after my death.” However, a shorter term restriction may be okay “Trinity college must have 1 year to decide whether they want to buy Blackacre.”
  + Forms of restraint:
    - Disabling: removes the power to transfer. “this property must not be sold”
    - Forfeiture: forfeits interest if transfer is attempted “if A attempts to sell Blackacre, it reverts to B’s estate.”
    - Promissory (contractual): Purely contractual and not on title is PERMISSIBLE. *In personam* agreement, remedy is damages for breach of contract. No impact on third party interests.
* Violates RAP
* Violated Legal Remainder Rules

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**Examples:**

* **Valid** defeasible interest: To A in fee simple, on the condition that if the property is not used as a residence, my estate may re-enter.
  + If A stops using the property as a residence, the grantor’s estate may exercise its right to re-entry.
* **Invalid** defeasible interest: To A in fee simple, on the condition that they maintain the residence.
  + Fails for uncertainty – what does maintain mean?
  + Remedy: Absolute grant to A.
* **Valid** determinable interest: To A in fee simple, while the property is used as a residence.
  + If A stops using the property as a residence, the interest is automatically reverted back to the grantor/their estate.
* **Invalid** determinable interest: To A in fee simple, so long as my family is allowed to reside within the house whenever they want to.
  + Fails for uncertainty and restraints on alienability.
  + Remedy: Grant fails entirely.
* **Valid** condition precedent: To B in trust for A in fee simple if/when she turns 18.
  + A is granted the property when she turns 18.
* **Invalid** condition precedent:To A in fee simple if she births a smart child.
  + Fails for uncertainty.
  + Remedy: Grant fails entirely.
* The distinction between defeasible and determinable is highly formalistic but can have serious implications. Where a will is drafted by a layperson, the courts can utilize the equitable doctrine of rectification to change the language so that it reflects the obvious intention of the testator. (***Caroline (Village) v Roper***)

## Legal Remainder Rules

* Legal Remainder Rules **ONLY** apply to transfer of **LEGAL TITLE** between **LIVING** people.
  + Technical, precise, and narrowly applicable.
* Rationale: promotes alienability by keeping interests simple, keeping restrictions limited.

**THE RULES:**

1. **A remainder after a fee simple is void (can’t be directing where fee simple goes after you have given it away).** 
   * **Justification:** attempting to direct future transfer of a fee simple estate is contrary to the nature of the fee simple, which is absolute ownership.
   * **Scope:** This rule will void a straight remainder on a fee simple, as well as a possibility of reverter (reversion) or right of re-entry on a fee simple, **IF** it is transferred to a third party in the same grant.
     + The transferor can retain a right of re-entry or reverter (REVERSION) on a fee in condition grants
   * Don’t want to direct the future transfer of a fee simple estate.
   * Examples of transfer that violate rule:
     + To A in fee simple with remainder to B in fee simple – the remainder to B is void.
     + To A in fee simple, but if the property is not used as a residence, then to B in fee simple – void because it is in the same grant, giving the right of re-entry to a third party on a fee simple estate.
2. **An estate of freehold (ownership) is void if it is designed to take effect in the future, unless it is supported by a prior particular estate (need to have provided for the interim).**
   * **Justification:** must be continuity of seisin. Common law will not tolerate a gap.
   * **Scope:** Applicable to any interest arising in the future (remainder, re-entry (condition precedent), reverter) must be supported by a prior particular estate
     + Example of violation: to A on the day she turns 21
     + Example of valid: to B for life, remainder to A.
3. **A remainder is void if it is to take effect by cutting short a prior particular estate. – a remainder must await the regular ending of the prior particular estate (temporal language)**
   * **Justification**: transfers that violate the rule add undue complexity to the system in estates of land
   * **Scope**: applies to **defeasible** interests, but not **determinable** interests
   * Example of a non-compliant grant:
     + “to A for life, on the condition that the property be used as a residence (condition precedent), but if it is not, then to B” --> premature end date (DEFEASIBLE)
   * Example of a compliant grant
     + “to A for life until the property is no longer used as a residence, then to B” (DETERMINABLE)
   * Non-compliant example cuts the interest short, whereas the second interest is defined to run only until a certain time.
4. **A legal CONTINGENT remainder is void unless it vests at or before the termination of the prior particular estate.** 
   * **Justification:** Ensuring timely vesting and continuity of seisin, no gaps.
   * **Scope:** Applies to contingent (unvested) future interests
   * Note: that because a possibility of reverter is treated as a vested interest in Canadian law, this rule would **not** apply in the case of determinable interest
   * Three Categories:

(1) Contingent remainder guaranteed to vest, if at all, before the termination of the prior interests are valid, no gap in seisin

To A for life, remainder to B if he marries before A’s death.

**Valid** because it vests before the termination

(2) Contingent remainder guaranteed to vest if at all, after the termination of the prior interest are invalid

To A for life, remainder to B, if he marries after A’s death (no way B can satisfy this before A’s death).

**Void** because guaranteed gap in seisin

(3) Unclear whether contingent remainder will vest before the termination of the prior interest - wait and see (invalid if it results in gap in seisin)

**Solution:** **wait and see,** if there is a gap then grant is void

To A for life, remainder to B if B marries – if B is married before A dies then it is valid (no gap of seisin), if not it is invalid.

\*\*This branch **sometimes** applies to wills (***Purfoy; Re Crow***) BUT, even this rule CANNOT apply to wills in Alberta because property under a will is temporarily held in a statutory trust (?) ***Devolution of Real Property Act ss. 2, 3***

## The Rule Against Perpetuities

**An interest is valid if it must vest, if it is going to vest at all, within the perpetuity period. That period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years.**

* Applies to CONTINGENT interests in real or personal property, including both legal and equitable interests.
* Does NOT apply to vested interests at common law.
* Rationale: acts to prevent uncertainty about property interests from extending too far into the future.

### Applying the RAP

**\*\*P. 588 for good wording**

1. **Is the limitation one to which the RAP may apply?** 
   1. Applies to contingent interests, NOT vested interests.
      * DOES NOT APPLY: To A for life, then to B for life, then to C for life, then to D in fee simple.
      * APPLIES: To A on the condition that A remain married to B.
2. **What is the date of the creation of the interest?** 
   1. Will: interest is created on the death of the testator.
   2. *Inter vivos* transfer: the interest arises on the date the instrument takes effect.
3. **Who is/are the life/lives in being?**
   1. Must meet these conditions and may be **expressly or impliedly** designated in the grant.
   2. Conditions that have to be satisfied:
      1. Measuring lives must be human.
      2. Measuring lives must be living (including those in gestation) at the date of the creation of the interest.
      3. If a group of persons is used as the measuring lives, that group cannot be capable of increasing in number after the date of the creation of the interest.
      4. If a group of persons is used as the measuring lives, that group must be ascertainable.
      5. It is possible to not have a life in being (in the case of two corporations) in that case - the period is 21 years.
      * *Ex: A devise from T “to all my grandchildren in fee simple.” T has two children, X and Y, who are both alive.* 
        + *The grandchildren cannot be measuring lives because they are capable of increasing in size (X + Y can have more kids).*
        + *So, X + Y are the measuring lives.*
        + *So, once X + Y die, the interest must vest within 21 years*
        + *This does not violate RAP because the contingency (who are the grandchildren?) resolves on death of X + Y – can’t have any more grandchildren.*
4. **Is it theoretically possible to construct circumstances in which vesting would occur outside of the perpetuity period?** 
   1. Theoretical NOT actual events or probabilities.
   2. Presumption of fertility for both males and females.
   3. If you are alive you can have a child. (Fertile octogenarian and precocious toddler (pp. 586-87).
5. **Can the limitation period which is invalid under the general law be saved through the application of the statutory modifications to the RAP?** 
   * Statute is a SAVING MECHANISM – if permissible under common law, don’t need to consider statute.
   * ***Alberta Perpetuities Act:*** 
     + **Reforms:** 
       - **Key reform: “wait and see” rule (*ss. 3, 4, 5*)**: if an interest violates the common law RAP because it MIGHT not vest during the perpetuity period, one should wait and see if actual events establish that the interest actually will vest, if at all, during a perpetuity period
       - **Age Reduction (*s. 6*):** if an interest is set to vest at an age greater than 21 and would violate the RAP, the age of vesting should be reduced to 21 if that will save the interest.
       - **Class splitting (*s. 7*):** late vesters can be excluded from the class in order to save the disposition for those who vest on time.
       - **General Cy-Pres Provision (*s. 8*):** where a disposition is invalid solely on the basis that it violates the RAP and it is possible to ascertain the general intention governing the disposition, then the disposition can be reformed by a court to give effect to the general intention within the limits of the RAP.
       - **Realistic Assumptions on Capacity to have bio-children (*s. 9*):** 
         * Men can have kids at 14+
         * Women can have kids from 12-55
         * Actual capacity can be considered through evidence for living persons.
     + **Order of Application of the reform provisions (*s. 11*):**

**Capacity to have children**

**Wait and see**

**Age reduction**

**Class splitting**

**General cy-pres**

* + - **Flat perpetuity period of 80 years for commercial interests (*s. 18*)**. If a contract would have allowed an interest to be acquired beyond 80 years from the date of the contract, the right to acquire the interest is held to expire at 80 years.(Would apply to top leases like ***Scurry Rainbow***)
      * ***Scurry Rainbow:*** Mineral lease –Taylor leases mineral right to Imperial Oil for ten years or until it’s no longer producing oil then grants a lease (conditional interest). Held to violate RAP as it went beyond 21 years.
        + **Grant of a top lease:** a lease granted to another party if the lease to the original party comes to an end if it is within 42 years
        + Court held RAP doesn’t apply because:
        + Top leases are encouraged in commercial cases, because it encourages Imperial Oil to use it or lose it
        + Not bound by the rule because underlying purpose of the rule isn’t reflected in these circumstances
    - **Special perpetuity period of 40 years for (*s.19*):** 
      * Right of re-entry on breach of a condition subsequent
      * Possibility of reverter on determination of a determinable fee simple (except for mineral leases)
      * Possibility of resulting trust on determination of a determinable interest (except for mineral interests)
      * NOTE: RAP would not apply in relation to determinable interests at all if it weren’t for s. 19 because they are considered vested.

