Property

2019-2020

Table of Contents

CHAPTER 1: THE NATURE OF PROPERTY 6

MEANINGS OF PROPERTY 6

FORMS OF PROPERTY 6

PROPERTY AND THE RIGHT TO EXCLUDE (MERILL) 6

ECONOMICS OF PROPERTY 7

SOURCES AND JUSTIFICATIONS OF PROPERTY 8

NOVEL CLAIMS 8

International News Service v Associated Press (Property in News) 8

Victoria Park Racing and Recreation Ground Ltd v Taylor [1937] (Property in a Spectacle) 9

Moore v Regents of the University of California [1990] (Property in the Human Body) 9

CHAPTER 2: PROPERTY LAW IN CONTEXT 10

ENGLISH COMMON LAW 10

CLASSIFICATION OF PROPERTY INTERESTS 12

GOVERNMENT INTERVENTION AND PROTECTION OF PROPERTY RIGHTS 12

Municipal Government Act, s. 640(1) 13

Hyrdro and Electric Act 13

Alberta Expropriation Act s. 2(1) 13

Property rules vs. liability rules 13

EXPROPRIATION 13

Process of Expropriation 14

Common Law Property Rights 14

Principles of Compensation 14

AG v De Keyser's Royal Hotel 15

Manitoba Fisheries Ltd v R 15

British Columbia v Tener 16

REGULATORY TAKINGS AND DE FACTO EXPROPRIATION 16

Pennsylvania Coal Co v Mahon 17

Penn Central Transportation Co v New York City 17

Lucas v South Carolina Coastal Council 17

Loretto v Teleprompter Manhattan VATV Corp 17

Mariner Real Estate Ltd v Nova Scotia 18

Canadian Pacific Railway Co v Vancouver 18

EXPROPRIATION PROVISIONS IN FREE TRADE AND INTERNATIONAL INVESTMENT AGREEMENTS 18

Chapter 3: The Boundaries of Property 19

PROPERTY, POVERTY, AND THE RIGHT TO EXCLUDE 19

Victoria (City) v Adams [2008] 20

Dwyer v Staunton 20

Fontainebleau Hotel v 4525 Inc 20

LAND AND WATER BOUNDARIES 21

LAND BOUNDED BY WATER 23

Public Lands Act: 23

Surveys Act: 23

Erik v McDonald 23

ACCRETION 23

Robertson v Wallace: 24

SUBSURFACE RIGHTS 24

Edwards v Sims (1929) 24

Economic Perspective on the Great Onyx Caves 25

Star Energy Weald Basin Ltd v Bocardo SA 25

THE RIGHTS TO MINES AND MINERALS 25

MINERAL TITLE DISPUTES 26

Borys v CPR 26

Surface Rights Act 26
Public Lands Act 26
Mines and Minerals Act s. 10 26
Mines and Minerals Act s. 1 27
Law of Property Act 27
AIRSPACE RIGHTS 27
Didow v Alberta Power Ltd [1988] 27
ECONOMIC EFFICIENCY 27
Coase Theorem & Property vs. Liability Rules – also see Great Onyx Caves 28
FIXTURES 28
Clash of Security Interests 29
La Salle Recreations v Camdex 29
Re Davis 29
Tenants Fixtures 30
Diamond Neon Ltd v Toronto-Dominion Realty 30
Personal Property Security Act 30
TRANSFORMATION OF PROPERTY IN CHATTELS 30
Glencore International AG v Metro Trading International Inc 31
McKeown v Cavalier Yachts Pty Ltd (1988) 31
Tests for Accession (Thomas v Robinson) 32
Common Law Rule for Accession 32
Statutory Rule for Accession 32
Jones v De Marchant 33
MISTAKEN IMPROVEMENT 33
Law of Property Act, s 69 33
Gidney v Shank (1995) 33

Chapter 4: The Concept of Possession 34
Pierson v Post 34
Popov v Hayashi (2002) 35
Clift v Kane 35
FINDERS 35
General 35
Armory v Delamirie 36
Keron v Cashman 37
Bird v Fort Frances 37
Baird v British Columbia 37
Parker v British Airways 37
Trachuk v Olinek 37
ABANDONMENT 38
Historical Resources Act, s 32(1) 38
The Jus Tertii Defence 38
ADVERSE POSSESSION 38
Limitations Act: 39
Land Titles Act, s 74 40
Municipal Government Act s 609 40
Public Lands Act s 4 40
Keefer v Arillota 40
ADVERSE POSSESSION OF CHATTELS 41
Barbaree v Bilo (1991) 41
O'Keeffe v Snyder (1980) 41
GIFTS 42
INTER VIVOS GIFTS 42
Nolan v Nolan & Anor (2003) 42
Alberta Evidence Act, s. 11 43
DONATIO MORTIS CAUSA 43

Re Bayoff Estate ... 44
Constructive delivery ... 44
Symbolic delivery ... 44

CHAPTER 4: DOCTRINE OF ESTATES ... 44
INTRODUCTION AND GENERAL NOTES ... 44
REPUGNANCY 1: Re Walker [1924] irreconcilable will – repugnancy – life estate or fee simple ... 47
REPUGNANCY 2: Re Taylor – not fee simple just because of power to encroach on capital ... 47
REPUGNANCY 3: Christensen v Martin – intentions based on circumstances, language of whole will ... 47
RIGHTS & RESPONSIBILITIES OF LIFE TENANTS & REMAINDERPERSONS ... 48
Powers v Powers Estate - Recurring expenses borne by life tenant; capital expenses borne by estate ... 48
The Dower Act ... 49

CHAPTER 5: ABORIGINAL RIGHTS IN LAND ... 50
Calder (1973) ... 50
Guerin (1984) ... 50
Proving Aboriginal Title ... 50
Aboriginal Rights Short of Title ... 51
Extinguishment of Title ... 51
Justifying Infringements of Aboriginal Title ... 51
Haida Nation Case ... 51
Legislation Re: Aboriginal Rights ... 52
Aboriginal Title and Common law Estates Similarities and Differences ... 52

CHAPTER 6: EQUITABLE INTERESTS ... 52
THE STATUTE OF USES, 1535 ... 53
THE EMERGENCE OF THE TRUST ... 54
TYPES OF TRUSTS ... 55
Express Trusts ... 55
Resulting Trusts ... 55
Pecore v Pecore ... 56
Constructive Trusts ... 56
Semelhago (SCC) ... 56
Bulun Bulun ... 56
Murdoch v Murdoch ... 57
Peter v Beblow ... 57
Kerr v Baranow ... 57

CHAPTER 7: QUALIFIED/CONDITIONAL TRANSFERS AND FUTURE INTERESTS ... 57
Determining the kind of Qualified Interest ... 59
The Rule in Browne v Moody ... 59
Phipps v. Ackers (Kotsar v. Shattock) ... 59
INEFFECTIVE STIPULATIONS ... 59
INVALID CONDITIONS ... 60
RESULTS OF INVALIDITY ... 60
INVALIDITY: UNCERTAINTY ... 61
Sifton v Sifton ... 61
Kotsar v Shattock ... 61
INVALIDITY: RESTRAINT ON ALIENATION ... 61
INVALIDITY: DOCTRINE OF PUBLIC POLICY ... 62
The Leonard Case ... 62
Doctrine of Cy-Pres ... 63
McKorkill (SCC) ... 63
Spence v BMO (ONCA) ... 63
Re Esther G. Castanera Scholarship (MBQB) ... 63
Kay v South Eastern Sydney Area Health Service (Australia) ... 63
INVALIDITY: PERPETUITIES AT COMMON LAW ... 63
Rule Against Perpetuities (RAP) ... 63

INVALIDITY: PERPETUITIES UNDER ALBERTA STATUTE **65**
Scurry-Rainbow Oil (Sask.) Ltd. v Taylor (2001) 65

CHAPTER 8: LEASES, LICENSES, AND BAILMENTS **66**
Street v. Mountford 67
Metro-Matic v. Hulmann 67
NATURE OF THE LANDLORD'S AND THE TENANT'S INTERESTS **68**
THE CONCEPT OF "TOUCHING AND CONCERNING" **68**
Merger Restaurants v. DME Foods Ltd. 68
Anderson v. BC 68
LIMITS ON THE TENANT'S RIGHT TO ALIENATE – RIGHT TO ASSIGN THE LEASEHOLD **69**
Sundance v. Richfield 69
OBLIGATIONS OF LANDLORDS AND TENANTS (Commercial) **69**
TERMINATION AND REMEDIES **70**
Goldhar v Universal 70
Highway Properties 71
Evergreen v IBI 72
LICENSES **72**
RESIDENTIAL TENANCY REFORM **73**
RESIDENTIAL TENANCIES ACT 73
BAILMENT **74**
Letourneau v. Otto Mobiles Edmonton 75
SUB-BAILMENT **76**
Punch v. Savoy's Jewellers Ltd 76
The Pioneer Container 77

CHAPTER 9: CO-OWNERSHIP **77**
JOINT TENANCY **77**
TENANCY IN COMMON **78**
SEVERANCE **78**
Sorensen v. Sorensen 79
RESOLVING CO-OWNERSHIP DISPUTES **80**

CHAPTER 10: SERVITUDES **81**
CREATION OF EASEMENTS **83**
TERMINATION OF EASEMENTS **84**
SCOPE OF EASEMENTS **84**
Laurie v. Winch- 1953 SCR 84
Malden Farms v. Nicholson- 1956 Ont CA 85
The Rule in Harris v Flower 85
OTHER SERVITUDES AND SERVITUDE-TYPE RIGHTS **85**
Profits a prendre: 85
Tener case 86
Dynex Petroleum v BMO SCC 2002 86
COVENANTS RUNNING WITH PROPERTY **87**
COVENANTS AT LAW **88**
COVENANTS IN EQUITY **88**
Tulk v. Moxhay 88
Galbraith v Madawaska 89

CHAPTER 1: THE NATURE OF PROPERTY

MEANINGS OF PROPERTY

- Property is not necessarily a thing, rather refers to the legal title, the enforceable exclusive right, or the intangible thing
- This is associated with rights, liabilities, and duties, what Waldron calls the basic elements of ownership
  - This network of legal relationships dynamic. Existing relationships can be altered and new ones creates, with corresponding new legal consequences
- Property rights are good against the world (versus contractual rights that are limited by privity of contract)
- Differing ideas about property rights: as a natural phenomenon, as a social construct that tends to reflect the balance of power in society
- Property as a "**bundle of sticks**": property as a bundle of rights, with each stick representing a right. Shows that any right associated with ownership can be unbundled and transferred to somebody else, while ownership is maintained
- Societal differences between property ad physical property – property is a claim that will be enforced by the society or the state, or by custom, convention, or law

FORMS OF PROPERTY

1) **Private property:** the person who has property has certain exclusive rights that no one else has to that resource
2) **Open access:** anyone can enjoy the resource, no one has the right to exclude others from the resource (e.g. air)
3) **Common property:** members of a particular group own and manage the resource together. To non-members of the group this looks like private property, but within the group it might look like open access
   a. E.g. villagers owning a grazing pasture
4) **Public property:** the state owns the resource and has the right to exclude. This form can behave like private property in some aspects, but is also imbued with certain duties
   a. Public ownership as in trust for the people
   b. E.g. Premier's office – this is public property, but you are still excluded from it
   c. E.g. water

PROPERTY AND THE RIGHT TO EXCLUDE (MERILL)

- The right to exclude is seen here as the most essential aspect of property
- **Points of consensus regarding the right to exclude:**
  - The institution of property is not concerned with "things" (scarce resources) as much, but rather with the rights of persons with respect these things/resources
  - Property includes the rights of persons with respect to both tangible and intangible resources (e.g. copyright)
  - Property means something different than possession (and property rights generally trump possessory rights)
  - Property cannot exist without some institutional structure that can enforce it (usually the state, but can also be something like social ostracism)
- **Disagreements on the right to exclude:**
  - How central the right to exclude is to the understanding of property. 3 intellectual traditions about this including single-variable essentialism, multi-variable essentialism, and nominalism
  - Essentialism: the search for the critical elements that make up the core of property in all manifestations (William Blackstone)

Single-variable essentialism	Multi-variable essentialism	Nominalism
o Posits that the right to exclude others is the irreducible core attributable to property	o Posits that the essence of property lies not just in the right to exclude others, but in a larger set of attributes o The right to exclude is a necessary, but not sufficient, condition of property o E.g. Tony Honore's	o Views property as a purely conventional concept with no fixed meaning o Essentially an empty vessel that can be filled by each legal system in accordance with its own values and beliefs o Here the right to

	standard incidents of property include the right to possess, the right to use, manage, right to security, etc.	exclude is neither sufficient or necessary, its presence is not essential

ECONOMICS OF PROPERTY

- How difference conceptions/justifications of property allow us to decide what is the best legal regime for dealing with a particular resource

1) **Hobbes:** describes the state of nature as one where there is no propriety, no dominion, no distinction between mine and yours, only what belongs to every man for as long as he can keep it
    a. Believed man has a right to every thing, even to another's body
    b. Importance of a social contract to escape the state of war and guarantee safety – helps to prop up the state, only then can we have industry
    c. When there is no property there are no incentives to invest, cultivate, and preserve
2) **Smith:** private property encourages labour, investment, and useful trade
    a. Basic idea is that in a legal system based on private property and the freedom of contract, things end up in the hands of the people who value them the most – this is the definition of efficient allocation of resources
    b. New property becomes the property of the person who manufactures it. Only if the value to the maker/buyer is higher than the value of the inputs, will the producer produce and sell the thing
3) **De Soto:** what characterizes devout economies is strong, formal protection of property rights. Societies where property rights aren't formally recognized or protected tend to be under developed
    a. Essentially that capitalism has not achieved as much success elsewhere as it has in the western world
    b. Says it is not about the amount of wealth nations have, rather that in other nations the majority of this wealth exists on the margins
    c. Because of this, the failure of market economies in emerging nations arises in large measure from the inability to release the capital potential locked into the existing assets
4) **Harden: TRAGEDY OF THE COMMONS** – how rational self-interest can lead the collective to it's doom, and how that result can be avoided
    a. This describes a pasture that is held in common by a village but behaves internally like open access. Every member of the community decides themselves how many cattle to bring onto the pasture, and every villager makes a decision in their own self-interest, leading to the ultimate depletion and collapse of the common pasture
    b. Gain theory perspective: shows how individual rationality leads to group stupidity (every cattle herder benefits from more cattle, but the cost (loss of pasture) is shared among the community. This is the same process as a producer who benefits from manufacturing steel, but inflicts the cost (pollution) on neighbors
    c. Harden sees two problems:
        i. No actor has an incentive to maintain or improve the common resource (benefits of improvement are spread but the costs are individual, because it's not in anyone's economic interest to get it done)
        ii. Resources can be gained by anyone so there is a race to get them – e.g. timber cut down before it is mature
    d. How do we solve this externality problem?
        i. Create a contract between all of the villagers. If the community is small enough this might be possible with custom or convention
        ii. Establish a firm – every villager owns shares in that corporation, so a vested interest is created
        iii. Nationalization
    e. Privatization allows different people to have a piece of the property, so they can decide how they want to manage it – but there are still costs involved with this (e.g. fences, monitoring)
    f. **Anticommons problem:** too many separate owners of a single resource end up blocking another's use, resulting in no one being able to properly use the resource
5) **Demsetz:** private property is superior to open access or common property because it aligns costs and benefits
    a. Defines externality: includes external costs, external benefits, monetary and non-monetary externalities – basically, somebody always suffers or enjoys the effects of action
    b. Although private property may be superior to other arrangements, we can't get private property every time, only when the gains from moving to private property are higher than the costs

c. Property rights are an instrument of society and derive their significant from the fact that they help a person form expectations that they can reasonably hold in their dealings with others – about creating legitimacy and consistency
d. E.g. before the fur trade anyone could hunt freely in the forest – hunting generates benefits and costs. Hunter enjoys benefits from the animal itself, but depletion of the animal in the forest negatively affects everyone. After trade with Europeans fur became very valuable and hunting increased, so stock was depleted.
    i. Externality of hunting increased, move from a system of open access to a system of property rights where people allotted an area of the forest where they could hunt, so the costs and benefits are not aligned

6) **Richard Posner:** Three characteristics to make property law more efficient:
    a. Promotion of exclusivity: the law needs to allocate resources to individuals and give them the tools to ensure that they are recognized and enforced, so as to minimize theft and free-riding
    b. Universality: as many goods as possible should be available to as many potential holders as possible
    c. Transferability of entitlements: to encourage and assist exchange to those who are the most willing to acquire them

SOURCES AND JUSTIFICATIONS OF PROPERTY

- Natural and rights-based approaches:
    - Hegel: property is necessary for self-actualization
        - Based on a theory of autonomy and free will. He says that to exercise our free will we require material objects
        - To enable people to self-actualize, we need to ensure that they have their own objects
    - Locke: property rights come from God because God created earth. This theory says that God gives everyone property in their own person (owns their own body), so the labour produced by their body is their own property
        - Idea that when you mix your labour into a part of the earth that was given to mankind, you have removed it from the common and appropriated it for your personal use (as long as you leave enough for everyone else)
        - A person who labours deserves to reap what they have sown (this has been influential in jurisprudence)
    - Radin: This is a personhood theory based on the attachment that people form with objects
        - Characterized two values that a resource may have – personhood value or fungible value
- Consequentialist approaches: not based in reasoning or divine order, rather deal with consequences
    - Bentham (utilitarianism): suggested that norms and choices ought to be evaluated not on the basis of their inherent nature or value, but rather on their consequences
    - Everything should be judged only on if it increases or decreases the total amount of happiness in the world (welfare utility)
    - Concluded that property does not derive from anything but law. It is born from law and dies from law, it is what the law says it is

NOVEL CLAIMS

International News Service v Associated Press (Property in News)

- Facts: News companies are in competition, and the complainant has alleged that the defendant has been pirating their news by bribing employees, by inducing their members to violate by-laws and obtain news before publication, and by copying news from early editions of their newspaper and selling it
- Issues:
    1) Is there property in news?
    2) Does published news become public property when it is published?
- Reasons:
    - Reasoning was largely economic, centered around the need to sustain incentives to engaged in news making
    - The court held that there is a quasi-property interest in news due to the commercial realities of its production
        - The defendant is taking material that has been acquired by the complainant as the result of organization and the expenditure of labour, skill, and money, appropriating it and selling it as its own in order to reap profits (Locke's theory of mixing labour with nature makes it yours)
    - Each party is under a duty to conduct its own business so as to not unnecessarily or unfairly injure that of the other party
    - It is necessary to distinguish the substance of the information in news from the particular form it is communicated in – the facts themselves contain no property interest, but the expression of the identity
- Dissent (Holmes J.):

        - Property is a creation of law and depends upon exclusion by law from interference (legal realism). A person is not excluded from using any combination of words just because someone has used it before
- Dissent (Brandeis J.):
    - The fact that a product of the mind cost effort, labour, and expense, doesn't automatically confer the status of property. Knowledge and ideas are governed by open access, meaning exclusion isn't available
- Ratio:
    - Three things contribute to the decision that AP has property in news:
        1. Labour theory – Locke
        2. Economic incentives – for the publishers and the consumption by public
        3. Institutional design – what is the appropriate mechanism for deciding property rights?

Victoria Park Racing and Recreation Ground Ltd v Taylor [1937] (Property in a Spectacle)

- Facts: the defendant is accused of placing an elevated platform on his land, from which it is possible to see the racetrack and broadcast the races. The plaintiff wants to stop this broadcasting because it prevents people from going to races
- Issue: Has quasi-property been created that legally prevents the defendant from broadcasting on his own land?
- Reasons:
    - A 'spectacle' can't be owned
    - Economic reasons: just because you suffer a financial loss because someone takes your business doesn't mean they did anything wrong (essence of competition)
    - You have to be able to show that you have some sort of protected interest that the defendant interfered with unlawfully
    - **Natural rights of a property owner don't include freedom from view or inspection**
- Ratio: No property rights in a spectacle, natural rights of a property owner don't include freedom from view or inspection

Moore v Regents of the University of California [1990] (Property in the Human Body)

- Facts: Plaintiff alleges that his physician failed to disclose pre-existing research and economic interest in his cells before obtaining consent to the medical procedures with which the extracted the cells
- Issue: Did the plaintiff retain an ownership interest in the excised cells and matter such that he may prosecute the defendants for conversion?
- Majority Reasons:
    - To establish a conversion the plaintiff must establish an actual interference with his ownership or right to possession
    - **Because Moore did not expect to retain possession of his cells following their removal and did not retain an ownership interest in them, the claim of conversion fails**
    - Statutory law drastically limits a patient's control over exercised cells and eliminates rights ordinarily attached to property
    - The Court is concerned with the rights of the patient. However, conversion is a strict liability tort which subjects innocent third parties to liability for acts which may not be under their direction and control. The court found that the breach of fiduciary duty theory and the lack of informed consent theory were better suited to protect the rights of patients. Thus, the Court declined to extend conversion liability in this type of suit.
- Dissent (Mosk J.): concurring
    - **The limitation present diminishes the bundle of rights that would otherwise attach to property, but what remains is still a protectable property interest** (property can be modified and still be property)
    - The Plaintiff's body is unique and based upon ethical and equitable concerns the Plaintiff should have a proprietary interest in the cells and tissue of his body
- Conclusion:
    - Since these cells are the same in every person and because of the reach of the legislation, the patented line is both factually and legally distinct from the cells taken from Moore's body
    - Policy implications also play a role – the tort of conversion could create an obstacle to current and future medical research, and this is better suited to legislation
- Ratio:
    - No action based on a theory of conversion may be prosecuted where the subject matter of the allegation are excised cells taken from Plaintiff in the course of a medical treatment; however, an action may be based on theories of breach of fiduciary duty or lack of informed consent
    - The law of conversion requires you to have either a possessory or a proprietary interest – neither here

    - Court chose not to expand the doctrine of conversion for policy reasons – should be legislated

Contrasting *INS v AP* with *Moore*

- Both are economic concerns
- In INS, Pitney is concerned with consequences of not recognizing enough property.
    - In Moore, Panelli is concerned with consequences of recognizing too MUCH property.
- Pitney is concerned about leaving information in the commons, the tragedy of the commons.
    - Panelli is concerned with excluding too much information from the commons, the tragedy of the anti-commons

Restrictions on the Recognition of New Property Interests

- **Principle of *numerous clausus* (Merrill):** concept of property law which limits the number of types of rights that the courts will acknowledge as having the character of property
    - This means 'the number is closed' and decreases flexibility, because property rights are special rights due to their effect against third parties meaning the holder of a property right is in a more powerful position than the holder of a personal right
    - This is a device for minimizing the effects of durable property interest on those dealing with assets in the future, and particularly the effects of excessive fragmentation of interests or **'anticommons'**
    - Downside is less flexibility
- <u>Policy justifications of *numerous clausus:*</u>
    1) Measurement-cost externalities:
        a. Parties who create new property rights will not take into account the full magnitude of the measurement costs they impose on strangers to the title
        b. By allowing even one person to create an idiosyncratic property right, the information processing costs of all persons who have existing or potential interests in this type of property go up
    2) Frustration costs:
        a. Mandatory rules sometimes prevent the parties from achieving a legitimate goal cost-effectively
        b. Standardization acts as a form of price-discrimination - parties that are willing to pay more for an objective can achieve it by incurring higher planning and implementation costs
    3) Optimal standardization:
        a. This is somewhere in between maximum standardization and the freedom of customization
        b. By creating a strong presumption against judicial recognition of new forms of property rights, the *numerous clausus* imposes a brake on efforts by parties to proliferate new forms of property rights. But permitting legislatures to create new forms allows for some diversification
    4) Information costs:
        a. Technology lowers information costs and diminishes the need for standardization

Anti-commons and assembly problems <u>(really its about transaction costs)</u>

- If use of genes and patented processes requires consent, can be major obstacle to research
- Really about transaction costs
- The commons or anti-commons are not the problem in other words. The problem is cost of trading property rights. The cost of aggregating or disaggregating property rights

CHAPTER 2: PROPERTY LAW IN CONTEXT

ENGLISH COMMON LAW

- Feudalism transpired out of the chaos of the decline of the Roman Empire. People sought security, found in the practice of commendation, by which people placed themselves under the protection of a more powerful neighbour where the weaker became the "vassal" and the stronger became the "lord"
- King appointed barons over large fiefdoms of land - the King enfeoffed to them as tenants in capite (in chief), and they pledged their military support in exchange for security of tenure and other privileges
    - As long as they did what the King wanted, they are guaranteed possession of the lands given to them - lands called tenements
    - Tenants in capite pledge a certain number of knights for the King's army

- Commendation created a situation where the vassal no longer owns the land but "holds" it from the lord - the vassal has become a tenant
- Vassals were able to subgrant their own vassal portions of the land in a process known as **"subinfeudination"**
    - Tenants in capite fulfilled their feudal obligations by subinfeudation

- **Tenure:** comes from the word "to hold", means that you are a landowner. A person who holds land that belongs to the King is a tenant
    - Feudal relationship: the essence of tenure is a personal bond between a feudal superior and a vassal, the right to hold the land of the kind (directly, or through a feudal overlord)
    - The only main similarity is possessory rights (can possess the land, but not sell)
- **Tenurial services (free tenure):** tenures were defined by the periodic obligations of the tenant. Standard tenures were:
    - Knight service: obligation to provide knights
    - **Socage:** obligation to provide some sort of produce or other source of revenue - fixed number that couldn't be changed
    - Frankalmoign: spiritual tenure, to pray for the King
    - Serjeanty: ceremonial tenures (grand and petite)
- **Unfree tenure**: was the burden of villeins (peasant serfs) to make the life of the manor possible
    - They have no rights in the courts of the king; their only rights are determined by custom. Work is not fixed but rather arbitrary
- Incidents of tenure: infrequent and occasional liabilities that would become more important than obligations
    - Homage and fealty: process by which a person becomes a vassal of a superior person, symbolic, service of reverence. Owe the superior complete loyalty
    - **Escheat: the right of the feudal lord to have the land revert to him if a tenant died without an heir**
        - The security of tenure was initially for the life of the tenure only, and when the tenure passed away it reverted back to the monarch (to protect the king)
        - This system didn't work for anyone because who would invest in land if after they're gone it goes back to the king
        - By the time Henry I came to the throne, it became the custom that the rightful heir was allowed to ascend to the tenement conditional on payment of one year's rent of the land (this is called relief)
- Forfeiture: if the tenant was guilty of treason, the land was forfeited and reverted back to the feudal superior
- Aids: special levies that were payable when the feudal superior required something
- Relief: the tenant's right to have his heir ascend to the tenement upon payment of one year's rent
- Wardship and marriage: wardship was the right of the lord to manage the land of the tenant who left an heir who hadn't reached the age of majority
    - Marriage: the lord has the absolute right to choose a spouse for the tenant's heir, to guarantee alliances
- Decline of English feudalism: this was due to social and economic developments, and the weight of the system
    - Tenurial services became unsatisfactory for the King as he wanted a professional army, so instead wanted money
    - **This led to tenants paying revenue to the kind instead of providing incidents of tenure (begins to look like taxes)**
    - Problem was inflation, which created shortages in revenue

Statute Quia Emptores:

- **This act provided that no one could take on new tenants of their own meaning the process of subinfeudination was now prohibited**
    - Before this, tenants would subinfeudate their lands to avoid taxes by taking new tenants and only charging them something trivial, which ends up costing the king a lot of money (this allowed them to avoid the incidents of tenure)
- This act allows free substitution, meaning that **land begins to behave like another commodity on the market that can be bought and sold**, which has a tremendous social impact
- The decline in feudalism means a change in society from status to contract – meaning that you are less limited by birth circumstances
- As a consequence **all land in England came to be held directly of the Crown**
- **Certain possessory rights began to exist**, and the selling of the bundle of property rights to someone else was created
    - The common law system does not recognize ownership of land because it is all the property of the Crown

Continuation of Feudal Ideas

- The doctrine of tenure remains the foundation of Alberta property law
- All land (except land held by Aboriginal Title) is technically held by the Crown, free from any services or incidents, except escheat

- The ***Unclaimed Invested Property Act*** says that when a person dies in Alberta without an heir, will, or relatives, the land of that person vests in the Crown and the right of Alberta (escheat)

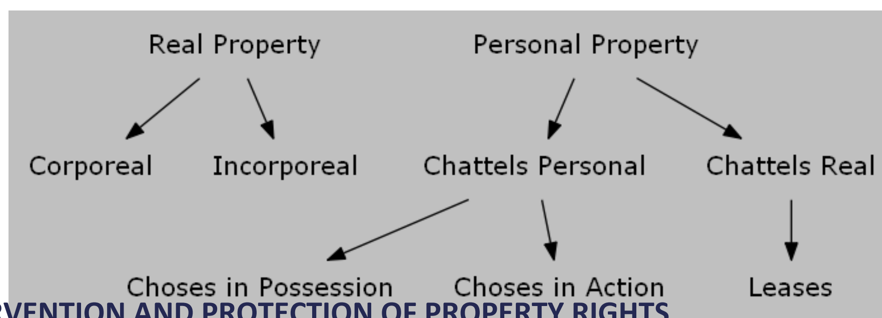
- The duration of tenure is defined by the doctrine of estates
    - The longest tenure you can enjoy is an estate in feel simple
    - Fee simple is an abstraction of owning the land (because the Crown owns it)

Reception of English Law

- Alberta was regarded as settled and the settlers were deemed to have carried English law with them
    - In other parts of Canada English law was imported through settlement, conquest, or cession
- English law automatically part of the law in Alberta – statute says that the date of reception was 1870
    - Caveats: the law shall be enforced so far as it is applicable, and so far as they have not been modified by a valid piece of legislation
- This pattern of adherence exists because:
    1) The reception of a given rule used because the absence of adoption would create uncertainty – more convenient to use this than to reinvent
    2) Credibility: English land law seen as representing the apotheosis of justice, and this common law was seen as the encoding principles of justice and a repository of centuries of collected wisdom
        a. Although this wasn't pursued at all costs, shown by the fact that often in conquered colonies the colony's laws were used

CLASSIFICATION OF PROPERTY INTERESTS

- **Real property**: permanent, non-moveable property
    - Example: land and buildings
- **Incorporeal property:** can't be seen or handled, only exists in contemplation
    - Example: the annual rent payable for a house
- **Corporeal property:** can be seen and handled
    - Example: a house
- **Personal property:** The belongings of an individual, excluding any real estate property or other buildings
    - Example: tangible and intangible assets of an individual.
- **Chattels Personal:** movable things which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another
- **Chattels Real:** another name for a lease, looks like a right in land and is essentially that
    - Writ of ejectment: allowed a tenant to recover possession of land against a trespasser
- **Choses in Possession:** tangible goods you can hold
- **Choses in Action:** proprietary interests that can only be enforced by the court
    - Example: the right to enforce a debt
- **Leases:** a conveyance of lands or tenements to a person for life, for a term of years, at will, in consideration of a return of rent or some other recompense



GOVERNMENT INTERVENTION AND PROTECTION OF PROPERTY RIGHTS

Government Intervention

- First thing to ask: <u>under what authority did the government act, or purportedly act, when it interfered with property rights?</u>
    - The rule is that there is no longer a royal prerogative over property, therefore any intervention by the government must be authorized by a statute
    - If a government acts outside its authority it is *ultra vires*

- Division of legislative powers for property:
    - Federal power: POGG, trade and commerce (s. 92(2)), banking, interest, patents, trademarks and copyrights (s. 91(22-23)), land reserved for Indians
    - Provincial power: property and civil rights (s. 92(13)), provincial public lands and timber, local works and undertakings, matters of a merely private/local nature, municipal institutions in the province

Examples of provincially sanctioned interventions:

Municipal Government Act, s. 640(1)
- A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality

Hyrdro and Electric Act
- Authority to expropriate under this Act

Alberta Expropriation Act s. 2(1)
- Applies to any expropriation authorized by the law of Alberta, shows how much to compensate if the government expropriates

Property rules vs. liability rules
- Property rules consist of those that entitle the claimant to an injunction
- Liability rules entitle the claimant to damages
- The distinction between them is important because injunctions and damages have different effects on future behaviour and on negotiated settlements to claims

Limits to Legislative Power over Private Property
- There is no provision in the *Constitution* defending property except for protection against state interference with Aboriginal rights
    - Section 8 "right to be secure against unreasonable search and seizure" is the closest
- No express protection against state confiscation in the Charter. This was not an oversight but a result of political interests
    - Some Charter rights have been effective in protecting a range of commercial interests, like the guarantee of freedom of expression clause to undo regulations affecting commercial advertising
- Canadian Bill of Rights (1960): still in force, but many of the rights are more robustly protected by the Charter
    - Prime significance today relates to property rights because the Bill recognizes a right to the enjoyment of property, and the right not to be deprived thereof except by due process of law (not that it won't ever be taken away)
    - The Bill applies only federally but several provinces have comparable legislation
    - ***Alberta Bill of Rights:*** Section 1(a) gives the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law
    - ***Alberta Personal Property Bill of Rights***
        - **Principle limit: may be overridden by express legislative action**
        - Section 2: only protects personal property, meaning that something like a lease is not protected by this
        - Section 4: every statute will be interpreted against the state and in favour of the property owner, unless an Act expressly declares that the enactment operated notwithstanding the Bill of Rights
        - This is not a real obstacle when the government wants to take personal property away

EXPROPRIATION

- **Expropriation is the outright taking of private land for public purposes.** This may trigger a right to compensation in accordance with the provincial ***Expropriation Act***
    - If the government regulates private property but doesn't acquire the land itself, there is rarely a right to compensation even if the restrictions are very severe or result in a drastic loss of value
- Various provincial enactments authorize expropriation, including the ***Municipal Government Act* and the *Hydro and Electric Energy Act***

- Not all measures give rise to compensation – compensation generally involves a case specific, or *ad hoc* inquiry that takes a range of factors into account. It is generally not enough to show that the impugned measure is not of universal application
- Case for expropriation:
  1) The Crown has title
  2) The "needs of many"
  3) Expedience and the assembly/holdout problem
- Cases for compensation for interference with property:
  1) Equity case for compensation: if there is a public interest in the project, then the cost should be borne by the project
     a. The burden shouldn't be placed on one individual for the benefit of all
  2) Economic efficiency:
     a. Incentives of landowner to invest: if no compensation, then no incentive to invest in the property (Hobbes idea that no one would cultivate the land if it could be easily taken away)
     b. Incentives of public agency: ensures that goods move from one owner to another when the buyers evaluation is higher than the sellers.
        i. The cost of the taking is a real social cost, so forcing compensation to be paid ensures that they only take projects that are worthwhile
  3) Practicality: some grievances are more compensable than others

Process of Expropriation

- When an expropriating authority decides to acquire private land, it must first notify every person who has an interest in the land it intends to take
  - The ***Expropriation Act*** specifies the information that must be included in the notice of intention
  - The notice of intention must be given either in person or by registered mail, and published at least twice in a local newspaper
- Once the notice of intention has been given, interested persons may file a "notice of objection" to the proposed expropriation. They may question whether the taking is fair, sound and reasonably necessary to achieve the objectives of the expropriating authority
  - E.g. an owner might argue that a right of way through his or her land should be narrower than the expropriating authority demanded
  - They may not dispute the right of the expropriating authority to resort to expropriation, or object to the project itself: a decision to construct a new highway, school, or hospital is political in nature, and is not for a court to decide

Common Law Property Rights

- The right to compensation does not exist at common law. It must be found in statute
- This is because the government's power to interfere with your property rights is derived from statutory authority - this comes from ***Sister of Charity of Rockingham v R***
  - "Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of the land taken, or for damage on the ground that his land is injuriously affected, unless he can establish a statutory right."