## Public Policy

* There are certain conditions that are so egregious and anti-social that they cannot possibly be upheld.
* Values at the heart of a liberal society at odds with each other here: equality and basic human rights and freedom of property.
* Courts are reluctant to use “public policy” reasoning to strike down conditions because it is vulnerable to individual justices infusing the law with their own personal ideas.
* ***Re Millar Estate:*** Charles Vance Millar, rich lawyer and practical joker died in 1926, leaving his estate “to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the registrations under the Vital Statistics Act,” after 10 years following his death. Court held that this is weird obvs but there’s no pressing public policy reason or common law reason to disallow.
* ***Re Leonard Estate:*** Leonard was very worried about then British colonies seeking independence, communism, and ze germans. So he created a scholarship to be given to “British Subjects of the White Race and of the Christian Religion in its Protestant form”, in a number of Canadian universities, preference given to clergymen, schoolteachers, military officers and engineers. Both men and women are eligible, but max. 25% of beneficiaries can be women. It operated for 60 years (20s to 80s) without anyone questioning it. Court in the 80s said it was fine, court in the 90s thought maybe no. Considerations:
  + How can the courts say, 60 years later, that these clauses are now contrary to public policy? What are our sources for public policy?
    - Public policy is not static - changes with society.
    - Justice Robins quick to say that racism and religious superiority is obvs counter to public policy.
    - Justice Tarnopolsky more careful – considered case law where racism was not held to offend public policy. But then he considers human rights legislation and the tort of discrimination and decides public policy has changed and racism is bad now.
      * Public policy must be gleaned from a variety of sources – statutory, declarations of government policy, the Constitution.
      * Tarnopolsky careful to say that racist conditions are okay in private family trusts, just not in public charitable trusts. Values **testamentary freedom**.
* So what happens when a charitable trust/foundation’s mission becomes impossible?
  + Cy pres: “As close as possible”
    - ***AG v Ironmongers’ Company***: Concerns a trust created in 1723 to free British slaves taken by the Ottoman Empire or by Barbary Coast pirates. By 1830, there were no such slaves. What should happen to the trust income? Instead of a reverter, the income should be spent on something “as close as possible” to the liberation of British slaves – liberation of other slaves.
    - Modern examples of Cy-Pres:
      * Changes in name, location, institutional identity. “to benefit the Beale St Hospital”.
      * Intervening factual or legal impossibility: ex: trust created to aid the liberation of Eastern European countries from Communist rule – no longer valid after 1991.
* ***Re Ramsden Estate:*** UPEI scholarship to be awarded to protestant students annually. Contradicted PEI University Act that said control of uni funding had to be non-denominational. Remedy here (cy pres) was to create a separate board (not part of the University) which would decide which students could get the scholarship based on their protestantism and other factors.
* ***Royal Trust Corp v UWO (In re Priebe):*** Clearly an incel, glad he’s dead. “…awards or bursaries to Caucasian (white) male, single, heterosexual students in scientific studies… No awards to be given to anyone who plays intercollegiate sports. … [Further, an] award is to go to a hard-working, single, Caucasian white girl who is not a feminist or lesbian, with special consideration, if she is an immigrant, but not necessarily a recent one.” Court ruled this was counter to public policy and couldn’t do cy-pres because he had an express clause the if the gift were voided for public policy the gift would be deleted.
* ***McCorkill v McCorkill Estate:*** Some guy left all his money to a neo-nazi org. Court said because the activities the money would be used for are illegal under the CC and counter the Charter the gift was clearly invalid – give to his closest relatives instead. Criticisms:
  + This is an absolute gift, not a conditional estate.
  + It would be legal to donate to this org while you’re alive
  + You can leave your money to an actual criminal if you want.
* ***Spence v BMO:*** Dad cut his daughter out of the will because she married and had kids with a white man. Court decided in favour of the dad/his estate – testamentary freedom.

# Leases and Licenses

## Introduction to Leasehold Interests

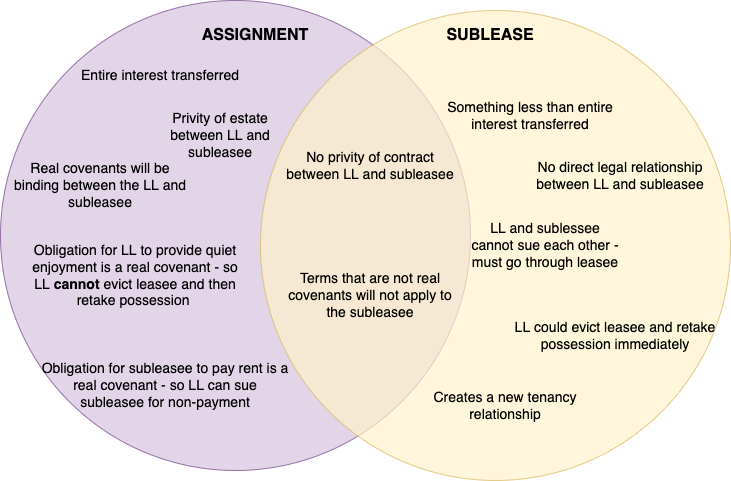
* **Leasehold interests:** Time limited right of possession in land
* Residential vs non-residential leasehold interests
  + Residential leases are entirely governed by statutes (RTA)
  + Commercial/non-residential leases are still largely governed by the common law.
* Leases are at the interface between property and contract.
  + *In rem* rights
  + Tenants can avail themselves of these rights - a tenant can sue someone for trespassing.
  + Proprietary in nature, but more customizable than a fee simple or a life estate.
* Legal remainder rules **DO NOT** apply to leases. There is no actual transfer of seisin - the party seised in estate remains the fee simple holder.
* Four types, all time-limited in one way or another, difference is in the ways in which limits operate:
  + **Fixed term**: fixed term under which the lease runs, when the term is up the right of possession ceases.
  + **Periodic tenancy:** for recurring periods of time (month-to-month) - recurs over and over until parties give notice to terminate it.
  + **Tenancy at will:** indefinite but can be terminated at any time by either party.
  + **Tenancy at sufferable:** Not really a lease. Basically, the tenant has overstayed the lease but the common law still requires them to pay their rent/uphold their side of the bargain.

### Leases vs licensees (*Fatac; Metro-Matic*)

|  |  |
| --- | --- |
| Lease | License |
| Grant of exclusive possession (p.294 in PPL) | **Permission to do that which would otherwise amount to a wrong (Trespass) based on some express or implicit agreement with the owner (Ziff)** |
| *In rem* right | *In personam* |
| Interest in land | NOT an interest in land |
| Binding on third party purchasers even without notice | Presumptively not binding on third party purchasers |
| Leasee is granted right to sue in trespass | Licensee does not have standing to sue in trespass generally |
| Leasee protected by provincial statutes | Licensee generally not protected by provincial statutes |
| Revocability limited by statute | Generally revocable at will |
| While the lease is in operation, the landlord retains a reversionary interest but their possessory right is suspended for the term of the lease. | Licenser’s possessory right remains during term of license. |

* ***Fatac*:** was the right to operate a quarry under a lease or a license? If there is a right to **exclusive possession** it is a lease, if it is something short of that, it must be something else. Even if the party calls it a lease/license, it doesn't matter if that name doesn't align with exclusive possession. Will still consider intention of the parties on the question of whether there's exclusive possession. In Fatac, the agreement to operate a quarry is a **LICENSE** because the agreement does not give rise to the right to exclude the landlord.
* ***Metro-Matic:*** A tenant has an agreement to set up laundry machines in a landlord's buildings. Finding: LEASE. Minor restrictions on tenant’s exclusivity does not destroy the lease in its entirety.
  + Factors going both ways:
    - Lease:
      * There was a promise that no parties would disturb the tenant's possession. (Right of quiet possession).
      * Parties call it a lease (this goes to the intention of the parties to create a right of exclusive possession.)
      * New landlord was bound by agreement
      * Occupancy demonstrating possession by having machines there
    - License:
      * 6(b) and 6(2) give landlord control over the room

### Transfer of Leasehold Interests

****

* **Privity of Estate:** Terms in a **lease** agreement that “touch and concern” land may be enforced by the assignees of landlords and tenants based on privity of estate.
* ***Merger Restaurants v DME Foods:*** Merger claims that it has a lease agreement that guarantees a certain number of parking spaces and does not allow the landlord to reassign spaces unilaterally. However, the lease agreement was between the restaurant and the PREVIOUS landlord. So is this obligation binding as a real covenant?
  + **Does this obligation touch/concern the land/interest?:** In THIS case, the parking concerns the interest. The restaurant isn't worth very much without parking because it is not accessible by means other than cars. This DOES NOT mean that in general a clause about parking would be a real covenant.
  + **To run with the land, covenants must either affect the land itself, that is, the nature, quality or value of the thing demised; or the value of the land at the end of term.**
* ***Sundance:*** Sundance wanted to sublet to Swiss Chalet – Beaver Lumber objects because it would interfere with parking and therefore reduce sales.
  + Terms of a lease agreement may have something to say about transfers:
    - Transfer subject to the consent of the landlord as long as consent is not unreasonably withheld. This term (some version of it) was included in the Sundance lease.
    - There was also an added requirement that if the other major tenant of the building objects to the nature of the business the landlords withholding of consent is NOT unreasonable/arbitrary.
  + Majority agrees that this is a legitimate objection and therefore a legitimate reason to withhold consent. Parking goes to the nature of the business because a restaurant creates "static parking" where people are staying for an hour or more, which will interfere with Beaver Lumber's business operation. This is about the financial interest as well - landlord gets a share of revenue from Beaver Lumber so it is legitimate for the landlord to not want to provide consent if it will lessen their share of the revenue.
  + **NOTE:** this would never fly with a fee simple. This goes to leaseholds being more customizable. This is probably because of the time-limited nature of leaseholds. If we did this on a fee simple it would be forever - more impacts on third parties, etc.
* ***Welbow Holdings (p. 627):*** determining whether a landlord has unreasonably withheld consent, consider:

\*\*Burden is on the tenant

COULD a reasonable person have withheld consent?

Based on the reasons given by the landlord AT THE TIME of refusal (potentially violated in ***Sundance***)

Must be considered in light of existing provisions of the lease, LL cannot require amendments that would benefit them.

* + 1. In general, refusal will be reasonable if the assignment would diminish the value of it’s the landlords rights.
    2. Refusal will be unreasonable if it was wholly unconnected to the deal between the LL and tenant.

A probability that the proposed assignee will default in its obligations under the lease **MAY** be a reasonable ground for withholding consent. Whether the LL can sue the sub-tenant NOT determinative.

Financial position of the assignee may be relevant.

Reasonableness is a question of FACT that must be determined considering the commercial realities of the marketplace and the economic impact on the LL.

## Leasehold Obligations

* At common law, the terms of a lease are a matter of contractual intention, with freedom of contract acting as the key guiding principle. (Not the case in residential tenancies – significantly altered by statute).
* However, at common law, some basic terms are implied **(IMPLIED COVENANTS)** however, even these can be negated by contracting parties.
  + **Covenant of quiet enjoyment**: implied, presumptive covenant that is only displaced by explicit language. Neither the landlord nor anyone claiming under landlord will interfere w/ tenant’s exclusive possession.
    - ***Southwark****:* how far can you push the covenant of quiet enjoyment? Not that far – tenants must take premises as they are. Tenants complaining about noise in building because of its construction.
      * Court says quiet means peaceful possession, it is not about noise. There is a limit to this - if there's some kind of interference (noise or something else) that deprives you of your right to use the property in other ways (a mere annoyance is not enough).
        + Doesn’t succeed in this case. Covenant is PROSPECTIVE in nature. No one will come along and interfere with your right to enjoyment. But here, the walls were always thin - may be different if the LL built something after the lease was signed.
    - ***Pellatt v Monarch****:* P warned about renovations in her unit & offered accommodation & ability to terminate lease. Despite this, court still found that noise, odors, and mess breached covenant of quiet enjoyment. “The covenant is not confined to direct physical interference… extends to any conduct of the LL which interferes with the place or comfort of the tenant or their family” (Quoted in P v M from ***McCall***)
  + **Covenant against derogation from the grant**: Deals with things that a landlord might do that may undermine the purpose for which premises are being leased/makes premises materially unfit for the purpose they were leased out.
    - ***Petra****:* a shopping mall that aspires to be a one-stop-shop for women's fashion (and fails). Tenant takes out a lease for a retail business. Business is not great for the mall, so they change the main atrium to a music store. The tenant then says this derogates from the grant because they signed on to be in a mall with a bunch of clothing stores like theirs - this would be good for business, not a music store with a few stores around it - this would not have the same impact on business.

**Test: Have these changes made the premises materially unfit?**

* + - * Court finds that there is an implied term in the contract that the landlord will not change the nature of the building so seriously as to undermine the purpose of the transaction - but failing to maintain the lower level of the mall as all women's clothing stores does not meet this standard. If the landlord turned it into something other than a shopping mall it would be different.
  + ***Clark***: Leasing to a competitor is not a *prima facie* derogation from the grant. It may reduce your business, but unless there is a specific anti-competition term in the agreement it is not derogation from the grant.
  + There are situations when both of these implied covenants could be breached.
    - Ex: renting out one space to a fashion store and the unit next to it to a toxic waste disposal company. Likely a breach of both covenants - quiet enjoyment is a more general covenant where as derogation is more specific to the facts.

## Residential Tenancies

* Common law significantly modified by statute (RTA).

### RESIDENTIAL TENANCIES ACT (RTA)

* **Purposes**: rectify **knowledge imbalance**, provide **stability**, remedy imbalance of **bargaining power**, **protect** individuals, recognize that rental is **home** for tenants but a mere investment for landlord (draws on **personhood theory of property**→ i.e., there may be a special connection/relationship to property), recognize that a place to live is a **basic need**.
* **Downsides of RTA:** has onerous terms that may **limit the alienability** of property, **pass price** of added expenses from landlords to tenants, & landlords may be **less willing to create and update** rentals.

|  |  |  |
| --- | --- | --- |
| **Function** | **Section** | **Provision Details** |
| Greater **security** of tenure for residential tenants | ***6*** | Limits the purposes for which a landlord can terminate a periodic tenancy. |
| ***11/12*** | Notice of termination not effective unless it falls within a prescribed reason (i.e., tenancy of employees or condominium) |
| ***2 (regs)*** | Reasons a landlord can terminate a periodic tenancy: Landlord or relative of landlord wants to move in; Landlord sells property; Landlord to demolish property or do significant repairs; or, Landlord wants to use property for non-residential reasons. |
| ***29  (4)(a)*** | breach of rent requires notice of termination with a date no less than 14 days, and if tenant comes up with money in the 14-day period then tenant can stay. |
| **Notice** of termination | ***8*** | landlord must give **3 months’ notice** for termination of a monthly tenancy. |
| Fixing of **standard obligations** between landlords and tenants in a rational and fair manner | ***16(c)*** | Landlord (LL) obligation: warranty of habitability (premises must meet a limited standard as prescribed by health housing standards) |
| ***16(b)*** | LL obligation: covenant of quiet enjoyment |
| ***17*** | LL obligation: provide a service of agreement (i.e., copy of tenancy agreement) |
| ***18*** | LL obligation: provide tenant w certain info (who your landlord is and how to contact them) |
| ***19*** | LL obligation: inspect premises & provide inspection report |
| ***23*** | LL obligation: regulates when LL can enter premises (emergency, abandonment) |
| ***21*** | Tenant (T) obligation: pay rent and not interfere with rights of landlord & other tenants; no damaging; vacating at end of tenancy |
| ***22*** | T obligation: sublease must be with consent of LL (but LL can’t unreasonably withhold) |
| Increase in **tenant’s remedies** (from CL) | ***28*** | Tenant can terminate with notice of 14 days where breach of warranty of habitability |
| ***37(1)*** | tenant remedies when landlord breaches (e.g., compensation, damages, etc.) |
| **Curtailment** of landlords’ **self-help remedies** | ***23/24*** | LL has no right to take possession of land once lease expires. (they would under common law) |
| ***34*** | LL needs an order for recovery of possession once lease expires. |
| ***34.1*** | Civil enforcement agency can evict at end of lease (not LL) with 14 days notice. |
| Protection of **statutory rights** | ***31*** | Tenancy agreement cannot violate statutory rights. RTA prevails if lease agreement is in conflict. Cannot waive statutory rights. |
| Elimination of **anachronisms** | ***27(5/6)*** | LL obliged to mitigate T’s damages/limit T’s liability when T repudiates agreement even when LL doesn’t accept the repudiation. |
| **Dispute resolution** | ***5.1*** | Provisions for the dispute resolution process instead of requiring court litigation |
| Advisory **board** | ***59*** | Establishment of landlord and tenant advisory board |
| Rent increase limit (frequency) | ***14(4)*** | Can’t increase rent more than once in given year |

## Bailment

* **Bailment:** The delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be executed and the chattels delivered in either their original or an altered form as soon as the time for which they are bailed has elapsed. (*Punch*) Essentially a lease for a chattel.
  + **Example:** You leave your car in a commercial parking lot. If you give the lot attendant your keys, you are the **bailor** and they are the **bailee**. BUT, if you keep your keys you are the **licensee** and they are the **licensor**. (This reverse-y situation would not arise in the context of land leasing/licensing, leasor would be licensor and leasee would be licensee).
  + **May arise where one party voluntarily takes control of another party’s chattels:** ex. finding a wallet and holding onto it for the owner.
  + **Unique set of obligations –** not just contract, not just tort, not just proprietary.
  + Bailment liability exists apart from contract and can exist outside of contractual privity (***Punch***).

### Bailment Obligations

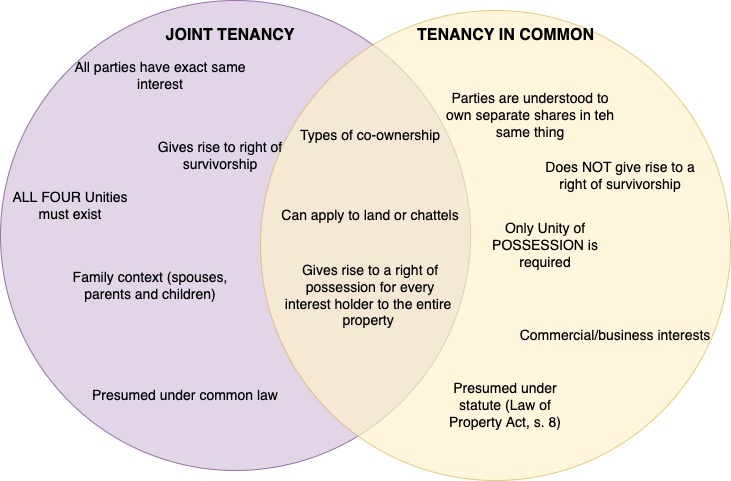
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| --- | --- |
| Bailee Obligations | Bailor Obligations |
| Duty to exercise reasonable care in relation to the chattels of the bailor, according to the standard of a prudent owner (*Letourneau, Punch*) | A bailor for reward (being paid) has a duty to ensure chattels are reasonably fit and suitable. (Shopping carts) (*Miller*) |
| Must return goods to the rightful owner at the end of the bailment term. Must not convert goods. | A gratuitous bailor must warn the bailee of any known defects that may make an item unfit for its purpose. |
| Adherence to contractual terms governing bailment | Obligations can be limited by contractual limitations as long as there is privity. |
| Other obligations may arise under different circumstances (i.e., insurance requirement in *Punch*) |  |
| Where the bailor establishes that damage to the chattel occurred while it was under the bailment, the onus is on the BAILEE to establish that they exercised reasonable care OR that the failure to exercise reasonable care did not contribute to the loss (*Letourneau; Punch*) |  |
| Obligations can be limited by contractual limitations as long as there is privity. |  |
| Sub-bailee owes a DOC to the original bailor to exercise reasonable care, lack of privity doesn’t change this. |  |