Principles of Compensation

- Where land is expropriated, the *compensation to the owner is based on the market value of the land and, depending on the circumstances, damages for disturbance and for injurious affection (devaluation of the owner's remaining land, where only part of his or her land is taken), and the value of any special economic advantage that the owner enjoyed because of occupying the land*
- The purpose of compensation is to make the owner, as much as possible, "whole"
- The ***Expropriation Act*** sets out additional guidelines for assessing compensation for special purpose structures and for compensating business owners, tenants, and holders of security interests
  - Also sets out various factors that must be *disregarded* when determining compensation, such as the fact that the expropriation was compulsory, how the land will be used by the expropriating authority, and any changes in the value of the land that are connected with the expropriation proceedings.

***Expropriation Act* of Alberta:**

- S.2 – if expropriation of land occurs, compensation must be paid
- 2(1) This act applies to any expropriation authorized by the law of Alberta
- 42(1) When land is expropriated, the expropriating authority shall pay the owner the compensation as is determined in accordance with this act

- (Land taken is guaranteed compensation that is determined by the act)

***Surface Rights Act* of Alberta:**
- S. 15(1) if operator can't acquire the rights, the surface rights board can grant a right of entry but board will determine the compensation payable to the owner under s.23 (Taking of an easement, right to exclude)

***Hydro and Electric Energy Act*:**
- S.37 - if transmission line extends/intrudes over your land, no compensation is allowed.
- **Similarly amounts to an easement, but not compensable here. Violate rights in USA but we don't have.**

***Mines and Minerals Act*, s 15.1 (pore space)**
- Pore space is vested in the Crown
- Confiscates private property and specifically states that there is no compensation to be had
- Also, **not even a taking**

Takeaways:
- Gov't takes land, it is compensable
- Government takes your pore space, not a taking, not compensable
- Oil company granted right of way over your land, it is compensable easement
- Electric company intrudes into your airspace, not a compensable taking

AG v De Keyser's Royal Hotel
- Facts: The claimants, De Keyser's Royal Hotel, were the owners of a London Hotel that had been used by some members of the armed forces in World War One, and they sought reasonable compensation for this occupation under the Defence Act 1842. The defendants, the Government, attempted to reject this claim, asserting that their duty to defend the realm, as per prerogative powers and the Defence of the Realm Act 1914, meant they had no obligation to compensate the claimants.
- Issues: Does the government's prerogative powers authorize them to evade statutory responsibility?
- Reasons: The royal prerogative does not entitle the Crown to take possession of a subject's land or buildings for administrative purposes connected with the defence of the realm without paying compensation. It is the authority for the statement that the royal prerogative is placed in abeyance (is not used) when statute law can provide a legal basis for an action
- **Rule:**
    - **A statute can implicitly confer a right to compensation**
    - **If a statute authorizes expropriation, there is an assumed right to compensation unless the stature explicitly states there is no compensation**

Manitoba Fisheries Ltd v R
- Facts: Manitoba Fisheries has a fishing contract to processes fish and export them to the US. The gov't wants to nationalize the export of fresh water fish to the US and so pass a statute saying that a Crown corporation is established, and all fresh water fish export will be done by the Crown corporation (they have an exclusive right). The effect is to put Manitoba Fisheries out of business overnight. The statute says that participating provinces may pass regulations to compensate the businesses negatively affected
- Issue: did the federal legislation take away the plaintiff's property?
- Reasons: the SCC finds that **business goodwill that Manitoba Fisheries built is an intangible property capable of being sold and protected**. The goodwill is now vested in the Crown corporation because they are the now the only ones who can do business
    - Court says that given that there is no provision to compensate, and no provision not to compensate, they were going to **invoke the rule in Keyers Royal Hotel** - an implied right to compensation
- Ratio:
    - Right to compensation based on *Keyser's* – goodwill is a proprietary interest – this is compensation for a regulatory taking
    - Kaplinsky says this is probably wrongly decided

British Columbia v Tener

- Facts: Tener acquired certain mineral rights in British Columbia. He wanted to work the materials, but the government wanted to have a provincial park where those minerals were located. BC ministry said Tenor will never be able to work with those minerals, so he sued
- Reasons:
  - SCC is confronted with a situation different from Manitoba Fisheries – it was able to say in that case that the Crown corporation took the business goodwill that belonged to the company, but here it doesn't appear as if anything was taken, just have the **obstruction of access**
  - The **principle in Keyser's** is invoked, so Tenor gets compensation for mineral rights
- This case and Manitoba Fisheries are **rare examples of the SCC finding a right to compensation implied in statute based on the construction in Keyser's**, having found that the government took property from the plaintiff

REGULATORY TAKINGS AND DE FACTO EXPROPRIATION

- Focus here on **equity and efficiency** – equity as more of a grey zone, efficiency as generally always favoured
- Difference between US and Canada: Fifth Amendment, states that private property cannot be taken for public use without just compensation
- In the United States the law recognizes a compensable "regulatory taking" where the regulations strip the land of all economic value, or force the owner to suffer a physical intrusion into the land, or are said simply to go "too far"
- **This is not the law in Canada**. Instead, the principle that the right to compensation must be based in statute means that an owner is not entitled to compensation unless the restrictions of the owner's rights are so drastic that they should properly be regarded as an effective taking of the land within the meaning of the ***Expropriation Act***. This is known as **"de facto" or "constructive"** taking of land
- The traditional view in Canada has been that there is no expropriation unless the government acquires the title to the land from its owner. The Supreme Court reiterated this view in its 2006 decision in *Canadian Pacific Railway Co. v Vancouver (City)*. In that case it held that a **de facto taking requires first:**
  - **"An acquisition of a beneficial interest in the property or flowing from it", and second, "removal of all reasonable uses of the property"**
  - The decision leaves the law uncertain as to whether owners must be compensated for a *de facto* taking. The door may be open, in theory, for successful claims in the future, but the threshold is very high and will not be met in the ordinary case

Regulatory takings doctrine:

- The basic approach in regulatory takings doctrine is known as the "*Penn Central* Inquiry" (a mixture of factors from both *Mahon* and *Penn Central*).
- This approach is an *ad hoc*, factual inquiry that asks whether the *property parcel as a whole* is impacted negatively by the regulation in an extraordinary way, such that it takes the regulation out of the police power domain and within the purview of the protections and limitations of the Fifth Amendment
- Three general factors used by the courts in their balancing approach **(*Penn Central* Inquiry)**:
  1) Economic effect of regulation on property
     a. Determining the economic value lost under a regulation must comprise the property as a whole
  2) Character of government regulation
     a. Is this a run-of-the-mill police power regulation or is it a dramatic and unexpected act of the government that affects property in such a substantial way that it constitutes a taking of that property?
  3) Extent to which regulation interferes with distinct, investment-backed expectations
     a. This assesses whether the expected use of the property that has been restricted by the regulation has long been a stick in the bundle that the law has secured to the property owner
     b. Was it reasonable for the landowner to expect to continue using the property in the way that it is now prohibited under the regulation, and did the land owner objectively evidence this reasonable expectation by investing in the property accordingly?

Ad Hoc Regulatory Takings: Regulation that has gone so far it has become a taking (only in the US)

Pennsylvania Coal Co v Mahon

- Facts: the city passed an ordinance restricting mining under people's homes
- Reasons:
  - If you own the surface, at common law you have right of supports. This means that anyone who has an interest below the ground can't take action if it would harm you, or else you would get damages
  - In this case all of the land is initially owned by the coal company, which sells people the surface and airspace rights and reserves the subsurface and mineral rights for itself. <u>They explicitly stated that the buyers do not have the right of supports</u>
  - The *Kohler Act* stated that a coal company has to reserve enough coal underneath to prevent subsidence, and when they don't they are required to pay damages
    - The effect of this act took the support rights that were reserved by the company, and gave them to the surface owners
    - Argued that this regulation has the effect of a taking – if this is accurate then it is subject to the Fifth Amendment '
- Holding: This is seen as a taking. The Kohler Act was not a legitimate exercise of police power, rather was an unconstitutional taking of defendant's property rights because no compensation was given
- Ratio: <u>The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking (US ONLY)</u>

Penn Central Transportation Co v New York City

- Facts: Owners wanted to build on their land but the city designated it as a conservation area. They argued it was a taking of their property
- Reasons:
  - We need to look at each case on an *ad hoc* basis to see if a taking has occurred. We do this by looking at: (test stated above)
    1) The extent of the harm
    2) Whether regulation interferes with investment-backed plans
    3) Nature of state action

<u>**Per Se Takings:**</u> where a state does something so that they automatically have to compensate

Lucas v South Carolina Coastal Council

- Facts: The Petitioner purchased two beachfront lots for $975,000 in 1986. He intended to build single-family homes on each lot. In 1988 the South Carolina legislature passed the Beachfront Management Act that barred the building. The Act's stated purpose was to protect property from storms, tides and beach erosion and as an environmental protection. The Petitioner did not challenge the state's right to pass the Act or its justifications for doing so. The Petitioner did claims that the passage of the Act resulted in a taking of the property since he cannot use it for the intended purpose.
- Issue: Does the no-build regulation result in a compensable taking?
- Holding: Yes. It is unreasonable for a state to prohibit the owner from using the land as he originally intended, unless it can be shown that this use results in a nuisance or that general property law prohibits such a use
  - The SC observed that mandated preservation of private land looks like a conversion of private property to public, a classic taking. Regulation of land use must account for owners' traditional understanding as to the states power over their property rights.
- Ratio: **If a regulation prohibits all economically beneficial use of land and the proscribed use could not have been prohibited under a given state's nuisance law, the regulation is a "taking" which requires "just compensation" to be paid to the landowner**

Loretto v Teleprompter Manhattan VATV Corp

- Facts: A law was passed that allowed a cable company to access all property. Loretto did not want to allow this
- Reasons: This law is a taking. **If it deprives you of the right to exclude then it is a taking per se (means we don't need to do ad hoc inquiry, it is factually compensable)**

Mariner Real Estate Ltd v Nova Scotia

- Facts: To preserve the beach and dune system as an environmental and recreational resource, the province of NS enacted the *Beaches Act,* which regulates the use of public and private beaches. Any development is prohibited unless authorization is obtained. The respondents applied for authorization to develop their land and were denied. They sought a declaration that their lands had been *de facto* expropriated by virtue of the Act. Trial judge held that they had been deprived of land within the meaning of the *Expropriation Act*
- Reasons:
  - Canadian courts do not have broad mandates similar to those in the US
  - Here the task is to determine whether regulation entitles respondents to compensation under the Expropriation Act
- Ratio: **Establishes the requirements for a *de facto/constructive* taking at common law**:
  1) An acquisition of a beneficial interest in the property or flowing from it
     - Not necessary to establish a forced transfer of property, acquisition of beneficial interest to the property suffices
  2) The removal of all reasonable uses of property – decline in value of land, even when drastic, is not loss of interest in land
     - The requirement must be assessed not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put
  - In Canada, **the right to compensation must be found in statute**
  - Use an **ancillary test:**
    1) Whether regulation is sufficiently severe to remove all rights associated with the property holder—Was Mariner real estate deprived of all its uses? No:
       - Not excluded from property
       - Could still exclude others
       - Could camp on it.
       - The **only thing they could not do is build** anything of value

Canadian Pacific Railway Co v Vancouver

- Facts: The CPR was granted a stretch of land originally intended for a railway. As time passed the land was not used for this purpose anymore and urban development sprang up. The CPR put forward proposals to develop the corridor and indicated that if the City of any public body wanted to acquire the land it was willing to sell. The City made clear that it would not buy that land and adopted the *Arbutus Corridor Plan By-law*. The effect of this by law was to freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land
  - CPR argues there is a presumption that the legislature intended any taking of property to be compensated, and argues that by limiting use there is an effective taking of the land
- Reasons:
  - CPR has not succeeded in showing that the city has acquired a beneficial interest relating to the land (it is not necessary to establish a forced transfer of property, acquisition of beneficial interest to the property suffices)
  - The bylaw does not remove all reasonable uses of property/prevent them from operating a railway
  - The legislation specifically states that there won't be any compensation
- Holding: There is no taking. In favour of the defendants
- Ratio: **There is no expropriation unless the government acquires the title to the land from its owner. A de facto taking requires first, "an acquisition of a beneficial interest in the property or flowing from it", and second, "removal of all reasonable uses of the property"**
  - The decision leaves the law uncertain as to whether owners must be compensated for a *de facto* taking. The door may be open, in theory, for successful claims in the future, but the threshold is very high and will not be met in the ordinary case – very high threshold
  - Shows that courts will continue to play a relatively small role in balancing the interests of private property owners and public authorities

EXPROPRIATION PROVISIONS IN FREE TRADE AND INTERNATIONAL INVESTMENT AGREEMENTS

NAFTA, Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

   a) for a **public purpose**;
   b) on a **non-discriminatory basis**;
   c) in accordance with **due process of law** and Article 1105(1); and
   d) on **payment of compensation** in accordance with paragraphs 2 through 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation")

TAKEAWAYS:

- These read like the US Constitution of the States,
    a. No property shall be taken without compensation
- These have <u>quasi-constitutional status</u> – cannot be bypassed through unilateral Canadian action
- **Foreign investors have protection like protection under the US Constitution**

Annex B.13

a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: **<u>(Penn Central Test)</u>**
    i. The **economic impact** of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
    ii. The extent to which the measure or series of measures interfere with distinct, reasonable **investment-backed expectations**; and
    iii. The **character of the measure** or series of measures;
c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

TAKEAWAYS:

- An indirect expropriation is protected like a direct expropriation
- Sounds like ad hoc analysis from US Regulatory Takings:
    - Extent of diminution – economic impact
    - Whether the regulation interfered with investment backed expectation
    - The nature of the state action – charter of the measure
- **Canada is giving more protection to foreign investors then Canadians**

Chapter 3: The Boundaries of Property

PROPERTY, POVERTY, AND THE RIGHT TO EXCLUDE

- One function of property is to provide a basis for who is allowed to be where
- Problem of homeless people having no private place – the idea of all land in a society being held as private property would be catastrophic for homeless people
- The current emergence of increasing regulation of public places to restrict the activities that can be performed there (e.g. sleeping on streets) can have consequences
- RC Ellickson suggests that the <u>problem of street order is a problem of land management</u> and suggests that city's codes of conduct should be allowed to vary spatially (system of zoning with red, yellow, and green zones, based on the tragedy of the commons)
- Waldron posits that individuals who have no private space to guarantee life sustaining activities have to do these activities in public, and society must take this into consideration

Victoria (City) v Adams [2008]

- Facts: Respondents, along with others, had set up a tent city in a public park. City sent them a note to vacate based on the Parks Regulation Bylaw and the Streets and Traffic Bylaw of Victoria. These bylaws prohibit erecting a temporary shelter on public property
- Issue: Does the prohibition infringe the rights of homeless people to life, liberty, and the security of the person not in accordance with the principles of fundamental justice?
  - The issue of the right to camp in public spaces in the sense of a right to set up a semi-permanent camp is not before the court - the issue here is the prohibition on erecting even a temporary shelter taken down in the morning
- Reasoning:
  - City claims that the right to camp on property rights makes the claim about property rights, and that property rights do not fall within the scope of s. 7
  - The use of a park space by an individual does not necessarily involve a deprivation of another person's ability to utilize the same "resource"
  - Defendants are not asserting a property right - don't want to have anyone excluded or determine the use of any city property - essentially what they are seeking does not amount to an expropriation of public property, simply saying that the city cannot manage its own property in a manner that interferes with their ability to keep themselves safe and warm
  - Effect of the prohibition is to impose significant and potentially severe additional health risks
- Holding: Held for the respondents. The infringement is not justified pursuant to s. 1 of the Charter. The prohibition on taking a temporary abode contained in the bylaws constitutes an interference with section 7
- Ratio:
  - **Not a property right**, but a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter
  - Without the Charter, likely that the city would have been able to exclude
    - BUT city owns parks in trust for people, not like private property – city cannot exclude

Dwyer v Staunton

- Facts: The public road was blocked by snow. A city bulldozer had cleared the path as much as necessary but had to go onto a private property to maintain the road. The defendant was stopped by the plaintiff for driving his truck across the land
- Issue: Can private property be used for public purposes in times of necessity?
- Reasons: You cannot exclude a lawful traveller who needs to go through property by a necessary cause. Public need is prioritized over private property
- Ratio: A traveller who is lawfully using a public road has the right to go upon private lands at places where the public way is impassable, due, for example to snow and ice. Must take case not to cause any unnecessary damage
  - **This shows another limitation on boundaries and the right to exclude**

Fontainebleau Hotel v 4525 Inc

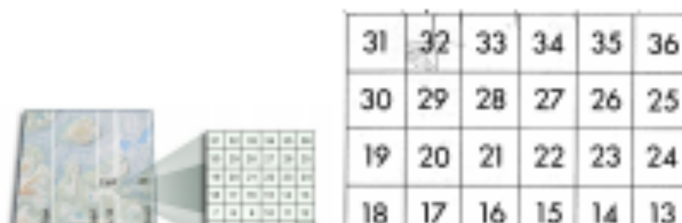
- Facts: The respondents owned the hotel Eden Roc, and the appellants owned the hotel Fontainebleau. The respondent was seeking an injunction so as to stop the appellant from continuing an addition to their hotel that would consequently block the sun from their pool and sunbathing areas. In the inferior court the judge had granted a temporary injunction in favour of the plaintiff under the maxim *sic utere tuo ut alienum non laedas*
  - This maxim means use your own property in such a manner as not to injure that of another
- Reasons:
  - The appellate court held that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property which is recognized and protected by law, and so long as his use is not something that the law will determine to be a nuisance
  - The court determined that the respondent did not have legal right to the free flow of light and air across the adjoining land of his neighbour
  - The court distinguished between a property use that injures one's neighbour, and one that injures the rights of one's neighbour
  - If common law does not offer you a remedy, it must mean that you have no right
- Holding: Court reversed the temporary injunction granted by the inferior court and dismissed the complaint

- Ratio: A landowner does not have a legal right to the free flow of light and air across the adjoining land of his neighbour. **The right to have one's view remain unobstructed cannot be created by implication; otherwise, property development would be hindered**

Note: Limits on the Right to Exclude
- Statutory: Alberta Human Rights Act s. 4 and 5
    - A person cannot exclude another person on the basis of certain protected categories (ethnicity, religious beliefs, etc.) if the property rights are open to the public

LAND AND WATER BOUNDARIES

- The Latin maxim that whoever owns the soil, holds title all the way up to the heavens and down to the depths of the earth
    - The courts have resisted applying this literally
    - *Cujus est solum* may be a useful point of departure in examining the scope of ownership rights, but it is so laden with qualifications that it is best regarded as a "fanciful phrase" and an "imperfect guide"
- We have these because there must be a way to establish and decide the physical boundaries of the property – especially if selling the property
- A boundary is an imaginary line drawn to mark the perimeter of a property. The location must be described in a conveyance document called the legal description
    - The legal description is not always controlling
    - It may be ambiguous (no internal coherence), so extrinsic evidence may aid in determining what was meant
    - When the intention remains unclear, it can be resolved by favouring one descriptive element over another (usually give the most effect to those things which are least liable to mistakes – so the **highest regard is natural boundaries**)
    - Ambiguity is resolved by using the natural monument and disregarding the statement of distance
- Ranking in descending order of importance of the elements used in ambiguous legal descriptions:
    - Natural monuments
    - Lines actually run and corners actually marked at the time of the grant (e.g. artificial monuments)
    - Abutting established boundaries if referred to in the grant (e.g. fences)
    - Courses and distances (measurements in plan/metes and bounds description)
- When boundaries are not agreed upon, the **conventional line doctrine** can be used (*Robertson v Wallace*)
    - Those portions of the boundary marked on the ground by survey monuments and shown on the map sheets by a series of straight lines connecting the survey monuments
- Metes and bounds: Refers to the natural monuments or features of the land. These boundaries are named in the deed and needed to trace back the origins of the land
    - Example: tree towards the boulder by the lake, etc.
- Certificate of title by reference to a cadastre: Can convey land by reference to that record in the cadastre (a comprehensive land recording of the real estate or real property's metes-and-bounds). Usually a reference to some central plan or geographic coordinates
    - Example: the Land Titles Act
- Dominion Land Survey 1870: Part of the government's efforts to settle Western Canada. In order to be sold, the land was carved up into parcels. This survey covered 800 000 square kilometers laid out in a grid
- The township system: Composed of meridians parallel
    - A column of townships is called a range
    - A township is 36 sections
    - A section is 1x1 miles
    - A quarter section is 160 acres (standard homestead, most common unit in Alberta
    - Smaller divisions include legal subdivisions to (40 acres)



- Dominion Lands Act, 1879
  - A federal law under which lands in Western Canada were granted to individuals, colonization companies, the Hudson's Bay Company, railway construction, municipalities and religious groups
  - It devised specific homestead policies to encourage settlement in the West, covering eligibility and settlers' responsibilities, and outlined a standard measure for surveying and subdividing land
  - Included:
    - Hudson's Bay Company Lands: ss. 17–21
    - School Lands: ss. 22–23
    - Town and Village lots: s 32
    - Land for churches, cemeteries, etc.: s 33
    - Homesteading provisions: s 34
- Land use allocation in Alberta today:
  - Largely divided into green and white areas
  - White: settled area of the province – farming, municipalities, etc.
    - About 3/4s is private, the rest is public
  - Green: given over to forest management companies (58% of the province)
  - Lands under federal jurisdiction include national parks, military bases, and reserves

- Certificate of title: a state or municipal-issued document that identifies the owner or owners of personal or real property. A certificate of title provides documentary evidence of the right of ownership mainly for real estate
  - The only interests recognized in land are those in a certificate of title – the Government of Alberta guarantees this title almost fully
  - This is as close as we get to owning the land because the Crown actually owns it
  - The order on the title goes meridian, range, township, and section
  - **Section 62 of the *Alberta Land Titles Act*** provides a guarantee of the owner of the land being the real owner, where no one can deny this ownership claim, but the certificate of title does not guarantee the boundaries of the property
  - **Section 60 of the *Land Titles Act*** says that the only legal interests in land in Alberta are those recorded in a certificate of title
- **Torrens System:**
  - In place in Alberta, operates under the authority of the ***Land Titles Act***. States that the Gov't of Alberta had custody of all original titles, documents, and plans, and has the legal responsibility for the validity and security of all registered land titles info. The gov't guarantees the accuracy of all titles. Idea if to guarantee accuracy so if an error occurs there is compensation available
  - Operates under three principles:

- Mirror principle: the title to property will reflect completely and accurately all current facts of the title
- Curtain principle: the current certificate of title contains all information about the title, so it is not necessary for an interested person such as a potential buyer to worry about any past dealings with the property
- Insurance principle: an insurance fund is in place to compensate anyone who suffers a loss as a result of a mistake being made about the validity or accuracy of a title

LAND BOUNDED BY WATER

- Common law distinguishes among water formations depending on whether they are navigable or tidal – at common law there is a presumption that the boundary of land that is adjacent to a non-tidal river extends to the middle of the river, unless documents of title state otherwise
- When the body of water is tidal, ownership extends only to the ordinary or mean high water mark - seaward of this the Crown has title

Public Lands Act:

- The title to the beds and shores of all permanent and naturally occurring bodies of water is vested in the Crown in right of Alberta

Surveys Act:

- The bed and shore of a body of water shall be the land covered so long by water as to wrest it from vegetation or as to mark a distinct character on the vegetation where it extends into the water of on the soil itself
  - **Rule: the line where there is no more aquatic vegetation is the boundary where private owners interest begins**
- Riparian rights: The allocating of rights to use a body of water by individuals who own property around said body of water – includes right of access to the water

Erik v McDonald

- Facts: All of the parties' own property that borders on the Pedersen reservoir. Due to the topography the appellants own the land both on the north and south side of the bay, and have constructed a fence across the water between these parts of their parcel which has the effect of isolating the small bay of the reservoir which borders the respondent's lands and prevents them from using the bulk of the reservoir.
  - Trial judge concluded that she didn't have to decide if the Pedersen reservoir was a naturally occurring body of water, because under **s. 3(2) of the *Water Act*** the **Crown owns "the property in and the right to the diversion and use of all water in the province"**. Even if the appellants owned the bed of the reservoir they didn't own the water and couldn't prevent the respondents from using it
- Issue: Do the appellants own the water or the bed of the reservoir, so that they can exclude others from its use?
- Reasons:
  - Common law position is that the owner of the land owned it from the depths of the earth to the heavens, but one exception in the ***Public Lands Act (2000)*** states that **the title to the beds and shores of all permanent and naturally occurring bodies of water is vested in the right of Alberta**
  - Riparian access to water is preserved no matter what, so regardless of who owns the bed, they cannot interfere with access to the water
  - There is legislation to say that water is not seen as not naturally occurring simply because it was dammed
- Holding: Province owns the reservoir and the water. Appellants and respondents maintain an equal common law riparian right of access to it. A fence would interfere with the common law rights of the respondents. Appeal dismissed
- Ratio:
  - **Where a water body is considered "naturally occurring" both the water and the bed will belong to the province**
  - **Where the water body is not naturally occurring, the bed of the water body will still belong to the holder of the title but the water will belong to the province**

ACCRETION

- At common law, a riparian landowner is entitled to the extension of land through accretion

- MUST BE GRADUAL AND IMPERCEPTBLE – it is the progress of the accretion that must be imperceptible, not the result
  - It is said that imperceptible criteria are met so long as the changes "cannot be observed in its actual progress from moment to moment or from hour to hour"
  - Can also occur through non-natural forces, e.g. the building of a dam upstream, as long as it wasn't a landowner who brought about the result
- The operation of accretion may be excluded in a granting document

Robertson v Wallace:

- The Robertson title read that "all the portion of section x that lies to the east and south of the west bank of Highwood River" and the Wallace title read "all that portion of section x that lies west and north of the west bank of the Highwood River"
- Later, natural events occurred that ended up adding land on the west bank, and an island in existence at the time of the grants became part of the west bank. Wallace claimed these areas
- This claim failed - on the evidence it was shown that the **change had been rapid, and was not gradual and imperceptible which is the legal test for accretion.** Therefore the original location of the river still defined the boundary

- Why?
  - One idea is that an addition to land may be too minute and valueless to appear worthy of legal dispute or separate ownership
    - "That which cannot be perceived in its progress is taken to be as if it never had existed at all"
  - **Helps to maintain water access for owners and protects the public interest in the use of navigable waters** - the presumption of accretion helps further these goals and maintains the water's edge as the property boundary between the public and private
  - Always limited by certificate of title

SUBSURFACE RIGHTS

- There is a potential anticommons problem with allowing surface owners to possess the entire sliver of land beneath their property – attempts to assemble these slivers of title could be thwarted by holdouts
- The resulting fragmentation may interfere with the needs of new technology, such as carbon sequestration
- The means of access to the subsurface are essentially the same for the owner of the surface and for some other private landowner, so there isn't a difference in the technologies used by the competing claimants as there is in connection with airspace
  - Potential uses for all owners of subsurface are identical!

Edwards v Sims (1929)

- Facts: a cave developed as a tourist attraction by Edwards, on whose land the cave's entrance was located. About one third of the cave was located directly below the lands of Lee. This portion was inaccessible to him. Lee commenced an action against Edwards for trespass. Primary issue here was whether a survey of the cave could be ordered
- Issue: Does the court have the power to invade the right of ownership for the purpose of determining the truth of the matter at hand?
- **Rules from the majority:**
  - **The surface owner has clear and legally protectable control inside the boundary line (exclusivity is respected)**
  - **By extending rights to the depths of the earth the greatest possible area of land is made ownable (universality)**
  - **The clearness of the rule reduces the transaction costs that might be produced by the need to determine who has title to what land – this certainty facilitates exchange (transferability)**
- Holding: The court has the inherent power independent of statute to compel a mine owner to permit an inspection of his works at the suit of a party who can show reasonable ground for suspicion that his lands are being trespassed on
- Dissent (Logan J.)
  - True principle is that the man who owns the surface, without reservation, owns not only land itself, but everything above, upon, or under it which he may use for his profit a pleasure, and which he may subject to his dominion and control. Further than that his ownership should not extend
  - Shows principles of legal realism, hints that he proposed this solution that was so far from common law principles because of other intentions
    - Cave wars seen as a problem, federal legislation had no money to acquire the caves and turn them into a national park, so one cave owner would be cheaper to buy than two

    - This dissent is a lot less clear than the bright line rule shown in the maxim, although in terms of economic efficiency it makes more sense that sole ownership should go to the owner of the entrance (prevents holdouts)

Economic Perspective on the Great Onyx Caves

- The dissenting opinion of Logan J. in the case draws heavily on rhetoric used in relation to the economic, desert and labour justifications used for private property
- BUT would the minority rule have been applicable if neither party had easy access to the caverns? If so, would ownership have been based on a race to the subsurface? (Potentially at the expense of the geological treasure underneath)
- The majority rule isn't just an endorsement of selfishness – the right of control of land (or other property) is an aspect of the freedom that springs from private property
- In this reading it might be assumed that most people will act rationally in pursuing their self interest, and if this is so, then the owner of the land should be willing to allow others to use it if the incentive to do so is high enough
    - **Basically the majority holding that gives the owner of the surface absolute rights of ownership can basis of economic efficiency** – premise is that we all have our price
- If we want to design a property regime that allocates efficiently, the system should seek to promote exclusivity, universality, and transferability
    - A rule that is based on exploration is less precise than one vesting absolute rights in the surface owner
- If the majority rule is an efficient one, then the harm to the cave operator shouldn't be as irreparable as the dissent claims – B could buy the right to use the caves from A
    - From an efficiency perspective, the determination of whether or not the caves will be used as a tourist attraction depends on the respective financial interests of A and B, NOT on the legal allocation established through litigation
    - Assuming the parties can bargain without high transaction costs, the right to the cave will go to the party who values it the most, and the legal allocation will affect merely who pays whom and how much **(COASE THEREOM)**
        - The economic function of laws is to influence the prices that are paid for various commodities

Star Energy Weald Basin Ltd v Bocardo SA

- A case involving petroleum and natural gas wells that were drilled diagonally on A's land and extended under B's property, the court held that title extended to the depths at issue but cast doubt on the maxim
- Recognized that this maxim may not be applicable far below the earth's crust, but that in the case at hand it didn't extend that far and so the application was not absurd here

Note: In many states pore space is vested in the owner of the surface, but in Alberta the ***Mines and Minerals Act* (2000)** deems all pore space to be, and have always been, the property of the Crown

THE RIGHTS TO MINES AND MINERALS

- The common law rule is that minerals except gold and silver are part of the land itself and belong *prima facie* to the owner of the soil, and the owner of the land
    - It is presumed that the land ownership also includes the minerals in the land (unless otherwise stated)
    - In reality this rule doesn't apply – there are so many exceptions that it essentially only applies to the Crown now
- Generally once ownership of a mineral estate has been granted, a sale between private individuals will pass mines and minerals automatically unless those interests are specifically reserved
- Absent statutory guidance, the question of what counts as a mineral is determined by the parties' intentions at the time of the grant (so mines and minerals is capable of having a wide variety of meanings)
- Three main principles:
    1. The Vernacular Test: to decide if a substance is "mineral", the test looks to see if it was considered to be so in the vernacular of miners, commercial people, and landowners (prefers the vernacular over the scientific)
    2. Purposes and Intentions Test: where regard is had not only for the words used to describe things reserved, but also for the leading purpose or object that the deed or statute embodies
        i. E.g. granting of land for agricultural purposes with the guarantee covenanting to cultivate
    3. Exceptional Occurrences Test: that the word "minerals" in a reservation doesn't include the ordinary rock, but only exceptional and rare substances
- Surface and mineral rights came with the purchase of land until the early 1900s. After this they have been owned by the government and can't be purchased, only leased by individuals and companies

- The disposition is called a grant. When there are terms placed on it there is a reservation of the grant, where the grantor grants the interest in land but reserves something within it

MINERAL TITLE DISPUTES

Borys v CPR

- Facts: CPR's original grant from the Crown included all mines and minerals. CPR granted some of the lands to settlers, reserving for itself the "coal, petroleum, and valuable stone". Natural gas is then discovered under the land
- Issue: Is natural gas reserved in the category of coal, petroleum, and valuable stone, or is it different?
- Reasons:
    - Although there is little chemical distinction between petroleum and gas, the vernacular test prevails. In *situ* petroleum is liquid, and gas is gas
- Holding:
    - CPR does not own the gas because it didn't reserve the rights to itself, so the rights/gas belong to the surface owner
- Ratio:
    - This case illustrates what a court might be faced with – there is a grant that reserves something, then something else is discovered. Need to determine if the new thing falls under the initial category

Right of Entry

1) At common law:
    a. If you own the land at common law, you have the right of access. You don't need the surface owner's permission to work the minerals. Can't cause unnecessary damage
    b. In Alberta, this was overwritten by legislation ***(Surface Rights Act, s 12)***

Surface Rights Act

c. **Must negotiate with the surface owner so that the surface owner will profit, or at least not be harmed if you want to enter the property**
d. If they can't come to an agreement, the Surface Rights Board will give an estimate of compensation to be given to the surface owner
e. Right of entry - An operator needs to obtain the consent of the owner and the occupant of the surface of the land in order to enter the surface of the land for the removal of minerals, for construction, or for incidents relating to construction, OR has become entitled to right of entry by reason of an order of the Board pursuant to this Act

Important Acts:

Public Lands Act

s. 35(1): "All mines and minerals and the right to work them are, by implication and without the necessity for any express words of exception, excepted from every disposition and notification made under this Act."

a. If there are provincial Crown lands granted to an owner today, the owner would not get any mines or minerals unless they are expressly granted
b. A Crown grant is taken to reserve mines and minerals impliedly

Mines and Minerals Act s. 10

s. 10: "It is hereby declared that no grant from the Crown, whether relating to land, minerals in land or otherwise, has operated or will operate as a conveyance of gold and silver unless gold and silver are expressly named and conveyed in the grant."