* In civil cases, the burden of proof is usually on the P to prove the elements of liability on a balance of probabilities. With bailment, there is a **reverse onus** because it is expected that the bailee is in a better position to know what transpired. If this is not the case, the reverse onus will not operate (***National Trust v Wong***).
* ***Mercer v Craven Grain Storage:*** Plaintiffs (3 farmers) storing grain with defendant company. Company went bankrupt. Farmers say this is a bailment and they retain title, so creditors can’t claim grain, Craven says this was a sale so farmer’s don’t have title and creditors can seize grain. Main issue: grain is intermixed, making re-delivery of the exact grain impossible. Held in favour of farmers - best way to give effect to parties’ intentions. **Ratio:** Impossibility of re-delivery of the specific articles may not necessarily preclude a bailment if that is the intention of the parties.
* ***Crawford v Kingston****:* Similar facts with cows instead of grain, but ruled differently due to contractual terms that passed title to Kingston.
* On an exam, consider the contractual terms. If the chattel is to be returned: bailment, if the chattel is not to be returned or a substitute of similar value can be returned instead: sale.
* ***Letourneau v Otto Mobiles Edmonton:*** At shop owner’s instruction, plaintiff left trailer in a lot adjacent to defendant’s shop overnight. The trailer was stolen. Defendant argued that because they hadn’t “received” the trailer (until morning), the bailment relationship did not exist at the time of theft. Held: Possession is a contextual inquiry. D instructed P to transfer possession by leaving the trailer on the lot, therefore, bailment was established.**Ratio:** Bailment does not require a contract. Once possession has been transferred and there is an **intention that it be returned**, a bailment has been established.
* ***Punch v Savoy:*** Plaintiff took $11,000 ring to Savoy to be repaired. Savoy shipped to Walker to complete repairs. Postal strike, so Walker sent the ring back via CN Rapidex delivery. Walker listed the value of the ring at $100. CN Rapidex lost the ring (believed to be stolen by staff).
  + Chain of liability:
    - Savoy to Punch: Savoy consented to the use of CN Rapidex without running it by Punch. Not in line with prudent owner SOC.
    - Walker to Punch: Walker sent the ring with a $100 valuation. Also not in line with the prudent owner SOC.
    - CN to Punch: CN did not even try to track down the employee who stole the ring. This is a breach of the prudent owner SOC. CN argued that it was immune to liability because of an exclusion clause, but the court ruled that there was no privity between CN and Punch, so this argument failed. Court said argument even failed between CN and Walker (where privity existed) because the clause could not apply to theft.
  + All sub-bailees are liable to Punch, but the court holds that CN is responsible for paying because they breached obligations all the way up the bailment chain.
  + **Ratio:** Obligations of bailee and privity do not operate in the same way that subtenants and landlords do. There IS a juridical nexus between bailors and bailees all the way down the bailment chain. It is possible to limit liability through contract, but these clauses are bound by privity of contract.

# Shared Ownership

## Co-ownership

### Joint Tenancy and Tenancy in Common



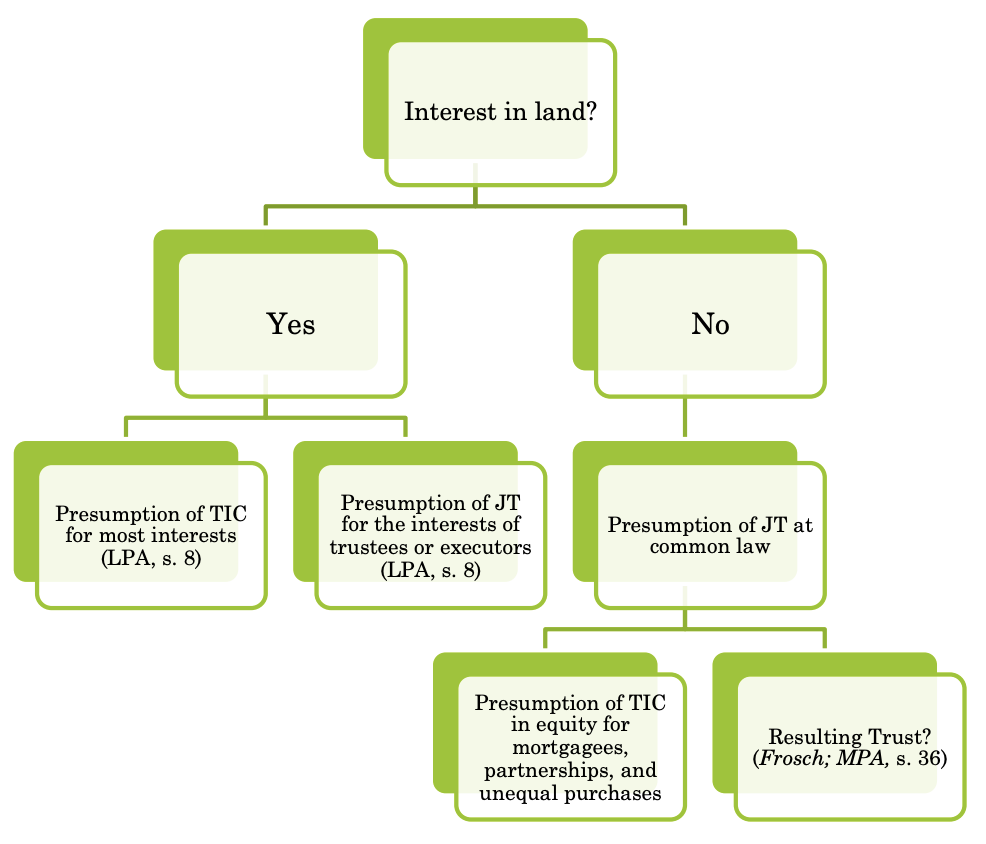
* **Co-ownership:** Traditional ways in which more than one party can have an interest in property/be represented on the title of the same thing (can be either land or chattels)

### Four Unities:

1. **Unity of possession:** the interests of each must relate to the same property. (This is the **ONLY** unity that has to exist in a **tenancy in common**, all four are required for joint tenancy)
2. **Unity of interest:** the interests of each must be equal in nature, extent, and duration.
   1. In a joint tenancy, A's interests can’t be subject to conditions if B's interest is not.
   2. If one party has a life estate the other must have a life estate (same nature)
3. **Unity of title:** the interests of each must arise from the same act or instrument.
   1. A can’t get the interest during someone's life while B gets it from a will.
4. **Unity of Time:** interests of each must vest at the same time
   1. Some flexibility here when it is granted under a will or a trust, but no flexibility if it is granted during someone's life.

### Creation of co-ownership interests

* **At common law,** there is a **presumption of joint tenancy** where more than one party holds an interest in property, unless a contrary intention is shown in the instrument (as long as the four unities are present).
  + Courts of equity can step in to reverse this presumption for certain categories of co-ownership.
    - Interests held by mortgage lenders and partnerships.
    - Situations where parties contributed unequally to the purchase price. Equity will recognize a tenancy in common with shares in property in to each party's contribution.
* Co-ownership of **LAND** is now presumed to be a tenancy in common, unless there is a contrary intention. (Law of Property Act, s. 8)
  + **Rationale**: serious implications to presuming a joint tenancy - one person basically loses their whole interest if they die first.
  + This statutory reversal does not apply to the interests of a trustee or executor in land.
  + Where it applies, courts have set a low threshold to overcome this presumption (***Bancroft***)
* Equity favours a tenancy in common, and where there is a gratuitous transfer, there is also a presumption of a resulting trust. Joint bank accounts are presumed in equity to be resulting trust to the proportion that each party put in (except for in marital situations where they are considered joint property) (***Frosch***)



* ***Bancroft Estate***: Testator left equal shares of estate (NOT LAND, presumption of TIC does not apply) to kids and widow. Issue arose when one beneficiary died – does the money go to his kids (estate, TIC) or to his brother (JT). Nothing in will rebutted presumption of JT, so money went to brother. Court said it would have been generous in finding language to rebut JT (“equally” would denote separate shares and therefore TIC) but nothing of the sort.
* ***Per stirpes***: Denotes intention for shares to descend from one generation to the next proportionately.

### Severance of Co-ownership Interests

* **Severance** terminates a joint tenancy, and transforms it into a tenancy in common.
  + Severance is an intermediate step between co-ownership and partition/sale (termination of co-ownership)
* A severance can be brought about by:

**1) A unilateral act of a joint tenant that destroys one or more of the four unities:**

* + - A unilateral declaration that one holds as a tenant in common is not sufficient (***Sorenson***)
    - A partition or sale order from a court constitutes a severance (***LPA s. 19***) but merely commencing an application does not (***Sorenson***)
    - A joint tenant of an interests in land can unilaterally grant the interest back to him or herself as a tenant in common, but they must provide notice to the other JTs. (***LPA, s. 12(d))***

**2) Mutual agreement**

**3) A course of dealing indicating a common intention to sever the joint tenancy.**

* ***Sorenson*:** Parcels of land held by the husband and wife (family home + vacant lot) On divorce, they have an agreement that wife will rent the home for her life for a nominal fee. They also have an agreement to sell the vacant lot. Shortly afterwards the wife is diagnosed with cancer. She is worried about her disabled son's wellbeing so she:
  + 1. Creates a document in which she declares severance of the JT.

Simply declaring the end of a joint tenancy, especially without telling the other party does not end the joint tenancy.

* + 1. Executes a will and makes her daughters the trustees and her son the beneficiary. Upon death of son, residue goes to daughters.

Setting up the trust destroys the **unity of interest**. Her half of the title is now held on different terms from her husband because her title is held in trust for her son whereas his is not.