Mines and Minerals Act s. 1

S 1: "minerals" means all naturally occurring minerals, and without restricting the generality of the foregoing…"

c. This legislation was intended to allow the landowners to profit, where they could recover the minerals by surface operation without the need to mine

Law of Property Act

S 7(1): "... every instrument transferring land operates as an absolute transfer of all right and title that the transferor has in the land at the time of its execution, unless a contrary intention is expressed in the transfer or conveyance."

AIRSPACE RIGHTS

Didow v Alberta Power Ltd [1988]

- Facts: Alberta Power Ltd constructed a power line on the municipal road allowance along the side of the appellant's land. These power poles are only two feet from the appellant's land and the cross-arms conductors extend 6 feet into the air space above the appellant's land. The trial judge held that it didn't interfere with the appellant's possession of air space because there is no decreased enjoyment of the property
- Issue: Has the respondent trespassed on the air above the appellant's land?
- Reasons:
    - The Latin maxim *cujus est solum* is referenced – this establishes that intrusion by an artificial or permanent structure into the air space of another is forbidden as a trespass
    - Two groups:
        - Cases involving permanent structural projections into the air space above another's land (this is generally held to constitute a trespass)
        - Cases involving a transient invasion into the air space above another's land at a height not likely to interfere with the land owner (unlikely to affect the landowner, e.g. airplanes)
    - In this case the court does not consider the second group appropriate because aircraft should not be equated with power lines (much less interference)
    - Haddad J.A. holds that the application of the Latin maxim should be balanced in compromising the rights of landowners against the general public. This balance could involve restricting the rights of an owner in the air space above his land to the height necessary for the ordinary use and enjoyment of his land and the structures on it (allows technological growth to be accommodated)
- Holding: Appeal allowed. The cross-arms amount to a trespass
- Ratio**: A landowner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land**
    - Concepts established here:
        - **Courts will not always give literal effect to the Latin maxim**
        - The proper remedy for interference with a landowner's air space with a permanent fixture is trespass, as opposed to nuisance

Notes: Following the dismissal of the application for leave to appeal, **Alberta amended the *Hydro and Electric Act* so it now permits the type of airspace intrusions that were an issue here, and doesn't provide compensation for this**

- This is for policy reasons – if this wasn't enacted, then every owner where power lines intruded over their land would be eligible. Costs would be dramatically increased. Needs of many bring provided power versus the individual need of each person for their personal property
- Now the government doesn't have to do the cost benefit analysis when deciding whether or not to intrude on land

ECONOMIC EFFICIENCY

- This plays an important role in the design of property rules – need to think about what is the more valuable use of the airspace/land
- Economic efficiency is about the efficient allocation of resources. **Property should end up in the hands of those who value it the most**

- We can always reach efficient allocation through trade – this is Coase theorem

Coase Theorem & Property vs. Liability Rules – also see Great Onyx Caves

In the absence of transaction costs any initial assignment of rights will lead to an efficient result

- Basically, that if the parties can bargain, then the initial allocation isn't important because it can still be reached in the end. It is the market that determines the ultimate use of resources
- Property rights/airspace rights are therefore factors of production – if we assign rights in those factors of production, they can be traded so they end up in the hands the parties who value them the most
- Transaction costs: what might impede bargaining
  - Collective action problems – freeriding and handouts
  - Strategic bargaining – bilateral monopolies (end up with a lack of productivity because it produces only strategic behaviour and friction)
  - Non-productive costs – costs of contracting, monitoring, and enforcing
- Coase states that when transaction costs are high, bargaining might fail

How legal rules can minimize transaction costs:

1) The law should mimic the market
   a. Try to accomplish what the market would do in a world without transaction costs
2) Assign property to the likely highest value user
3) Choose a remedy to protect the entitlement
   a. Choose a "property rule" (injunction) when transactions are likely to be smooth
      i. This is a rule that protects your entitlement so that it cannot be taken or infringed upon, so the transfer price is set by you at negotiation
   b. Choose a "liability rule" (damages) when courts are more effective
      i. A liability rule protects your rights in a different way – entitlement is taken away/infringed upon, and then a court retroactively sets the price for your entitlement
   c. How to choose between these: conventional thinking is that if we think bargaining is relatively straightforward, we protect the entitlements by a property rule and leave the parties to work it out themselves. If we anticipate a breakdown of the bargaining process or high transaction costs, use a liability rule

FIXTURES

- A chattel that becomes sufficiently attached to the land may be transformed into a fixture, thereby forming part of the realty
- When chattel becomes a fixture, it ceases to be personal property and the title to that item is subsumed into that of realty
- The determination of whether a chattel has been transformed into a fixture is a matter of intention, objectively determined – this is determined by examining the degree and object (purpose) of annexation
  - The objective test of intention is mainly aimed at protecting third parties who may be dealing with the land at some future point. By relying on external factors, third parties who may be unaware of some existing contractual relations can, in theory, know whether a given item is a chattel or a fixture
- When a chattel is attached to the land, however slightly, a rebuttable presumption is raised that the item has become a fixture
  - Extent of the attachment tends to affect the strength of that presumption
  - The presumption is reversed if the chattel is resting on its own weight
  - The sole ground for the rebuttal of these two presumptions is the object/purpose of annexation
- **Two stages for assessing fixtures:**
  - First question to decide is whether or not the personalty became a fixture (use the fixtures test from ***La Salle***)
    - **What is the degree of annexation?**
      - Any physical attachment gives rise to a viable presumption that the chattel is transformed to a fixture
      - Generally items resting on their own weight or those that are merely plugged in would be chattels unless appreciable damage would result from their removal
      - When equipment is attached to a structure, all of its components are generally regarded as fixtures, even a part that can be removed easily if removal of that part would render the machine/fixture inoperative

        - **What is the object or purpose of annexation?**
            - Was the purpose of the attachment to enhance the land having regard to the land's intended use? (fixture exists)
            - Was the purpose of the attachment for the better use of the chattel as a chattel? (affixation doesn't make part of the realty)
            - Should be assessed objectively, as it appears to the world
            - Items not physically fixed to the land may be regarded as fixtures if they appear to intend to be part of the land (e.g. garage door opener)
            - If an item is physically affixed to the land but the purpose of annexation is to make that personalty better or more valuable, rather than to improve the land, then it could be seen to have retained its status as personalty

    - <u>If it is a fixture, ask what happens to the existing interest in both the chattel and the land</u>

Clash of Security Interests

- **Under the common law the general rule is that when chattel becomes affixed it falls under land security**
- Thus, the security holder of the chattel loses the right of repossession and is only left with an action on the debt against the purchaser
- These disputes are regulated by statute in Canada:
    - **In Alberta a security interest in a chattel will normally enjoy priority over a subsequent land mortgage if that (chattel) security interest is taken before the item becomes a fixture**
    - Regulation of this interest is required to protect the chattel security against prior mortgage – failure to register it in the land titles office will lead to a loss of priority over those who deal subsequently with the landowner on the faith of the register

La Salle Recreations v Camdex

- Facts: The owner of the realty (Villa Motor Hotel) get financing from their project. They borrow the money from Camdex Investments, and give them a mortgage on the land (security interest). Villa buys the carpeting from the vendor, but the money is not paid right away. The vendor makes it a conditional sales agreement where they stipulate that the vendor retains title to the carpet until the purchase price is paid in full. Villa now has two liabilities - to Camdex and to the vendor for the carpet. Then, Villa goes bankrupt.
    - The vendor says that is his carpet, so they should get it regardless of anything else. Camdex says they have a mortgage on the land and there is no carpet, it is a fixture so all the right in it are subsumed in the realty
    - If the carpet is deemed to be a fixture, the vendor loses. The only chance is for the court to say that it is still a carpet and not part of the realty
- Issue: Is the carpet a fixture or realty?
- Reasons:
    - **Fixtures Test: made up of two questions**
        - **What is the degree of annexation?**
            - How is the thing connected to the land?
            - Any physical attachment, however weak, gives rise to a viable presumption that the chattel has been transformed into a fixture
            - Contrary presumption that anything not physically attached is presumed not to be fixture
        - **What is the object or purpose of annexation?**
            - Should be assessed objectively, as it appears to the world
            - Items not physically fixed to the land may be regarded as fixtures if they appear to intend to be part of the land (e.g. garage door opener)
            - If an item is physically affixed to the land but the purpose of annexation is to make that personalty better or more valuable, rather than to improve the land, then it could be seen to have retained its status as personalty
            - Doesn't matter if there is a contract that stipulates otherwise

Re Davis

- Case about whether bowling alleys were chattels or fixtures
- Test here was if the **object of affixing of chattels is to improve the freehold**, then even if the chattels are only slightly affixed to the realty, they **may well become part of the realty**

- If the **object of the affixation of the chattels is the better enjoyment of the chattels**, then the **affixation does not make them part of the realty**

Tenants Fixtures

- Certain fixtures that are installed by tenants are subject to special rules for detachment- basic governing principles for these tenants fixtures are laid out in *Frank Georges Investments Ltd v Ocean Farmers Ltd*
- These fixtures become part of the freehold but can still be severed. Once severed they stop being fixtures and start being chattel again
- Tenants right of restoration is subject to four considerations:
    1) At common law the items must fall within a set of protected fixtures in order to be removed (includes items attached for the purposes of trade, ornamentation, or domestic convenience)
    2) Removal may be precluded if it will cause serious damage to the property
    3) The implied right of detachment may be abridged by a contract
    4) Must have timely removal – have to act before the term has run its course (sometimes for a reasonable period afterwards) (*Carabin v Offman*)

Diamond Neon Ltd v Toronto-Dominion Realty

- Facts: The signs were put on the land under a contract between Diamond and a tenant on the land, Uptown. There was a contract between the two that stated the displays remain Diamond's property and will not be deemed fixtures. The land was owned by Western Canadian Properties and leased to Uptown. Eventually, Uptown transferred that lease to Dueck along with the contract for the signs. Dueck entered into a new lease for the signs with Diamond. When the lease between Dueck and Diamond expired, and Dueck's lease of the land expired, the signs were left there. Western Canadian then sold the land to TD. TD had no knowledge of any contract relating to the signs. TD sold the signs to Nettie Holdings.
- Issue: When the defendants purchased the land, were these items fixtures? (if so, then it is conversion)
- Reasons:
    - Even if the defendant did have notice of the claim 6 months after buying the land, this notice couldn't affect the character of the articles because they had already been passed on with the conclusion of the sale
    - The defendant couldn't be affected by the contracts for the leasing of the items because it didn't have knowledge of them when it bought the land
    - The defendant acquired title to the signs when it bought the land, so when it sold them there was no conversion
- Holding: Held for the respondents. The degree and object of annexation but support the conclusion that the signs had become part of the realty before the defendant bought the land
- Ratio: **This is an issue of tenant's fixtures – at the end of the lease they have the right to disconnect the fixtures and restore them back to chattel status**. When Dueck failed to exercise the right to remove the fixtures, Diamond should have taken action to remove them

Personal Property Security Act

- If you have a security interest or lease, you can protect your investment by registering your agreement under the PPSA and under the Land Titles Act
- The sole scope is security interest over a chattel

TRANSFORMATION OF PROPERTY IN CHATTELS

- This happens when chattels belonging to two or more people become somehow connected. It deals with the question of who owns the object under dispute
- 3 types:
    - **Confusion: occurs when fungible items are inseparably combined**
        - E.g. A's apples become mixed with B's apples
        - Authorized confusion (done when pursuant to a contract)
            - Rights as agreed
        - Innocent: innocent mistake
            - The owners are said to become owners in proportionate share
            - 50/50 contributions if known

- Wrongful: negligently done
  - Old rule: culprit loses all rights (punitive, can be too harsh because they lose all the property they actually had)
  - **New rule (*Indian Oil, Glencore*): says that they become owners in proportionate shares, reflecting the quality and quantity of the contributions.** Any doubt is resolved against the wrongful party and if the innocent party suffered a loss as a result they are also entitled to damages (equitable)
- **Accession: Items that are initially distinguishable from one another can become inextricably fused**
  - E.g. A rebuilds an engine only to discover that the parts were stolen and belong to B
  - General rule is that the owner of the mother acquires title to the progeny (see *Cavalier Yachts*)
  - **Must identify the principal chattel**
- **Alteration: A chattel is fundamentally transformed**
  - Title will be affected only when the goods are substantially transformed (to what degree this is isn't clear in the jurisprudence)
  - E.g. A's iron poles are made into a wrought-iron gate

Glencore International AG v Metro Trading International Inc
(Confusion)

- Facts: Metro Trading International (MTI) was a company that mixed, bought, and sold oil. 5 different companies had contracts for the storage of oil in MTI's facility in Fujairah (in the United Arab Emirates). The oil was stored in a way that it was commingled with oil of similar quality. Metro Oil, a company associated with MTI, had entered into a refining contract with one of the companies with a contract, Texco. Texco was to provide MTI with crude oil to be refined by Metro in exchange for quantities of the refined oil. This meant that it wasn't only the ownership of oil that was in question, but also the ownership of oil that was transformed into a new product
  - MTI went into bankruptcy - at this point there was only 750 000 tonnes of oil in their facility, and there should have been 2.5 million
- Issue: What system of law governed the transactions in place?
  - This case deals with what was left out of the previous case **- the effect of proprietary interests of the wrongful and irreversible mixing of goods of different kinds**
- Reasons:
  - Cited *Indian Oil Corporation Ltd v Greenstone Shipping* - this case created the new rule for commingling, states that where B wrongfully mixes the goods of A with goods of his own (which are of the same nature and quality) and they can't be separated, the mixture is held in common and A is entitled to receive out of it a quantity equal to that of his goods which went into the mixture. He is also entitled to claim damages from B for losses suffered
  - True principle of English law is that property in chattels is not lost simply because they are processed into a new form - greater concern on the origin of the new commodity than on the fact that a new commodity has been created
    - The true owner is always entitled to take their property back in its new shape despite any form of alteration, if he can identify them in that new commodity and show that it is wholly of substantially composed of them
  - Proposition that a new commodity automatically belongs to its manufacturer with some care - not a settled principle, especially if the manufacturer is a wrongdoer
- Ratio:
  - When one person wrongfully blends his own oil with oil of a different grade or specification belonging to another person with the result that a new product is produced, that new product is owned by them in common
  - The proportions in which they own the new blend should reflect both the quantity and the value of the oil which each has contributed
  - Any doubts about quantity or value should be resolved against the wrongdoer
  - Innocent party also entitled to recover damages in respect of any loss suffered

McKeown v Cavalier Yachts Pty Ltd (1988)
(Accession)

- Issue/Facts: Competing claims to the ownership of a yacht. The plaintiff owned a laminated hull that was supposed to be turned into the finished product. An agreement was entered into between the parties to do so. Cavalier was sold to Spartech, with Spartech taking on the contract and the plaintiff paying an additional $20 000. Spartech claimed that it had not received payment for the yacht, and because it didn't have contractual rights against McKeown it asserted ownership of the yacht.

- Defendants argued that McKeown's hull had become an accession to the work performed by Spartech
  - McKeown wants specific restitution
- Reasons:
  - The judge holds that the yacht is chattel that would be seriously affected if the "accretions" added by Spartech were removed. To remove the additions would destroy the current article so the law of accession applies. This is the injurious removal test.
  - The hull was worth $1,700 and the accretions are worth $24,000. Which is the major chattel to which accretions were added (principal chattel)? The judge takes the view that the hull was added to piece by piece, and as those pieces were add they became the property of the hull owner, McKeown.
  - Spartech should have taken the process steps of finding out who the yacht belonged to rather than assuming it was theirs and completing work on it. The hull, along with the work completed by Spartech, is the property of the plaintiff.
  - Regarding the specific restitution, is the chattel sufficiently unique so that damages are not appropriate? Yes, the yacht should be returned to the plaintiff.
  - Should Spartech be compensated for the improvements? The plaintiff wanted the work done, but thought that his yacht trade-in was sufficient payment. The plaintiff is ordered to pay the difference between the trade-in value and the value of the work done by Spartech $4,409.
- Ratio:
  - If minor chattel can be detached, then it can be ordered to be returned, or it cannot be returned and then compensation can be awarded. If minor chattel cannot be detached, then compensation can be awarded.
  - The **law of accession**:
    - If any **corporeal substance receives an accession by natural or artificial means**, as by the growth of vegetables, the pregnancy of animals, the embroidery of cloth, the **original owner is entitled by his right of possession to the property in its improved state**
    - Similarly, when the goods of one person are affixed to the land or chattel, for example a ship, of another, they may become part of it and so accrue to the owner of the principle thing.
  - It is relevant whether an innocent third party had added to someone else's chattel without any actual or constructive notice of another's ownership and cases where there was no such knowledge

Tests for Accession (*Thomas v Robinson*)

1. **Injurious removal test**: can the items be removed without serious physical injury to the principle chattel?
   i. E.g. Welding metal
   ii. If the part can be removed without damaging the remaining principle chattel then there would be no accession even though the removed part is of vital functional importance (e.g. engine from a car)
2. **Separate existence test:** has the separate identity of the acceded chattel been lost?
   i. E.g. a brick in a house
3. **Destruction of utility test:** would the removal of the combined items destroy the utility of the principal chattel?
   i. E.g. a car is not just a collection of parts, if you remove the engine it no longer functions as a car
4. **Degree and purpose of annexation test (fixtures test):** looking at the degree and purpose of annexation, has an accession occurred?