* + 1. Brings a motion for sale (but dies before this is heard in court).

Commencing an application does NOT have the effect of severing the JT, it must have been heard and approved in court.

* + **So YES, the JT was severed**

## Concurrent Ownership Disputes

### Ending a Co-ownership Relationship

* No common law remedy – all statutory.
* **Rationale:** values individual alienability and autonomy over collectivism, community, or family interests.
* Co-owners can't be forced to stay in co-ownership. Parties are **entitled** to a remedy:
  + Under ***s. 15(2) of the LPA***, the court has the power to make orders of partition and sale:
    - **Partition**: each get half of the land (not always possible, ex. in an urban municipality the land would need to be rezoned to partition.
    - **Sale:**  External sale and division of proceeds OR sale among the co-owners.
  + Court has discretion over which route it will take but it MUST take one of the routes. (Statutory language: SHALL).

**\*\*ONLY APPLICABLE TO INTERESTS IN LAND**

* **NOTE:** Could also have a group of people own property collectively through a corporation – this way each co-owner does not have the ability to force partition or sale of the land. Each co-owner still entitled to sell their shares at any time, protecting alienability.

### Other Remedies

* ***S. 17(2)*** ***of the LPA*** allows the courts to order additional payments to compensate for issues that may have come about during the co-ownership.
  + ***2(A):*** If one party has actively excluded the other from accessing/occupying/possessing the land (**OUSTER**), that is a violation of the excluded co-owners’ rights.
  + ***(2)(D):*** a co-owner has committed waste by unreasonable use of the land. This likely means AT LEAST **voluntary** waste - some positive, wrongful act that somehow amounts to unreasonable use.
    - ex. one party lives on land, one party doesn't (by choice, no violation of rights) - but the party living on the land adopts 100 cats that cause damage. This would likely be waste constituting unreasonable use of the land.
* ***2(E):*** co-owner is entitled to compensation for improvements to the land as long as they improve the capital value of the land.
* ***2(F/G):*** co-owner can be entitled to compensation for improvements that DO NOT improve the capital value of the land (paying electrical bill), but if you do you have to pay compensation for occupying the land
* ***27:*** Parties may contract away their right to seek an order or partition or sale, but if the continuance of co-ownership is causing undue hardship to one or more of the parties the court may still terminate the co-ownership.
* ***Frosch:*** Joint bank account held by two brothers who had contributed equally - personal rather than real, so presumption of JT at common law. One brother died – does his estate get his half (TIC) or the surviving brother (JT)? Both put money into the account **gratuitously**, so, presumption that a **resulting trust has formed** and will revert back to the depositing party. Presumption could be rebutted if there was an INTENTION to gift. Surviving brother could not rebut.
  + Even though common law may have found this to be a joint tenancy, equity prevails over law and equity finds a resulting trust and a tenancy in common So, each party retained an equitable interest in the share that they had put in.

## Family Property Law

* ***Matrimonial Property Act*** replaced by ***Family Property Act*** in 2020 and now includes Adult Interdependent Partners.
  + Distinctive form of shared ownership under family property regime
  + Centres on division of property owned by spouses
* **Relationship of interdependence** definition:
  + Share one another’s lives
  + Are emotionally committed to one another, and
  + Function as an economic and domestic unit.

|  |  |  |
| --- | --- | --- |
| S | Function | Commentary |
| 6 | **Deferred sharing**: Spouses continue to hold separate property in their own names during the course of the marriage/AIP. BUT at the end of the relationship, division of assets takes place that’s intended to be equitable. |  |
| 7(4) | If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8. | Presumption of **equal distribution** unless that is not just and equitable.  BUT since this isn’t crystal clear/there’s discretion built into the regime, this could make things *less efficient in principle.* |
| 7(2) | Property **not** subject to division: gift from third party, inheritance, pre-marriage/AIP |  |
| 36 (1) | In making a decision under this Act, the Court shall **not apply the doctrine of presumption of advancement** to a transaction between the spouses in respect of property acquired by one or both spouses before or after the marriage. |  |
| 36(2)(a) | Where property is under two spouses, it creates a presumption of joint beneficial ownership being intended (applies to personal and real property) | Beneficial ownership = we are talking about equitable ownership.  No room for resulting trust! Equitable title of the land is owned by both spouses (but, again, only a presumption & with evidence of intent to the contrary, presumption can be rebutted) |
| 36(2) (b) | Joint bank accounts with both parties' names on them are **deemed** to be subject to joint beneficial ownership. | Goes further than 36(2)(a).  36(2)(b) is **not rebuttable**. No room at all for resulting trust back to one of the spouses. Legal AND equitable title held jointly by both spouses. |
| 19(1) | The Court, on application by a spouse, may by order do any one or more of the following:  (a) direct that a spouse be given exclusive possession of the matrimonial home;  (b) direct that a spouse be evicted from the matrimonial home;  (c) restrain a spouse from entering or attending at or near the matrimonial home. | This is independent of who is on the title.  If it would make sense for a person to become title owner of matrimonial home, then this would count against their share of the assets of the marriage. |
| 37 | Agreements regarding division of assets, such as prenups, have specific criteria that must be met | Notably, both spouses need independent legal advice |

## Condominiums

* **Condominiums** are a way of combining titles to individual areas (your unit) with shared titles to other common areas (hallways). Owners own their unit + a share of the common area.
* Difficulties under common law:
  + No contractual privity between subsequent owners and the developer – so how can collective duties (condo fees, etc.) be enforced once the property has been transferred from its first buyer?
* ***Condominium Property Act:*** 
  + Sets out a default set of bylaws for new condominiums.
    - No excessive noise, etc.
    - Can be amended by a special resolution of the condominium owner.
    - Condo corps have broad discretion in passing bylaws regulating use and conduct on the premises BUT, no restraints on transfer, leasing, etc. ***s. 32(5)***

### Exclusion Property vs Governance Property

* **Exclusion Property:** owner has the right to exclude others from the property. Clear, bright-line rule. This applies to the owner’s actual unit within the condo.
* **Governance Property:** alternative way of managing property - lots of people have rights of access to the resource and there are more granular rules about what kind of activities are allowed.
  + Possible issue: too many different activities may start to interfere with one another (leaving trash in the hallway of a condo, over-use of common social area, etc.)
  + Governance rules step in to protect collective interests. More governance rules in settings like condos (bylaws) but also exist in the context of fee simple ownership – nuisance bylaws, grass height bylaws, etc.
* ***Condo Corp v Korolekh:***Court has significant discretion in remedies involving condominiums, up to and including an injunction for eviction/sale of the unit (rare, but possible). Based on:
  + - Seriousness of condo owner’s conduct (in this case, physical assaults, racism, mischief, homophobia, intimidation, etc.;
    - Size of condo corp (relative to the indiv’s share);
    - Impact of individual on shared spaces;
    - Whether condo board has attempted to rectify the situation/solve disputes previously & how individual responded. (many orders had been made, fines administered, not paid and behaviour continued.)
* NOTE: Something like this would not happen outside of a condominium context. You could be charged for various things, but your neighbours could not get together and force you to sell your property.
* **Is it fair to limit rights so severely in the condo context compared to fee simple home ownership?**

|  |  |
| --- | --- |
| YES | NO |
| Consent/Fair Notice: When you buy a condo you sign up to live in a collective setting with more rules. Deal with it. | **Affordability:** Lots of people can’t afford to buy single-detached dwellings. Their rights should not be unduly limited. |
| Collectivism/Proximity: When you share walls and common spaces with your neighbours your freedom must be limited to provide for fair and equitable enjoyment of the property. | **Autonomy:** Individual owners should be able to live where they want and do what they want (within the confines of normative society/laws and bylaws that apply to all homeowners. |
| Increased alienability: pet-free/child-free properties may allow people who don’t like or can’t live around pets/kids to live in a condo. | **Decreased alienability:** cuts both ways – pet-free/child-free properties also limit who can live in the condo. |
| Community: Condo laws can help to promote the kind of community owners want (55+, etc.), which can have positive impacts for all owners. | **Discrimination:** Constructing a community of similar owners can lead to discrimination if certain people are discouraged or not allowed to move in. |

### Condo Property Act

* Alberta just enacted legislation to abolish age restrictions, **except** for seniors.
  + If you were an adult only building before 2018 you could stay that way – grandfathered in (for now, 15-year transition period.) But if trying to create rules after, can only do if it is designated for seniors
  + Why seniors? Unique needs, fixed income, love 2 vote.

# Servitudes

* A **servitude** in Roman law was a right to use the property of another. This is a generic term for rights in land **other than** rights to exclusive possession.
* At common law, an **incorporeal hereditament** refers to a property interest in land that is non-possessory (does not give rise to a right of exclusive possession).
  + **ARE** incorporeal hereditaments:
    - Easements
    - Profits-a-prendre
    - Restrictive covenants
  + **ARE NOT** incorporeal hereditaments:
    - Lease does not fall into this because leases provide a right of exclusive possession.
    - License is not a property interest - it is a personal right of access (*in personam*).

## Easements

* **Easement:** a right, attached to land:
  + **Positive Easement:** to use the land of a different owner (without a right to remove anything from the land)
  + **Negative Easement:** to prevent the owner of the other land from using his or her land in a particular way.
* An easement is a property interest in land that runs with both the parcel that benefits from the easement (the **DOMINANT tenement**) and the parcel that is burdened by the easement (the **SERVIENT tenement**).
* Characteristics of an easement:
  1. There MUST be a dominant and a servient tenement. At common law, easements cannot exist in gross but must be connected (appurtenant) to a dominant tenement.
     1. Statutory exception: conservation easements don't have a dominant tenement.
     2. Under the ***Land Titles Act 69(1)(b)*** pipeline easements can exist without a dominant tenement.
  2. An easement must accommodate the dominant tenement.
     1. For something to be an easement, it needs to somehow benefit the dominant tenement - there has to be a **practical benefit.**
     2. The right must be reasonably necessary for the enjoyment of the dominant tenement – cannot simply confer a benefit on the owner of the dominant tenement (this could be achieved with a contract).
  3. The dominant and servient tenements must not be owned **and** occupied by the same person; **AND**
     1. Landlords can give an easement to tenant over lands retained by landlord.
     2. Look to p. 383 of POP for more.
  4. A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant. (***Re Ellenborough***)
     1. Because the transfer of possession is not possible, a grant is required to pass ownership.
     2. Ground for invalidity on the basis of not being capable of forming the subject matter of a grant:
        + Uncertainty/vagueness
        + A right amounting to joint occupation or depriving the owners of possession cannot be recognized as an easement
        + Rights should not constitute “mere rights of recreation, possessing no quality of unity or benefit” (***Re Ellenborough***)
* Courts have shown more willingness to recognize positive easements than negative easements, likely because negative easements are more prone to impeded the productive use of servient property.

### Creation of Easements

* An easement can be created by:
  1. **Express grant:** There is some document that you can look at and say “this is what created the easement”
  2. **Reservation:** dominant tenement is selling part of the land to the servient tenement but wants to keep a certain right (right to cross the land, etc.)
  3. **Implication:** based on apparent accommodation (***Wheeldon v Burrows***) or based on the common intentions of the parties.
     1. Didn't actually write it in the instrument but there's a clear intention from the parties.
        1. Ex: selling a basement knowing that the buyer plans to run a restaurant out of the basement. Common intention to offer ability to effectively ventilate space is implied.
     2. Long-standing, continuous, apparent, and reasonably necessary use of the land prior to the division.
  4. **Necessity** (***Nelson***)
  5. **Prescription**: long-standing use -> ABOLISHED in Alberta **(*LPA* s. 69(3))**
  6. **Proprietary estoppel**: **equitable** doctrine based on detrimental reliance regarding an interest in land. So when you encourage someone to rely on your assurances to their detriment equity will step in to protect that reliance.
     1. Ex: you ask if you can build a road across Lavoie's land and he says "sure". You put a lot of time and resources into building the road, then Lavoie says "nvm". At common law, there's no contract here so Lavoie has the right to exclude. But the courts of equity will step in here and stop you from doing this.
  7. **Statute** (e.g. rights under condominium statute): pipes and wires that go throughout the whole building.
     1. Conservation easements
     2. Pipeline easements

***Nelson:*** Even though the court ruled against Nelson in his claim for a public use designation, this case gives us the test for finding of designated for public use:

1. Intention of the owner to dedicate the land to public use
2. Manifestation of that intention by opening up the road and allowing public use.

\*\*Neither branch met in Nelson – municipality of Leduc ended up expropriating the road.

## Profits-à-Predre

* **Profit-a-prendre** is a right to enter onto land and take some product from it. (ex. Harvesting timber, mining for O & G/minerals, hunting animals.)
* A PAP is not itself a possessory interest (you do not OWN the trees), it is merely a right to enter onto land and to acquire title to the product **by reducing it to possession (by cutting down the trees and turning them into timber)** (***R v Tener***).
* PAPs CAN be held in gross - no need for a dominant tenement. Ex. Right to hunt under a PAP is not attached to your ownership in some other parcel of land. (But you can have a PAP appurtenant to title in land, which would have a dominant tenement)
* If you have a PAP to cut timber do you own the trees?
  + NO, you have an access right to go onto the land and reduce those things to possession.
* **Mineral leases** are usually PAPs: they are not temporary exclusive possession of the minerals (lease) they are a right to go and take possession of the minerals for a set period of time and you pay a royalty to the owner (generally the Crown).
* ***BMO v Dynex:*** Company in bankruptcy liquidation has leased the right to extract oil and gas (called a "working interest" in the industry). It is a time-limited PAP and is an asset of the company that is bankrupt. The company pays a royalty to the owner of the minerals (lessor's royalty) in exchange for the PAP. As part of Dynex's dealings with its suppliers it gives them a royalty as well ("overriding royalty")
  + **Issue:** Is the subsidiary right that you create along with your PAP also a property interest in lan? Is the overriding royalty a property interest owned by the suppliers or a contractual arrangement? This matters because there is not enough money/assets to go around. Proprietary interest takes priority over a contractual arrangement.
  + Common law rule that would seemingly prevent this finding: You can have these limited categories of non-possessory property interests, but once you do that that's it. Anything you create out of a PAP or easement is no longer another subset of property rights, that's just a contractual right. BUT, this is an old common law rule and Justice Major basically just doesn't like it. Treats it as an anachronism.
    - Lavoie doesn't like this reasoning, Major J didn't really think about numerus clausus - categories in property law are closed, parties cannot create new categories of property interests whenever they want. (Presumption against novel property interests)
  + Major finds that we should recognize this as an interest in land because the common law needs to be flexible to account for common practices (commercial practices in this case). The O & G industry uses these kinds of interests all the time, it serves an important purpose in the industry and might have negative implications if these arrangements are no longer available.

\*\*LOOK AT ZIFF CAN IF THIS COMES UP

### Access Rights

* Canadian common law has generally recognized that owners have a presumptive right to exclude, without an obligation to justify the exclusion (***Harrison v Carswell***).
* However, the right to exclude may be qualified in various ways, giving rise to public rights of access.
  + Human rights legislation (qualifying the right to exclude for discriminatory purposes)
  + Necessity to preserve life or property (common law idea)
  + Common law requirements of innkeepers and common carriers
    - If an innkeeper advertised their services they could not legally exclude people without a good reason. This was because travel used to be very dangerous and refusing inn service could be extremely dangerous for travellers.
  + Necessity to travel along a public highway (***Dwyer v Staunton***)
  + Dedication of a road to public use (***Nelson***)
  + Local monopolies on something that is essential (water or electricity are common things that fit in this category) can't exclude people from accessing these services.
* ***Wu*** (NZ case) - right of a casino to ban someone from its premises. In NZ, the doctrine of **prime necessity** requires that an owner justify exclusion from a business “affected by the public interest”, in which the owner has a monopoly. Court extends the doctrine of prime necessity/local monopolies to casinos but cannot rule in Wu's favour because there is a statutory provision that says casinos can exclude people (policy justification: card counters, other bad behaviour, etc.)
* What are the benefits of letting businesses exclude who they want?
  + Certainty
  + Autonomy
  + Control of property
  + Business owners should be able to decide what is and is not the right kind of conduct/environment
  + Incentive to buy and own property
* Benefits of limiting business’s ability to exclude:
  + Fairness
  + Covert discrimination
* ***Biden v Knight*** - case about Trump blocking people on twitter. Should the right to exclude from social media platforms be justified or should it fall entirely to the platform owner’s discretion?

## Covenants

* **Covenant**: a valid contractual undertaking that is traditionally under seal.
* **Equity** equips courts to allow a covenant to run with the land (and thus bind future owners) despite an absence of privity of contract or estate (***Tulk***).
* Covenants running with the land primarily serve as a way to engage in private land use planning.
  + Ex. the covenant in ***Tulk*** ensured a garden would remain in Leicester Square.
* Covenants can be used to restrict land use to particular categories of use (*ex. residential only*), to maintain certain aesthetic standards (*ex. no purple houses*), or to preclude certain activities or types of business (*ex. no grocery stores*).
* In the past, restrictive covenants were used to restrict the sale of land to people of certain ethnicities or religions (***Re Drummond Wren***). Such restrictions would be illegal today – public policy, HR legislation, would not “touch and concern” land.

### Requirements for a Burden Under a Covenant to Run with Land

1. **Covenant must be restrictive/negative in substance.** 
   1. It must direct what cannot be done, rather than what must be done. **It must be possible to comply by doing nothing.**
   2. Positive covenants traditionally cannot run with the land.
2. **It must be intended that the burden run with the servient land, and the burdened lands must be sufficiently described in the document.** 
   1. Burdens are not presumed to run (presumed to be a contract between the parties) with the land intention for a burden to run must be manifested somehow.
3. **The covenant must be for the benefit of dominant lands, and those lands must be sufficiently identified in the document.** 
   1. A covenant in gross cannot run with the land
   2. The dominant lands “must be easily ascertainable from the deed containing the covenant” (***Galbraith***)
   3. The covenant must “touch and concern” the dominant lands by affecting the mode of occupation or “directly” affecting the value of the land (*ex. restricting the use of a nearby parcel is normally fine but regulating the class of acceptable purchasers is not*)
4. **Equity must be prepared to enforce the covenant.** 
   1. In the absence of legislation, notice of the covenant to third-party purchasers is **required**.
   2. The notice requirement has been subsumed by **modern land title registration systems**, which allow for the registration of restrictive covenants.

### Transmission of the Benefits of a Covenant

* The benefits of a covenant can be transmitted in three ways:
  + 1. **Annexation:** Benefit is annexed to run automatically with land. This may require explicit language (*ex. “this runs to the benefit to Blackacre and all the heirs of Blackacre”)*
    2. **Assignment:** Unlike burdens, benefits can be expressly assigned under contract law (*ex. if the instrument creating the covenant does not explicitly state annexation you could assign the benefit under contract to new owner*)
    3. **Building schemes:** Restrictive covenants may be created as part of a larger residential or commercial development. This means the benefits **and** burdens of covenants can run with parcels contained in a valid “building scheme. Certain criteria must be met:
       - Generally, a building scheme will set out a system of reciprocal rights and benefits, with each parcel constituting both a dominant and a servient tenement within the system.
       - In other words, the scheme sets out a kind of local land use law that both burdens and benefits each of the parcels.
       - *Ex. building plot for only pink houses. Every plot is burdened by being required to have a pink house. However, the benefit is that you live in a monochromatic community.*

#### Requirements for a Valid Building Scheme

1. The titles must be derived from a common vendor.
2. The vendor must have laid out the parcels subject to restrictions that could only be consistent with a general scheme of development (through minor variations for particular lots are permissible).
3. There must be an element of mutuality, such that the restrictions are intended for the benefits of all parcels.
4. The affected parcels must have been purchased on the understanding that the restrictions would inure to the benefit of all other parcels.