No sure guide as to which approach should govern – the proper approach may depend on the nature of the dispute

Common Law Rule for Accession

- When you fuse two items of personalty to that they cannot be conveniently detached there is accession. The principle personalty becomes the subject of all the property rights and the rights to the accession are lost. There are only rights in the dominant chattel
- The courts decide whether gradual improvements of accession, the essence of the improvement, or the total value is used as the test to determine this
- Damages ("liability rule") or return in specie ("property rule")
  - **Recovering possession is only available for land. This is why we have the distinction between realty and personalty. Return in specie could only be granted in a court of equity when the item is unique**

Statutory Rule for Accession

- ***Personal Property Security Act:*** Even minimal attachment falls within the statutory definition of an accession

Jones v De Marchant

(All three)

Facts: Beaver pelts mixed together (4 of husbands & 18 of wifes,) sewn together and turned into a coat.

A. **Confusion**: **Mixing** of the plaintiff's pelts with those of her husbands
    - After putting all beaver skins in a pile, cannot tell whose beaver skins were whose.
B. **Accession**: Combination of chattels: pelts **sewn together.**
C. **Alteration:** Beaver pelts sewn together and then **altered into a coat**, which could not be divided

MISTAKEN IMPROVEMENT

Law of Property Act, s 69

- When a person at any time has made lasting improvements on land under the belief that the land was the person's own, the person or person's assign:
    - Are entitled to a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvement, or
    - Are entitled to or may be required to retain the land if the Court is of the opinion or requires that this should be done having regard to what is just under all circumstances of the case
- The person entitled or required to retain the land shall pay compensation that the Court may direct
- Normally you're entitled to the money you spent improving the land, but if the true land owner doesn't pay you then you can potentially retain the land

- Lien: a right to keep possession of property belonging to another person until a debt owed by that person is discharged
- The improver is still a trespasser! Even if, as the doctrine requires, the improver must have acted under a mistaken belief as the right to be on the land, it is trite law that an innocent error of fact is no defence to an action in trespass to land SO the landowner can counterclaim for damages in tort or seek occupation rent
- This is different than the fixtures test! It is a rule that exists on top of the common law rule of fixtures and transformation

Gidney v Shank (1995)

- Feuerstein owned a freighter canoe that was stolen from him, and eventually purchased by plaintiff Gidney from a third party. Gidney repaired it putting 100 hours of his own work and $806 into reconstruction. Police later removed the canoe from his house as part of a criminal investigation. Both parties laid claim to the canoe
- Issue: claim for restitution as a remedy for unjust enrichment
- Reasons:
    - For unjust enrichment there must be:
        - An enrichment
        - A corresponding deprivation
        - An absence of any juristic reason for the enrichment
    - Beard J held that there was a juristic reason for enrichment (contrary to the trial judge) - this was that there was no relationship between Gidney and Feuerstein and consequently Feuerstein didn't know Gidney was investing time and money into the canoe, and didn't consent or acquiesce to the investment. **This means that it wasn't unjust**
- In *Gidney:*
    - Making canoe useful on water was an incontrovertible enrichment to Feuerstein
    - Taking the canoe was a deprivation to plaintiff
    - BUT, since no relation between Gidney and Feuerstein and no knowledge of plaintiff's actions, there WAS a juristic reason for Feuerstein to keep enrichment. Feuerstein never consented to improvements; no communication
- Holding: Appeal allowed for Feuerstein

Chapter 4: The Concept of Possession

- Not interested in true ownership. Question here is always regarding the priority of claim

Elements of Possession: these are both important but depending on the context they may be relaxed

1) **Factum: physical aspect**
2) **Animus: intent to possess**

Physical vs. Legal Possession

1) Physical possession – the word "possession" may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession (or occupation). This is a question of fact rather than law
2) Legal possession – that possession which is recognized and protected by law.
   a. **Legal possession requires:**
      i. **Animus possidendi (the intention to possess) and**
      ii. **Factum (physical control). The Interpretation of these 2 components can vary substantially.**

De Facto Possession

- Legal possession is often associated with de facto possession, but legal possession may exist without de facto possession, and de facto possession is not always regarded as possession in law.
- A person who, although having no de facto possession, is deemed to have possession in law is sometimes said to have constructive possession

Constructive Possession

- A type of legal fiction created when either the physical or mental aspect of possession (animus and factum) is watered down

Custody

- Often contrasted with possession. A person may have custody only without having any possessory rights (ie. the case of a car lease – driver has custody but not legal possession)

First Possession (sometimes called discovery – from *Pierson*)

- The person who first occupies or possesses property is entitled to maintain their position, at least until someone with a better claim emerged
- Allows for the person's possession to be respect, decreases potential conflict
- Adverse possession – gives the person in possession a better claim than even the title holder

Pierson v Post

- Facts: Post and his dogs hunted and chased a fox along the beach. Pierson was aware of the hunt, and he killed the fox and carried it away. Post claimed a legal right to possession of the animal
- Issue: Does a person obtain possession of a wild animal by chasing it?
- Reasons:
  - Merely finding and chasing a wild animal does not give a person possession. Even merely wounding the animal will not give right to possession
  - The animal must be captured or killed in order to constitute possession
  - Need the combination of manifesting intent combined with an act to bring it under your control
- Dissent:
  - Believes this should be an issue for social custom of the relevant community – property is contextual to an extent
  - The majority doesn't provide the right incentive – you could be doing all the work of the hunt but someone could deprive you of what is rightfully yours
  - His rule: Property in wild animals may be acquired without bodily touch as long as the pursuer is within reach or have a reasonable prospect of taking, and an intention of converting to his own use
- Holding: Post didn't establish property in the fox, so there is no cause of action
- Ratio:
  - **Mere pursuit of an animal does not give one a legal right to it. Need the combination of manifesting your intent combined with an act to bring it under your control**
  - Problem with this way is that wasted efforts are created (not economically efficient)

Notes/Summary:

- **Common law rule: need possession – this becomes the root of ownership (e.g. wild animals)**
- Starting on the hunt does not confer any rights on the hunter
- When the hunter has reasonable prospects of capturing – the dissent in *Pierson* would say there are pre-possessory rights and all other hunters must be precluded from hunting that animal
- Majority rejects the dissent and insists on an **unequivocal act, such as trapping or mortally wounding** to such an extent that the animal is deprived of its natural liberty

Popov v Hayashi (2002)

- Facts: Popov and Hayashi were at a baseball game. The ball landed in the upper portion of the webbing of the glove worn by Popov. It is unclear if the ball was secure. He was pushed to the ground by the mob trying to get the ball and subsequently lost possession of the ball. Hayashi picked it up. It is unclear if he Popov would have retained control of the ball had the crowd not pushed him down. Popov pled causes of actions for conversion, trespass to chattel, injunctive relief and constructive trust
- Issue: Did Popov achieve possession or the right to possession as he attempted to catch the ball?
- Reasons:
  - Possession requires both physical control over the item and an intent to control it from others - disagreement here about how the definition should be applied (e.g. some activities like hunting allow for possession to be recognized even before absolute dominion and control is achieved)
  - Rules are contextual and crafted in response to the unique nature of the conduct they seek to regulate. Are influenced by custom and practice of each industry
  - Popov established that a **pre-possessory interest gives rise to a qualified right of possession** – this case shows an exception to the rule from *Pierson*
- Holding:
- Ratio:
  - This case allows for the **recognition of ownership rights based not on possession, but on pre-possessory interests** limited to these circumstances (you are engaged in pursuit and unlawful acts of others interrupt you, from *Pierson*)
    - To establish need to:
      - Take significant but not complete action to possess
      - Efforts must be interrupted by the unlawful acts of others
  - BUT **even if pre-possessory interest is established, it doesn't give you all the rights – only the rights to pursue an action**
  - This is the only reference in case law to a pre-possessory interest
  - Possession is contextual

Clift v Kane

- Facts: Ships would kill seals, put them on shore and then continue to hunt other seals. Others would come and take them from the shore
- Issue: Do we apply the rule of possession?
- Majority: If you kill an animal your title is absolute
- Dissent: Favoured the abandonment issue – killing it is not enough. If you can't recover they are lost to you and returned to common stock

Note: Property in Wild Animals

- Common law rule is that wild animals are subject to limited property rights – no absolute property rights, only qualified (unless they are ones that return)
- *Alberta Wildlife Act* s. 1(3): shows that possession is not clarified – very unclear provision

FINDERS

General

- Prior to the advent of systems of land registration and recording, possession served as the primary basis for demonstrating title. Prior possession still serves as the principal mode of proving title to personal property

    - There is no general registry for personal property
- **The system is not about identifying absolute entitlement, but of priority of entitlement**
- '**A finder acquires title good against the world, except for those with a continuing antecedent claim (they assert possessory title)**
- A finder is placed in a position inferior to that of subsisting prior claimants, but superior to those arising afterwards – timing is central
- The true owner's rights have not been extinguished. The finder has possessory title but the true owner has ownership
    - Problematic not to confer title – means that it wouldn't be a wrong to take objects *from* a finder, and the chain of title after would be precarious
- Right to property may be upheld even if possession wasn't obtained lawfully, but connection to criminality may prevent this *(Bird v Fort Frances, Baird v British Columbia)*

Right of finders in *Trachuk* and in *British Airways:*
- ***British Airways* rule**: If it is embedded, the occupant wins. If its not embedded but discovered there, the occupant has to manifest intention to control for lost articles
- ***Trachuk* rule**: Where a person has possession of lands with a manifest intention to exercise control over it and the things which may be found upon it or in it, then if something is found on or under the land, the presumption is that the object is under control of the occupant

- These rules are not consistent – Trachuk does not make the distinction between whether the article is embedded or simply there BUT the justice in this case specifically mentions intending to adopt *British Airways*
- Could argue that the rule in Alberta is that the occupant must manifest intention at all times regardless of how the property was discovered. BUT could also argue that Galant J intended to follow *British Airways* and go by that interpretation – not clear which is right

Legal Rules on Finders

Rights and obligations of the finder (*Parker v British Airways Board*)

1. The finder of a chattel acquires no rights over it unless (a) it has been abandoned or lost and (b) he takes it into his care and control
2. The finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing
3. A finder of a chattel, while not acquiring absolute property, acquires a right to keep it against all but the true owner or those in a position to claim through the true owner, or someone who can assert a prior right to keep the chattel which was subsisting at the time when the finder took it into his care and control
4. Unless otherwise agreed, any agent who finds a chattel in the course of his employment and not wholly incidentally to it and take it into his control does so on behalf of his employer, who acquires a finder's rights to the exclusion of those of the actual finder
5. A person having finder's rights has an obligation to take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it in the meantime

Rights and liabilities of an occupier

1. An occupier of land has superior rights to those of a finder over chattels in or attached to that land, and an occupier of a building has similar rights in respect of chattels attached to the building, whether in either case the occupier is aware of the presence of the chattel
    i. If the object is embedded or attached to the premises, the occupant always wins
    ii. Distinction made between embedded chattels and those simply found on the land
2. An occupier of a building has rights superior to those of a finder over chattels upon or in, but not attached to that building only if before the chattel is found, he has manifested an intention to exercise control over the building and the things that might be found on it
3. An occupier who manifests an intention to exercise control over a building and the things upon or in it so as to acquire rights superior to those of a finder is under an obligation to take such measures as in all the circumstances are reasonable to ensure that lost chattels are found, and to acquaint the true owner of the finding and to care for the chattels in the meantime
4. An occupier of a chattel (e.g. ship, car, plane) is to be treated as if he were the occupier of the building

Armory v Delamirie
- Facts: Chimney sweep finds a jewel and brings to a shop for appraisal. The apprentice takes it and removes the precious stones. They tell him that it isn't worth anything, and when he rejects the offer, the defendant refuses it return it with the stones attached. The plaintiff sued him in trover (action for the return of personal property)

- Issue: Does the finder have possessory rights?
- Reasons:
  - Jeweller says that the sweep is just a finder, not the owner of the ring, so can't sue on the basis of possession or ownership
  - BUT the common law is not interest in who owns what, rather interest in the relative merit of the claims
- Holding: Chimney sweep's claim is superior
- Ratio: **The finder has a better claim to the object than anyone else in the world except for the true owner**

Keron v Cashman

- Discussed in Popov, used to demonstrate equitable sharing (but it doesn't have anything to do with this)
- 5 boys coming home from school and they find an old stocking filled with something. They hit it each other with it. It is full of cash
- The cash is split between all of the boys
- This isn't actually about equitable sharing - when the first boy found the stocking he established the factum (physical control) but **not the intention (mental element)** to possess its contents. When it burst open everybody had the intention to possess, but it was not under the exclusive control of any one boy - they all had equal factual control at that point. Possession was established at that moment, they were all **joint finders**

Bird v Fort Frances

- Boy and his friends play hide and seek. Under the house he finds an old can that is filled with cash. Police take the money and the boy sues, so it's the boy against the police
- Police say the boy had no permission to climb under the private property, so he is a trespasser (owner of the pool hall where it was found did not bring forward a claim)
- Boy wins over the police - even though he was a trespasser did not affect his claim
- Ratio: **Possession is entitled to the same legal protection whether or not it has been obtained lawfully or by theft or other unlawful means**

Baird v British Columbia

- Baird admitted to certain things at the police station but was never charged with anything. He was the driver of a getaway car in an armed robbery in Ontario. Checks into a hotel in Vancouver and puts his valuable in the hotel safe. Police are alerted and take the money, and Baird is never charged but is not allowed his cash back so he sues
- Statutes in Canada that allow authorities to seize the proceeds of crime - but this isn't relevant here because he wasn't charged
- Court says that Baird's conduct was so tainted by criminality that they won't assist him with his claim
  - "From wrongdoing there shall be no right"
- **Finders rights can be disallowed because of an individuals connection to criminality**

Occupier versus finder: who prevails?