(***Berry v Indian Park Association***)

* ***Berry v Indian Park Association:*** Homes in Phase I and II of the Sugarbush community were built in 1974-75, and they created the Association, a mock condo scheme. They established a building scheme governing management of land in Phases I and II, and when lots were sold, they would impose on the purchasers a number of restrictive covenants. In 1988, the Association amalgamated its land with the land of another to make Phase III and tried to enforce its bylaws on Phase III. The developer of Phase III agreed to work with the scheme, but the homeowners in phase III decided they wanted no part in the rules.
  + The bylaws were NOT annexed to run with the land
  + There was no valid building scheme. Failed because:
    1. Lack of common vendor
    2. The lots were not laid out as part of a general scheme of development because the original scheme of development did not include the new lots.

|  |  |
| --- | --- |
| Pros | Cons |
| Allow for potentially valuable local planning by equipping people to choose what type of community they want to live in. | Potential to restrain alienation indirectly |
| Greater certainty about neighbouring uses for both commercial and residential owners | Potential for added complexity/information costs |
| Landowner autonomy | Potential for economic exclusion (single family homes only) |
| Conservation | Potential restrictions on competition |
|  | Lack of adaptation to changing circumstances (subject to judicial power to modify/remove restrictions) |

## Positive Covenants, Invalidity, and Conservation

* A positive covenant requires the covenantee to take some positive action. It is NOT possible to comply by doing nothing.
* Traditionally, English and Commonwealth courts have held that a positive covenant CANNOT run with land. ***Amberwood Investments*** upholds this principle.
* Exception in ENGLISH LAW: otherwise valid interests may be made conditional on the interest holder taking positive action (ex. you can use this road (negative covenant) provided that you pay half the maintenance costs (positive covenant)) **NOTE:** this argument was rejected in ***Amberwood***.
* ***Amberwood Investments:*** 2 adjacent condo towers that were meant to share some recreational facilities, one gets built, one does not. Easements ensuring access from both buildings to these shared facilities (negative) with provisions that require contribution to the maintenance of these shared facilities (positive).
  + Undeveloped parcel changes hands multiple times. The new owner says the maintenance cost provision doesn't apply to them because it's positive and therefore cannot run with the land.
  + The court considers:
    1. Is there a good reason to still have this distinction between positive and negative obligations?
    2. Considers the increase in condos as a reason to potentially not delineate in this way anymore.
       - BUT ultimately decides the court should not change the rules (thinks the legislature should do so). Opening the door to positive covenants essentially opens the door to new property interests. Could lead to onerous obligations being placed on property holders.

### Alternative Strategies for Positive Obligations

* + **Conditional easements:** 
    - These are valid in Canada.
    - These easements are expressly conditional on paying for them (like benefit and burden exemption in British Law).
    - This also failed in ***Amberwood*** - the condo corp was arguing for implicit conditional, court said no – must be EXPRESS.
* **Chain of covenants:** Achieving positive obligations using contract law.
  + Work within the bounds of privity of contract: *"As long as I'm the owner of this house I will host an easter egg hunt once a year, and I also promise that if I send this land to anyone I will make them promise to host an easter egg hunt, and I also promise if I sell the land I will make them promise to make the next person promise to host the easter egg hunt. I also promise that I will enforce this promise against next buyer."* 
    - Issue: involuntary transfers will break the chain (death, bankruptcy).
  + There was a chain of covenants in ***Amberwood*** but because there was a mortgage default it didn't run with the land because the seller did not have the opportunity to negotiate that term with the new owner.
* **Rentcharge:** traditional incorporeal hereditament. (Received as part of English law in Canada)
  + $X per year indexed to inflation.
  + Placed on the title to land that can run for a certain period of land or can run indefinitely.
  + Happens commonly in residential developments (“Summerside Encumbrance”)
    - Covers the maintenance of common areas

### Invalidity of Covenants

* Covenants can be invalid for a lot of familiar reasons:
  + Illegal restraints on alienation: "You can't sell this to anyone outside of the family" (also would violate the "touches and concerns land" requirement)
  + Uncertainty: a restrictive covenant on title has to be sufficiently certain. Reasonable and practical level of certainty, not absolute.
  + Contrary to public policy: “This property can only be sold to white, male, Christians”

### Termination of Covenants

* Covenants may end due to:
  + Expiration (if there is a term)
  + Unification of title: if one party ends up owning both tenements.
  + Agreement: dominant and servient tenement owners come together and agree to take the covenant off.
  + Equitable bars (*ex. unreasonable delay in enforcing the covenant: if the dominant tenement doesn't enforce for a long time, leading the other party to rely on non-enforcement*)
  + Statutory judicial power to amend or discharge a covenant ***(LTA s. 48(4))***
    - *Ex: most of the parties want the covenant to be gone but a few hold outs don’t.*
    - *Ex: covenant that is inconsistent with land use bylaw and is inconsistent with public interest.*

### Examples of Covenants

1. All buildings must be built out of brick.
   1. **NEGATIVE:** You can adhere without doing anything (don't build if you don't want to build with brick)
2. The owner shall not cause or permit the dilapidation of the buildings on the property.
   1. **POSITIVE:** Not permitting dilapidation requires positive upkeep and maintenance.
3. The owner must maintain the property as a park.
   1. **AMBIGUOUS:** Kind of depends on background provisions. Does it require active upkeep or just not changing it from its current state?

# Mortgages and Title Registration

## Title Registration

* **Title Registration** provides a procedural overlay on the substantive law of property in land.
* Registration systems determine the procedures for transferring interests and the priorities of competing claims. However, registration systems are based on the pre-existing substantive law.

### Priorities at Common Law and Equity

* Priorities among **legal** interests:
  + *Nemo dat quod non habet:* no one gives what he does not have.
  + First in time = first in right.
  + *Ex. B claims to have title to Blackacre but A has a superior interest that precedes B’s claim. B transfers title to C, who is unaware of A’s interest. C’s title is subject to A’s prior title. B couldn’t give what B didn’t have.*
* Legal title and prior **equitable** interests:
  + Legal title is subject to a prior equitable interest **except** where the legal title is held by a good faith purchaser for value without notice of the prior equitable interest.
  + Ex. If B sells Blackacre to C without telling them about A’s equitable interest, C retains legal and equitable interest UNLESS they were aware of the A’s existing equitable interest. A’s course of action is to sue B for damages.

#### Perceived Problems with Common Law

* Risk is generally placed on the buyer: they must verify the seller's title. This adds a fair amount of cost and risk to the transaction. Lawyer would have to go back through chain of title and verify that the land you think you're buying is actually what the seller says it is. Still risky - lawyers could miss things.
* 60-year limitation was placed on this at common law - you didn't need to go all the way back to the first ever holder of the land.
* Market based solution to this: insurance

### Deeds Registration and Recording

* Intermediate step between purely common law system and the land titles system. Aims to simplify by creating a centralized public repository of documents relating to interests in land.
* Instruments (deeds) registered gain a degree of priority over non-registered instruments (given that they are valid). This creates an incentive when you buy an interest in land to go and register your interest because then you know your interest will be prioritized over unregistered interests.
* Government **DOES NOT** guarantee the registered title (key difference), so buyers still cannot rely on the deed to reflect the true state of title – still risky.
  + Someone could register something fraudulently or erroneously register an interest then sell the interest. The buyer would still be screwed because the seller did not have good title - doesn't matter that it's registered if it’s not valid.

### Torrens System of Land Registration (Land Titles Registration)

* Devised by Robert Torrens, Australian PM in 1858.
* Adopted early in BC, AB, and SK.
* Basic idea: government **guarantees** the accuracy of records in the title registry.
  + Benefits:
    - Lower risk for buyers
    - Lower transaction costs
    - Facilitates mutually beneficial transactions
    - Facilitates lending secured by interests in land (because banks/lenders know what mortgages exist and can adequately assess their risk in granting a mortgage)
* Key ideas: mirror principle, curtain principle, and insurance principle.
* **Mirror principle:** the registry is a mirror of all rights in relation to land. This is a reflection of the ACTUAL state of title (not necessarily true in the deeds system).
  + The failure to register an interest means it may be legally ineffective, especially against third parties. Very significant incentive to register.
  + Notice of an unregistered interest is generally legally ineffective (***Land Titles Act, s. 203***)
    - Mere fact that someone knows about an unregistered interest as a matter of fact doesn't matter. Interest must be registered for it to be binding on the purchaser.
  + How does adverse possession interact?:
    - Some people would say that this doctrine is at odds with what the Registry seeks to achieve. This argument has been accepted in many jurisdictions that have Registries and adverse possession has been abolished in many Canadian jurisdictions, but NOT Alberta. There are moves to abolish adverse possession in AB - might happen soon. For now, adverse possession is an **exception** to the mirror principle in AB.
* **Curtain principle:** the registry draws a curtain over past transactions, such that it is possible to rely on the current certificate of title as a **definitive** statement of the interests in a parcel of land.
  + You can rely on what the Registry says regardless of whether there was some defective title in the past does not matter.
  + A certificate of title issued by the Registry is generally indefeasible (subject to limited exceptions), meaning it cannot be challenged based on past acts that might undermined the validity of current rights.
* **Insurance principle:** Compensation for those who suffer losses as a result of an inaccuracy in the registry.
  + A mistake or fraudulent transaction in the Registry could have serious implications given that the registry is gospel in this system. Insurance principle basically says "we will have a fund to provide compensation for people who suffer these losses."
    - You can have open ended standards the seek to provide a just outcome in every case, or you can have a bright line rule that provides certainty and clarity.
    - The Registry is a movement towards bright line rule, but the issue with this is that it can be a blunt instrument that can end in radical and unjust results. Insurance principle addresses this.
* ***60(1)*** is the keystone of the Alberta ***Land Titles Act.***

“*The owner of land in whose name a certificate of title has been granted shall,* ***except in case of fraud in which the owner has participated or colluded****, hold it, subject (in addition to the incidents implied by virtue of this Act) to the encumbrances, liens, estates, and interest that are endorsed on the certificate of title,* ***absolutely free from all other encumbrances, liens, estates, or interests whatsoever*** *except the estate or interest of an owner claiming the same land under a prior certificate of title granted under this Act or granted under any law heretofore in force and relating to title to real property.”*

### The Fraud Exception

* **The Fraud Exception:** an interest in land registered through fraud in which the owner participated or colluded may be cancelled or corrected. (BUT if A registers an interest knowing that B has an unregistered interest that will be defeated by A’s registration, that does not amount to fraud (***203(3)***)
* **Indefeasibility:** A certificate of title issued by the Registry is generally indefeasible (subject to limited exceptions), meaning it cannot be challenged based on past acts that might undermined the validity of current rights.
* **Immediate indefeasibility vs deferred indefeasibility:** is an innocent owner who receives title directly from a fraudster protected by indefeasibility of title?
  + The Fraudster's title can definitely be challenged, but it gets confusing when they sell it to an innocent person. The initial innocent owner is in a position to potentially tell that there's fraud going on given that they're dealing directly with the fraudster – maybe they should have known? Gives rise to the immediate vs deferred indefeasibility distinction.