Parker v British Airways

- Facts: Parker waiting in BA's lounge at Heathrow – finds bracelet – no one claims so he does
- Should it go to the finder or owner of the land? Not embedded here
- **Court:** Goes to Parker, **BA had no animus possidendi and lacked physical control.**
  - **TEST: When not attached or embedded, an occupier must have an intention to exercise control over premises and possess everything in it**
    - No evidence BA searched for or demanded lost objects
    - Not even regular cleaning or maintenance is enough to give you claim over the finder
  - If had been found by employee – BA would possess
  - **Mention that if trespassing, landowner is preferred even if show no manifest intent to control**

Trachuk v Olinek

- Facts: Trachuk and the four defendants, Olinek, Fulkerth, Austin and Muntz each claim the right to possession of and title to $75,960 which was uncovered by he four defendants from under the surface of a quarter section of farmland. At the time the money was found he was not the owner of the property, he was a lessee from an oral agreement with the landowner.
  - **Defendant's claim:** on the basis of being the finders of the money and fortune finders of lost property are entitled to it against all the world except the real owner

    - **Trachuk's claim:** bases his claim on being an occupier of the property and being in possession of the money by virtue of being in *de facto* possession of the lands which contained the money
- Reasons:
    - Olinek was lawfully on the premises, took possession of money; Trachuk loses because he could not show: *de jure* (legal title) right to the land where money found, *de facto* (actual) possession of the land since the fence wasn't meant to exclude others from the area.
    - **Because the money had been deliberately hidden under privately owned land, the general rule, that the finder of lost property is entitled to it as against all the world except the real owner, does not apply**
- Holding: In favour of the defendants. Their possessory title was superior to Trachuk's
- Ratio: **Where a person has possession of a house or land, with a manifest intention to exercise control over it, then, if something is found on or under the land the presumption is that the possession of that thing is in the owner of the location in question**

ABANDONMENT

- **An express intention to abandon, coupled with an occupation by a newcomer is required before abandonment is complete, OR**
- **An owner or possessor of chattel can easily divest themselves of ownership by abandoning chattel with the intention of surrendering ownership (divesting abandonment)**
    - This only requires the requisite intention and conduct by the owner manifesting requisite intent
- The act of abandonment is a question of fact to be proven by the party relying on the principle of abandonment
- Can use the following factors to support an inference of the intent to abandon:
    - Passage of time
    - Nature of the transaction
    - Nature and value of the property
- This is DIFFERENT from misplacing an item – losing all hope of recovery is not equivalent to the *animus* of abandonment

Historical Resources Act, s 32(1)
Property in all archaeological resources and paleontological resources within Alberta is vested in the Crown

The Jus Tertii Defence
In disputes over property, the law is concerned with ascertaining the relative rights of the parties to the contest. This means that a better claim residing in some third person (*jus tertii*) is immaterial

ADVERSE POSSESSION

- **Doctrine of adverse possession:** If you exhibit possession of the correct nature and of the required duration, your rights are good not only against the world but also against the title holder (protects LAST occupancy)
    - This is a defence to an action to recover possession by the title holder, and is about balancing the rights of the two parties
    - Governed by common law and statute
        - Requirements of possession tests are developed in case law, but the **procedure and time limits** are defined by statute (*Limitation Act* and *Land Titles Act*)
- POSSESSION: person asserting squatter's rights must have requires factual control (factum) and intention to possess (animus)
- *Clissold v Perry*: Government expropriated land from Clissold. It is discovered that Clissold is not the owner of the land. If the true titleholder came, he would have prevailed over Clissold. Crown said he hasn't established possession, so he wouldn't get anything. Courts say that he has established possessory title which is good against the world, so they still have to pay him
    - **Application of relativity of title** - he doesn't have the best title, but he has title good against the government so the gov't still has to pay him

- **Time limits:**
    - In Alberta the ***Limitations Act*** states that if the title holder does not seek a remedial order for recovery of possession **10 years after being dispossessed**, then the person in possession of the land at the expiration of the clock is entitled to immunity from liability to the title holder upon pleading the defence

- You HAVE to plead it
- Self help by peaceful means by the title holder is ineffective after 10 years (section 3(6))
- Effectively after 10 years, even though the Act doesn't say you aren't the title holder, this title is worthless
- BUT they can get a fresh certificate

- **Quality of Possession: need all 5 or else no rights can be asserted**
  5 elements from *Keefer v Arillota*
  - **Open and notorious:** the clock will not run unless the squatter's possession is discoverable by the true owner (objective). The clock will begin to run if the owner is alerted to adverse possession. This means that the clock will begin to run against the title holder if they knew, or should have known
  - **Continuous:** If possession is interrupted, the clock is restarted - this also depends on circumstances - continuous doesn't have to mean 24/7
  - **Actual:** the person in adverse possession must physically occupy the land and are entitled only to the part of the land that they occupy
  - **Adverse**: the squatter must not be on the land with the title owner's permission or acknowledging the better title of the owner
    - Although some cases where a person is granted permission to access land under an easement, then overuse and abuse that easement by fencing, staking a permanent claim, etc., so the easement can mature into an adverse possession claim
  - **Exclusive:** the squatter's possession must be exclusive. Considers the actions of the true owner - if the title holder demonstrates even minor acts of dominion over the property, then the person in adverse possession can't be said to have established exclusivity

- **Inconsistent use test:** this test is not part of the regular series of test. It was added at one time in England when a jurist said that a person in adverse possession must also demonstrate that their use of the property in question was inconsistent with the intended use by the title holder
  - BUT this is very incompatible with the notion of possessory title SO this test is NOT PART of the law in Alberta almost entirely
  - *Nelson v Mowat* held that the requirement of inconsistent use test was rejected in Alberta. In 2018 a case said that the Alberta Court of Appeal rejected this test

Statutory Requirements for Adverse Possession

- In Alberta adverse possession is a defence to a claim by the titleholder. **Entitled to immunity because 10 years have elapsed (for land)**

Limitations Act:

- **Section 2(a):** if a claimant does not seek a remedial order within 2 years after the date the claimant should have known or ought to have known all the elements that allow a claimant to bring forward a claim
  - E.g. clock begins to run when you find out
  - Not important for claims of possession
- **Section 2(b):** 10 years after the claim arose, the defendant on pleading the Act as a defence is entitled to immunity from liability in respect of the claim
  - This is for land, not personalty!
- **Section 3(4):** the limitation period in subsection (1)(a) does not apply where a claimant seeks a remedial order for the recovery of possession
- **Subsection (3)(3)(f):** a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property
- **Section 3(6):** after the 10 year period the limitations period has elapsed. After this period they cannot gain possession by self-help. Entering the premises is of no consequence after this period. There is NOTHING that the title holder can do
  - If you're the title holder, if 10 years the only thing you can do is sell the land (section 3(6) shows that self help can't help gain possession) - should just take action prior to this

Takeaway:

- Limitation period is two years from time of actual or constructive delivery for chattels
- Limitation period is 10 years after the claim arose for land
- As soon as the title owner is dispossessed the clock starts running
- Adverse possession essentially means that after 10 years your title is extinguished

- If squatter acknowledges, in writing, the true owner's title to the real property prior to the 10-year expiry limitation, squatter loses its AP claim
    - In CL, any acknowledgement (writing or oral) will defeat an adverse possession claim
- Limitation is **suspended** for any time that the defendant fraudulently conceals the AP claim
- At common law: If you conceal the fact that you are acting as the owner, the clock **restarts**

Land Titles Act, s 74

- (1) When the 10 year period has elapsed and you are sued and get judgment in your favour, or are not sued but are bringing a claim to show you are in adverse possession, **once you get confirmation from the court of your entitlement to possession you can now go to the registrar's office to show you can stay, and they will issue you a new certificate of title in your name - you become the title holder**

- Effect of *Land Titles Act*: Once the titleholder is dispossessed the clock begins to run. If there is one trespasser or a series of trespassers for a series of time, the person who is currently in possession is the one who then holds the land
    - Multiple people can constitute continuous adverse possession
    - Only the registered claims are binding legally, and trespassers claims aren't registered on title
        - Adverse possession claims are not included in the title - e.g. if a person buys land they can see the easements, etc. but can't see that adverse possession has been happening for 5 years already. **When they purchase the land they get a fresh start and the clock starts over again**
        - Cannot file a caveat on the land for adverse possession claim
    - A series of squatters can be on the land and establish adverse possession. But if during the period the land is sold to a new buyer, this **restarts the clock**
- NEED TO FILE FOR TITLE if you are possessing land adversely after 10 years, otherwise you are vulnerable to resale
- Remember that if you buy land you are always encumbered by agreements/title with the land
- Abolishing adverse possession - it would allow facts on the ground to trump survey boundaries that were established a long time ago, important in the face of climate change, erosion of land, etc.
    - This is probably happening in Alberta soon

Municipal Government Act s 609

Can't claim adverse possession of crown or municipal land

Public Lands Act s 4

Can't claim adverse possession of crown or municipal land

Takeaway #2

- A person claiming adverse title must first have possessory title. Have to do this without secrecy, without permission, and peacefully. That type of possessory title is good against the world except someone with a better title. Someone who was there earlier, or maybe the title holder. The person with possessory title can defeat even the person with the title holder (normally title is better than possession).
- Inconsistent use test not part of Alberta doctrine
- At common law it is established that a person acquiring a legal interest in land is bound by all pre-existing legal interests affecting that land. The fact that the second interest was purchased without knowledge of the prior entitlement is of no consequence. The second legal title holder is bound (**first in time is first in right**)

Keefer v Arillota

- Facts: Keefers had a right-of-way across Cloy's land. Keefer built a garage at the end of the right-of-way and used a grassy area. Cloys still used the driveway and the grassy section occasionally. Cloy didn't object when Keefer moved the garage from the rear of his property to the rear of the strip. Cloy often used the driveway for their tenants, customers, or delivery trucks. Keefer had easement of gravel strip that ran between building owned by Keefer and subsequently by the Arillottas. It was in their deed, non possessory right; Keefer used the grassy area with no objection from Cloys, also the predecessors to the Arillottas. Cloys spent most of the year in Florida, especially in the winter.
- Issue: Did the respondents' possession challenge the right of the legal owner to make the use of the property he wanted to make of it?
- Reasons:
    - Keefer's didn't interfere in any way how the land was to be used by owners.
    - Cloys never parked their car or truck on the strip of land; they never intended or wanted to use the strip for parking

- **A person claiming possessory title must establish (1) actual possession for the period (2) that such possession was with the intention of excluding from possession the owner and (3) discontinuance of possession for the period by the owner entitled to possession**
    - A possessory title cannot be acquired against a person by depriving them of the uses of their property that they never intended or intended to make of it. The *"animus possidendi"* (& the test) which a person claiming a possessory title must have is an intention to exclude the owner from such uses as the owner wants to make of his property
    - The respondents fail in (2) and (3) - the Keefer's never intended to oust the Cloys
    - Constructive possession of the owners was displaced by the actual possession of the Keefer's, but as far as the balance of the strip, the owners made as much use as they wanted. It strip was used to access the apartment. Cloys didn't use the full width of the strip but constructive possession of the whole property is not ousted simply because he is not in actual possession of the whole
- Holding: Appeal allowed. Respondents were entitled to a declaration that the appellants' title has been extinguished only with respect to that part of the land occupied by the respondent's garage
- Ratio: Possession of part is possession of the whole if the possessor is the legal owner

***Teis v Ancaster (Town)* (1997)**
- Facts: The Teis claimed possessory title to two strips of land - the "ploughed strip" and the "laneway" located on the edge of a public park owned by the town, mainly used to play baseball. For over 10 years both the Teis and the Town mistakenly believed that the Teis owned these strips of land.
- Issue: Does a person claiming possessory title have to show inconsistent use when both the claimant and the paper titleholder mistakenly believe that the claimant owns the land in dispute?
- Ratio: Inconsistent use test doesn't apply when there is mutual mistake

ADVERSE POSSESSION OF CHATTELS

A dispossesses O (owner) – A transfers chattel to B – B transfers to C – O demands from C

- **Limitations Act: does NOT extinguish TITLE at the end of the period (2 years in Alberta), it only extinguishes ACTIONS**
    - Tests of open/notorious not applicable to personalty b/c if you were deprived of this and its changed hands, how would you know that someone is openly and notoriously wearing your possession?
- Because there is no express provision for the extinguishment of title at the end of the period, the chance to bring an action is never lost because the title owner can always bring a new action against the new possessor

Barbaree v Bilo (1991)
- Facts: B1 owned a motorcycle. In 1985 A (B1's estranged spouse) took the bike. The two year limitation period governing actions between B1 and A expired in 1987. In 1990 A sold the bike to B2. B1 then sued for its return
- It was held that the action was tenable because once the property was passed to B2, the limitation for an action against him begins to run anew since he has committed a fresh conversion (even though the two-year limitation period in which an activity could be launched against A had expired)
- Limitations period has expired but the court says that the wife is still the owner and therefore when Bilo refuses to give it back, this is a fresh act of conversion by Bilo
- Now the wife has a fresh limitation period to pursue action against him. Once she seeks her remedial order he must give the motorcycle back to her
- Limitations Act does not EXTINGUISH title at the end of the period, it only extinguishes actions - she is barred from bringing a claim against her husband, but not barred from bringing a claim against Bilo
- Ratio:
    - **Here the effect of running the period did not extinguish the original owner's title**
    - Clock never ends in Alberta

O'Keeffe v Snyder (1980)
- Facts: Throughout a 30 year period the whereabouts of her painting had been unknown to the plaintiff
- Issue: could an action be brought in 1976 to recover a painting that had been stolen in 1946?
- It was held that the limitation period should commence to run only when the cause of action, including the party against whom possession is sought, was property discoverable (even if not discovered) by the plaintiff. The period is not interrupted by a transfer of the property by one wrongful possessor to another

- Holding: <u>Court holds that if an artist diligently seeks the recovery of lost or stolen art but can't discover the location and identity of the thief of possessor, then the statute of limitations doesn't begin to run</u>
    - <u>With personalty, the focus is on the conduct of the owner! Versus on land the focus is on conduct of the person in adverse possession</u>
- Here the effect of running the period meant that the title of the original owner no longer exists
- Ratio:
- **Discovery rule:** clock runs against O'Keefe only when she first knew or reasonably should have known using due diligence, the cause of action, including the identity of the person in possession.
    - Shifts the burden to the true owner to show they have tried to locate their stolen property and subsequently tried to recover it
    - Thief can acquire title in time

Takeaway
- Thief has possessory title to give, not good title. This is what the buyer would acquire. New Jersey goes with the discovery rule (could they have discovered the identity of the person and location), where Bilo says that once you make a fresh demand and the person refuses, the clock resets
- **Essentially no adverse possession of personalty in Alberta**
    - **No provision barring the person with title from self help with personalty, unlike for land**
- Because we only have one law on this Alberta, it isn't completely settled

GIFTS

- **Gift: a transfer of property without consideration**
    - A gift is legally distinct from:
        - A contractual promise (is enforceable)
        - A promise to give a gift (not enforceable)
    - It may be made of any interest in real or personal property, including intangibles
- <u>Gifts by mode:</u>
    1. ***Inter vivos***: a gift during one's life
    2. **Testamentary gifts** (legacies and devises)
        a. A devise is a grant of land by will
        b. Legacy/bequest is a gift of personalty by will
    3. ***Mortis causa***: gifts in contemplation of death

INTER VIVOS GIFTS

<u>Perfecting a gift of personal property *inter vivos* requires:</u>
1) Donative intent
2) Delivery
3) Acceptance (relaxed)

Other ways to give:
1. By deed of gift
    a. E.g. if a relative wants to transfer money into your account, the bank might want to know this is a gift and require documentation. This deed shows this, it is signed, sealed, and delivered to show that it is a gift and the donor won't want it back
2. By declaration of trust
    a. A person has title in the court of the law, but someone else is actually the beneficiary of the title. One person can hold the property in name only, but the beneficial title belongs to someone else. Need to sign a declaration of trust to show this

Nolan v Nolan & Anor (2003)
- Facts: Case concerns the ownership of three paintings by the artist Sidney Nolan. The plaintiff was his daughter by adoption and claimed that Sidney had made a gift of the paintings to her mother, Cynthia Nolan, before her death. Following Cynthia's death the three paintings essentially remained in Sidney's possession until his death. The plaintiff alleged proof of

the claim that a gift had been made to her mother largely based on documents from exhibitions that had recently come to light
- Issue: Did Sidney Nolan give Cynthia Nolan the paintings as a gift?
- Reasons:
  - **Intention to make a gift:**
    - Donative intention is characteristically accompanied by words of gift which evince the intention and delineate the object and extent of the intended benefaction
      - Words of gift are usually necessary to achieve that certain in relation to matters such as defining the extent of the benefit the donor intends to confer
    - BUT donative intent doesn't need to be manifested by words of gift - unusual circumstances may be imagined where other means fulfil those functions (onus is then on the would-be donee)
    - At any stage until delivery occurs, the donor can validly retract the gift
    - A promise to make a gift, or an expression of gift by words of future intention (however clear and unqualified) is not sufficient to establish a perfect gift
    - The element of delivery needs to be satisfied in order to give complete effect to the donative intention
    - Need to be cautious when determining claims made against the estate of a deceased person
  - **Delivery**
    - Delivery is the legal act essential to complete the gift. Transfers possession and ownership to the donee
    - A valid delivery marks the termination of the donor's dominion - continuation of control or power in the donor is inconsistent with a valid delivery and thus inconsistent with a perfect gift (need to relinquish all control!)
    - Delivery can be actual (manual or physical transfer of goods) or constructive (can take various forms where the nature or bulk of the goods renders manual delivery impossible or impractical)
    - Delivery can precede manifestation of intent; confluence required
      - Where delivery takes place subsequently, it is necessary to establish that the previously expressed donative intent is still present when delivery occurred. Also necessary to establish that the chattels were already in possession of the purported donee at the time when the words of gift were expressed or donative intent was made manifest
    - Where the chattel the subject matter of a parol gift is already in possession of the donee at the time the gift was made, a further delivery or a change of possession is unnecessary
  - **Delivery in common establishments**
    - E.g. in *Re Cole* where the husband takes his new wife to their new house and says everything in it is hers, but since they live in the same place there is no delivery or change in possession
      - In this case they should get a deed of gift to show the transfer
      - Need something more
      - **Possession is equivocal**
    - Words aren't generally sufficient to perfect a gift – in ordinary circumstances both words and delivery are required
      - Here, relaxing the visible act would be "dangerous", leaving only the oral requirement

Alberta Evidence Act, s. 11

- Section 11 holds that you can't rely on your own evidence to prove donative intent
- Need corroboration because if the donor is deceased your own information is insufficient
- This evidence must be material! E.g. take a picture

DONATIO MORTIS CAUSA

- ***Donatio mortis causa* is a gift in contemplation of death**
  - This is something the common law recognizes when the owner of a property is in great peril and facing imminent death, and doesn't have the time or possibility of making a valid will
- Basic elements:
  - Impending death from an existing peril;
  - Delivery; and
  - Gift is only to take effect upon the death of the donor
- Has to be some form of delivery, but delivery is contextual – some things aren't possible to be done in the circumstances

Re Bayoff Estate

- Facts: Bayoff had prepared a valid will in September, 1997. On his death bed, he made Ms. Simard the executrix of his will. Bayoff gave his safety deposit box key to Simard and said "everything there is yours". Bayoff asked her to clean out this box and signed an authorization form. However, the bank refused her access absent further documentation. Before she was able to obtain such documentation, Bayoff had passed away. Given that she was the executrix, she subsequently received the contents of the box
- Issue: Did Bayoff make a donatio mortis causa (gift in contemplation of death)?
- Reasons:
  - In this case it is not a conditional gift, so probably isn't valid because of the time delay
  - This isn't an *inter vivos* gift because the delivery was not good enough for this (would have required filling out the bank forms), although delivery WAS good enough for *donation mortis causa*
  - BUT there is **an exception under the rule in *Strong v Bird*, if:**
    - The donor intends an inter vivos gift; and
    - That intention continued until after death; and
    - The gift is undelivered; and
    - The donee takes legal title to the donor's estate as the named executor (or administrator)
    - THEN the donee can perfect the gift
- Holding: The oral gift was valid

Relaxing the delivery requirement:

Constructive delivery

- Change in capacity of possession
- Delivery of means of access and control likely sufficient if:
  - Donor does not retain access or control and
  - Actual delivery is impractical
- Basically trying to make a gift of something in circumstances where delivery is not practical or feasible
  - E.g. is delivery of keys sufficient? What else could the donor have done to deliver? Is this the only set of keys, is there any residual control over the asset?