* + - Under a system of **immediate indefeasibility**, owner #1 is protected - they get title of Blackacre and the true owner can have a claim under the insurance system.
    - Under a system of **deferred indefeasibility** it doesn't kick in until innocent owner #1 sells Blackacre. At that time innocent owner #2 is protected. If the title is challenged while owner #1 has title their title is challengeable.
* Case law is ambiguous on this - ON has gone deferred indefeasibility, Aus and NZ has gone immediate, there's some case law in AB that goes towards immediate but it’s not settled. \*Lavoie thinks immediate indefeasibility is the better read.
* Obviously, if the "innocent owner" colluded with the fraudster they are no longer innocent and would fall under the fraud exception.

### Other notable title principles

* Torrens-style land titles systems enhance the security of buyers of interests in land but may reduce the security of existing owners ("dynamic security" vs "static security")
  + *Nemo dat* provides static security to the interest holder.
  + Registry provides dynamic security for transactions.
* Assurance fund: compensation for those who suffer a loss as a result of operation of the ***LTA***.
  + Criticism that this only provides financial protection. Some people's connection to land is far greater than monetary.
* Priority of interests in land is set by ORDER of registration.
* *In personam* rights: Indefeasibility of title **DOES NOT** preclude claims between the transferor and transferee of an interest, even claims that can result in a change to the registered title (*ex. rectification of title due to error, contractual remedies, etc.*)
* **Caveats:** a mechanism to preserve the status quo by making all subsequent interests subject to the caveat.
  + Registering a caveat on someone else's title can provide a degree of security to the person who registers it so that anyone who buys the land down the line will still be bound by it.
  + Caveat is only as worthwhile as the interest is valid.
    - Ex*: if you have a contract for the sale of land and the title hasn't transferred yet but the buyer wants to make sure the land will convey to them, they can register a caveat.*
  + ANY valid interest in land can be registered as a caveat.

## Mortgages

* **Mortgage:** a security interest in land. A property right that serves as financial protection in the event that a debt is not paid.
  + **Mortgagor/BORROWER:** holds an interest in land that is put up as security for a loan
  + **Mortgagee/LENDER:** holds a security interest in land as a means of securing the loan.
* **Basically, pay back the loan or the lender will be able to use the title to the land to satisfy the debt.**

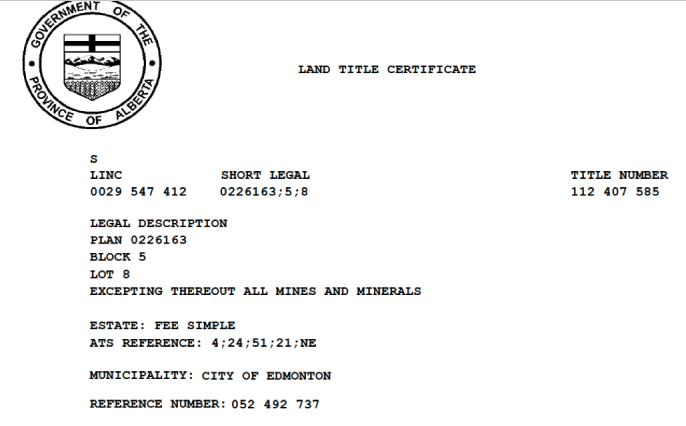
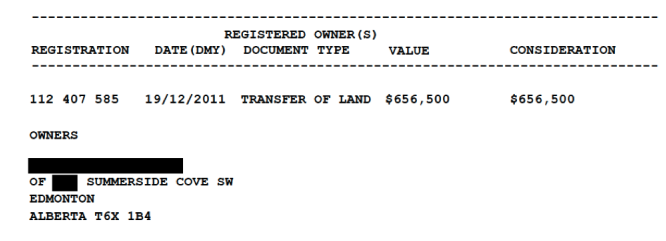
### Mortgages at Common Law

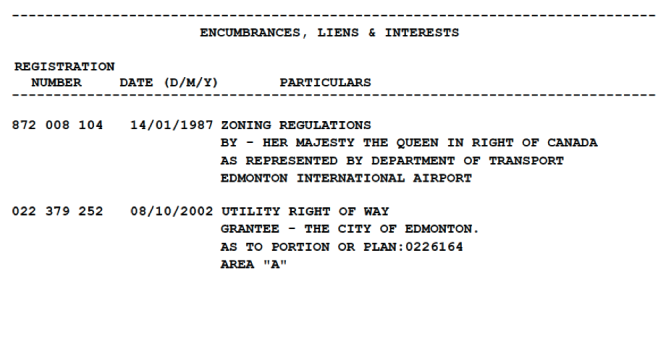
* The borrower would transfer title to the lender subject to a CONDITION SUBSEQUENT to the effect that if the debt were satisfied, the lender would reconvey the title back to the borrower.
* The borrower would remain in possession despite transferring title – transfer of title served as an added source of security for the lender in the event the borrower defaulted.
* Common law courts interpreted rights under mortgage arrangements strictly, a SINGLE late payment could result in complete loss of title.
  + Equity stepped in to remedy the perceived harshness of common law.
    - **Equitable right of redemption:** right of the borrower to redeem the title by paying the outstanding amounts, even after the time for payment has passed.
    - **Equity of redemption:** mortgagor's equitable right to the monetary value of the land minus the outstanding amount of the loan. ORIGIN OF “HOME EQUITY”.
      * Even if the borrower defaults and the mortgagee forces a sale, the mortgager is entitled to the net value of the land minus the loan.

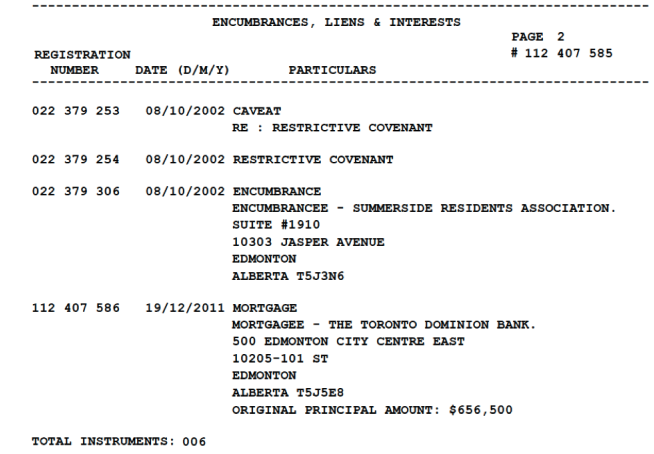
### Mortgages under the LTA

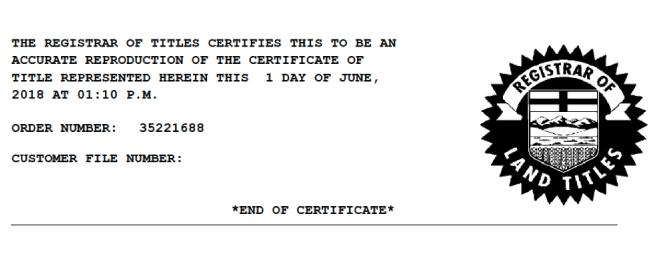
* A mortgage under the LTA is technically a "charge" on title, **not a transfer of title to the lender**.
  + No longer correct to say "the bank owns my home". Nowadays the homeowner continues to have the fee simple title but there is a charge on the title that secures the lender's interest.
* Mortgages are registered on the certificate of title of the interest in land to which they apply.
  + Very important part of a real estate transaction - make sure that the prior owner's mortgage has been discharged. Otherwise it runs with the land and the new owner is on the hook.
* Despite this formal distinction the same rights and remedies would be available under common law vs. under the LTA.
* If there is more than one mortgage on title, the priority of the mortgagees is set by the order of registration
  + A 2nd mortgage is riskier for the lender. If the property needs to be sold to satisfy lenders the 1st mortgage will be paid back first - 2nd one might not be paid or only paid in part based on what the land sold for.

### Mortgage remedies

* “Money or mud”
* **Foreclosure:** action brought in court to terminate or "foreclose" the borrower's right of redemption where the borrower is in default. Title vests in the lender. (“**MUD”**)
* **Sale:** the title to the land is sold, with proceeds beyond those needed to pay the mortgage debts and other encumbrances going to the borrower (“**MONEY**”) - this is generally the preference of financial institutions, they just want the money they don't want to own/deal with property.
* **Other remedies:** suing on the personal covenant; taking possession; appointing a receiver.
  + **Personal covenant** is the personal obligation on the borrower to pay the lender. Action in debt. Only relevant in cases where the value of the land is less than what is outstanding on the loan. This has been restricted in AB during the Depression (but this restriction doesn't apply to high ratio mortgages where down payment less than 20% of the total loan so millennial homebuyers are SOL)
* **Land Title Certificate example:**

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