Symbolic delivery

- Probably insufficient to make a gift

CHAPTER 4: DOCTRINE OF ESTATES

INTRODUCTION AND GENERAL NOTES

- An estate confers a segment of ownership as measured by time
- *"AN ESTATE IN THE LAND IS A TIME IN THE LAND, OR LAND FOR A TIME, WHICH ARE NO MORE THAN DIVERSITIES OF TIME"*
  - Fee simple is the greatest, signifies land for perpetuity x.

Why create estates in land?

The law of estates is the product of the tension between **autonomy and utility**.

- Autonomy (dead hand control): want estate to pass to widow and then to the children
- Utility: to realize the economic potential, promote trade, and encourage stewardship of the land (Ellickson from Reader)
  - Promote trade: using the time axis, we can carve up the estate and sell it to those who value it more.
  - Avoid overexploitation of the land

Creation of Estates – 2 Methods

- By operation of law (e.g. *The Dower Act*).
- Or by an instrument (a devise or a grant *inter vivos*)
  - The type of estate created is a function of the language used

Common Law Estates in Canada (+ Copyhold estate)

1. **Freehold estates**: fee simple, life estate, fee tail – owned by a freeholder, who has liability/tenurial obligations to the crown.
   a. Recourse to the common law courts to reinforce their possession.

   b. Seisin – the person who is seized of an estate is the person who is liable for the feudal services and feudal incidents. No abeyance of seisin is allowed (today no longer need delivery of seisin)
   c. Common law rights in land
2. Leasehold
   a. Voluntary arrangement between a landlord and a tenant.
   b. That lease is not merely a person right; it is an estate in land that can be transferred, and all the rules of property apply to that estate.
   c. Person who has an interest is not a freeholder, they hold of the landlord
3. Copyhold Estate
   a. Never in Canada

Freehold estates

1. **Fee simple**
2. Life estate – life tenant
3. Fee tail (all but extinct, abolished in Alberta)

Estate in Fee Tail

- Fee Tail has been abolished in Alberta (*Law of Property Act,* s 9) - any attempt to create a fee tail will create a fee simple.
- Purpose: to keep property in the family ("To A and the heirs of his body" etc…)
- Policy for abolishing

Problems of fee tail

- Barring the Tail: a process by which the court would enlarge the fee tail and make it a fee simple because they give an **estate of limited value**
- Strict Settlement: Male heir gets a life estate instead so he doesn't **squander the estate**

ESTATE IN FEE SIMPLE

An estate of potentially infinite duration. The estate passes to any living blood relative (if intestate) or as devised in a will. If neither exists, property reverts back to the Crown via escheat - *Ultimate Heirs Act*.

- If a person in the province dies and has no heirs, it will revert to the provincial crown via the *Unclaimed Personal Property and Vested Property Act* s 15(e).
- Can be divided into smaller estates
- Is fully alienable – *Statute Quia Emptores* and *Statute of Wills*
  - Prior to SQE, had to receive permission from superiors. After, tenants could buy and sell interests and estates.
  - *Statute of Wills* affirms that landowners can designate whoever they choose as their rightful heir

Devise = passes the estate in death

Grant = *inter vivos* (during his lifetime)

Remainder = upon death of life tenant, possession of fee simple goes to the owner of remainder

- Only ends when there are no legal heirs

CREATION AT COMMON LAW

"MAGIC WORDS" – required to grant fee simple inter vivos at common law – need these words to create a fee simple: "To A and her (or his) heirs".

"To A" denotes who it goes to, and "and her (or his) heirs" denotes the nature of the estate given, namely fee simple.

- **Words of Purchase:** "To A" describes recipient of the property
- **Words of Limitation:** "and her heirs" denotes the duration of the state granted
  - Heirs have no rights/entitlements, but mere expectancy (*spes successions*)
  - Line of heirs is just a basis of measurement
- Ex: "To A in fee simple" – if *inter vivos*, would be a life estate
  - Note, if in a will → fee simple **(For policy reasons, cannot correct because you are dead)**

Modern Position in Alberta

- In most jurisdictions today the "magic words" are no longer essential to create a fee simple estate – now depends on the intentions of the testator as advanced by the language

- Alberta's *Law of Property Act,* s.7 (1): in the absence of words of limitation, **the entire estate is transferred,** unless a contrary intention is suggested by the instrument (e.g. if I had a fee simple, you get a fee simple unless there is an alternate indication present)
    - Same as in *Wills and Succession Act*, s 9(2) – If you leave property to some party, all of your rights in it are transferred to them upon death.
- "To A" is always presumed to grant a fee simple
    - **Presumption of fee simple that can be rebutted by showing grantor's true intent.**

THE LIFE ESTATE – Tenant for Life

Classification – 3 Types

1. Conventional (*pur sa vie & pur autre vie)*

"To A for life (for as long as she wishes/to have and use during her lifetime)" **(*pur sa vie* – for his or her own life)**

"To A for the life of B" **(*pur autre vie* – for the life of someone else)**

- B is the *cestui que vie*, i.e. merely the measuring life, no interest
- More than one person can be chosen as the *cestui que vie*

"B has a fee simple in reversion"

- As soon as term (life) is up, rights are returned to original party.

"To A for life, then to B"

- Both A and B's rights created/vest immediately
- Estates can be transferred at any time, but only the entitled portion can be transferred
- Grantor has a fee simple in reversion
- Transferable but measuring life is fixed

2. By Operation of Law (dower, curtesy, homestead, remedial)

A. Dower – Common Law – if widow is not devised, she is granted a life estate in the matrimonial home
B. Curtesy – Common Law – if widower was not devised anything by his wife, he is granted a life estate in the matrimonial home
C. Homestead – Common Law – dower abolished in 1880's in prairies - instead family home is exempt from seizure by creditors, non-owning spouse can prevent dispositions of the home and has a life estate after death of owner
D. Remedial – life estate granted as a court ordered remedy

3. By operation of a faulty purported grant of an estate in fee simple

Technique: Draw Interests on a Timeline

Eg 1 - O grants "to A for life"
|---- Life Estate (A) ----|---- Fee Simple in Reversion (O) ----|

Eg 2 - O devises "to A for life"
|-----life estate (A) -----|----fee simple in reversion (O's estate) ----|

Eg 3 - O grants to "A for life" then to B for life then to C
|---- life estate (A) ----|---- life estate B ----|---- fee simple in remainder (C) ----|

REPUGNANCY: interpreting inconsistent gift overs (is it a life estate or fee simple?)

Rule: In the case of wills, it is "trite law" that the court's job is to give effect to the testator's intentions.

Ex. "To A in fee simple, but should anything remain undisposed of by A then to B"
Or. "To A absolutely and forever during her lifetime"

3 Potential Solutions

A) Treat gift to A as **fee simple** and discard subsequent stipulations as repugnant
B) Cut the gift down to a **life estate**, remainder going to donees of subsequent gift
C) "**Power to Encroach**" – the first gift is a life estate with the power to encroach on the remainder
   - May allow the life tenant to overreach the life interest and take actions such as mortgaging or leasing the property during their lifetime

REPUGNANCY 1: Re Walker [1924] irreconcilable will – repugnancy – life estate or fee simple
Facts: Deceased left his wife "all my real and personal property" with any portion of estate "undisposed of after his wife's death, meant to go to his nephews.

Issue: What did the testator intend? Can courts lawfully give effect to that intention?

Decision: Found an absolute gift – wife gets fee simple.

Reasons: Court tried to find the dominant/paramount intention. Case provides very little reasoning as to how to determine the dominant intent of the testator. Problem because Walker clearly intended to benefit two sets of beneficiaries, and the court's interpretation means only one beneficiary is favoured. The gift to the wife is for all rights incident to ownership and then also attempts to give rise to the remainder which is irreconcilable.
Ratio: Sometimes the true intention of the testator may be impossible to fulfill

REPUGNANCY 2: Re Taylor – not fee simple just because of power to encroach on capital
Facts: "I give, devise, and bequeath all my real and personal estate of which I may die possessed to my wife Kathleen, to have and use during her lifetime. Any estate, of which she may be possessed at the time of her death is to be divided equally between my daughters…" But, wife then also left directions.

Issue: Was the wife entitled under an absolute interest or was she only granted a life interest?

Decision: "During her lifetime" serve as words of limitation. Will revealed intention of life estate. Just because she is allowed to encroach indefinitely on estate (she could sell the property or anything during her lifetime), still, it doesn't result in an absolute interest.

Ratio: where intention of testator is plain and clear, court must give effect to it without being diverted by rules of construction. Power of encroachment is *prima facie* limited to reasonable maintenance. Regardless of how extensive the power of encroachment may be, this does not extend to fee simple

REPUGNANCY 3: Christensen v Martin – intentions based on circumstances, language of whole will
Facts: Husband dies and gives house to wife "for her use until she no longer needs it, then give it to the Christensens."

Issue: What are the parties' respective interests in the property?

Decision: Martini receives life estate with no power to encroach. The gift over to the Christensens does not allow them to become registered owners right away. "Said property" indicates that he wanted to give life estate WITHOUT power to encroach.
Ratio: Court tries to give effect to the testator's intentions as ascertained from the language, considerations of the whole will, and external circumstances
5 possibilities
1. Absolute gift to M, hope that would give later to Cs
2. Determinable fee simple to M, gift over to Cs
3. Conditional fee simple to M, gift over to Cs
4. **Life estate to M with or without power to encroach, gift over to Cs (Court chose without)**
5. License of occupation to M, gift over to Cs

RIGHTS & RESPONSIBILITIES OF LIFE TENANTS & REMAINDERPERSONS

DOCTRINE OF WASTE – life tenant and remainderperson, or co-owners of property.

- Concern that life tenants may bring down value, because interested in maximizing short-term enjoyment
- Doctrine prevents life tenant from acting unreasonably or interfering with the remainderperson's interest

4 Categories:

- **Ameliorating:** acts that enhance the value of property
    - Was actionable at common law, but generally not actionable today.
    - Contrary to justifications of private property – efficiency, utilitarianism
- **Voluntary:** active injurious conduct that diminishes value of the land in the long run
    - Can be harmful even if done with good intentions
    - E.g. moving fixtures, cutting young trees, opening new mines, over-cultivation
        - Canadian exception: not wasteful to cultivate/clear trees for certain repairs
    - This is actionable - life tenant is liable to the remainderperson unless the gift states otherwise
- **Permissive:** damage resulting from the failure to preserve or repair property.
    - A **life tenant is not impeachable** for this kind of waste **unless** the gift imposes an express duty to repair
    - I.e. Inaction by the life tenant is not actionable.
- **Equitable:** awarded when destruction is extremely severe from reckless, wanton and malicious acts.
    - Presumably the only type of waste that can't be excluded
    - *Law of Property Act,* s. 71 → life estate does not confer on life tenant, the right to commit equitable waste, unless expressed clearly on instrument creating the estate.

Other Applications of Waste Doctrine

- ***Law of Property Act,* s. 29-32**: Applies to dowress, tenant for life for years, guardians of a minor, lessees, & shared ownership (tenants in common and joint tenants are liable to their co-tenant)

Powers v Powers Estate - Recurring expenses borne by life tenant; capital expenses borne by estate

Facts: Deceased gives mother equitable life estate, with power to encroach for maintenance of the estate ONLY.
Issue: To what extent is the estate obliged to pay for repairs to property?

Division of costs:

- Cost of Heating - life tenant out of the **income**
- Repairs - if necessary for preservation of building or maintain property - pay out of **capital**
    - Replacement of furnace, fences, etc…
- Repairs - if recurrent or periodical - paid for out of **income** (lawn care, painting)
- Insurance - generally depends on *purpose* of insurance involved
    - Furnace insurance - not required for preservation – **only if the insurance is for benefit of remainderman will the cost of premiums be borne by capital**
        - Trustees must insure against loss by fire, premiums come out of income
- Mortgage payments - interest portion comes out of income, but the principal portion out of capital
- Property taxes - recurring payment – **income**

Best solution for this situation: create a trust where the trustee has fiduciary duties to manage the estate in accordance with the settlor's instructions, trustee can then properly order division of costs

- Trustee has the legal estate; beneficiary has the equitable estate
- Even better: use a joint trustee; the fee simple reverts to other trustee on death, or use a trust company

GENERAL POWERS OF ALIENATION

- ***Wills Act* s.3** → life tenant can sell/lease the life estate to another, but the estate still expires on death of the measuring body

DOCTRINE OF DOWER

- OLD: Gave a widow an life estate in 1/3 of husband's real property
- **Abolished** in 1886 in Alberta **-** no widow is entitled to dower except as provided by *The Dower Act*

The Dower Act

What are the rights? s.1(c)

1. Veto right to non-owning spouse to prevent disposition of the home
2. Confers a life estate on the surviving spouse in the homestead (devises postponed)
3. Protection from creditors (now dealt with in the *Civil Enforcement Act*)

Who does the Act apply to?

- Gender neutral since 1948
- Only applies to married couples – must be legally married, rights end on divorce
  - Not to interdependent adult partnerships

What does the Act apply to?

- Homesteads s. 1(d) – parcel of land on which the dwelling house occupied by the owner, limited to 4 adjoining residential lots (in a town/city) or one quarter section of rural land
- Excludes land owned by married person together with third party (s.25)
  - If just husband and wife, Dower applies s.25(2)
- Can extend to mines and minerals (s.24)
- Applies to leaseholds if a long-term lease
- Can have more than one homestead s.3(1)→ as long as you have lived in each home.

What if the will devises the homestead to someone else?

- Life estate takes precedence over the will (s.18)
  - If own 2 or more homesteads, surviving spouse must elect one homestead ss. 19-20
  - Also applies to some personal property (s.23)
    - Includes the items that are exempt from seizure – i.e. household furnishings and appliances <u>up to a monetary limit</u>

What does proper consent look like?

- If purchasing, request this consent at the beginning of the deal (so seller cannot back out)
- S.4 - Consent shall be contained in or annexed to the instrument by which the disposition is effected in the prescribed form
- S.5 - the spouse must understand the rights that they are releasing by consent (Acknowledgement)
- Even if not married, a dower affidavit must be signed by the owner

When is consent NOT required?

- Leases under 3 years
- If getting separated, a s.7 agreement can release dower rights without a court order
- **Courts can dispense with consent under s.10 of *The Dower Act***
  - (5) The Court may by order dispense with the consent of the spouse if in the opinion of the Court it appears fair and reasonable under the circumstances to do so.
  - (6) The Court may make the order with or without imposing conditions

Do we need Dower today?

- Many other provinces have abolished Dower because other protections for widows exist
- Alberta keeps it because of the **consent provisions**
  - Although designed to preserve the land for a life estate, the consent provisions are valuable for spousal control during their lives

CHAPTER 5: ABORIGINAL RIGHTS IN LAND

- Aboriginal rights are entrenched in the ***Constitution Act* s 35** and pre-date European settlement
- **Royal Proclamation, 1763**: reserved land for Aboriginals, only Crown can purchase from them
- Both aboriginal law AND common law concepts of possession must be considered
- **Doctrine of Discovery:** Principle of international law under which European governments could assert sovereignty over territory prior to other European sovereigns (regardless of the presence of prior indigenous groups)
- As understood at common law, discovery gave the government the right to govern the territory, as well as the underlying or radical title to the land.
- ***Terra Nullius* –** defined as land belonging to no one. Most British colonies were not treated as *terra nullius*.
  - Some British territories settled in the 19th centuries were treated as *terra nullius*, including BC and Australia.
- **The *Royal Proclamation*,** 1763 formally recognized an aboriginal legal interest in part of the territory that becomes Canada.
  - Also provided that this land could only be transferred to the Crown via a treaty
- Constitutional limitations:
  - Crown constrained by the duty and honour of the Crown and sec. 35 rights (rights recognized and affirmed)
  - Sec. 35 extends to property rights. After 1982 Aboriginal rights cannot be extinguished
  - *Sparrow* held that sec. 25 rights are not inviolable – once the state action infringes the right, the Crown must show justification

Aboriginal Law vs. Indigenous Law

- Aboriginal law: the law of the Canadian state in relation to aboriginal peoples
  - Includes common law doctrines like aboriginal rights and title, treaty rights, s. 35 and legislation (*Indian Act*)
- Indigenous law: the law of the particular indigenous groups
  - Includes Indigenous legal traditions that can often be traced back to before contact, e.g. traditional Gitxan land tenure principles
  - Also includes formal laws enacted by Indigenous communities exercising self-government powers
    - E.g. a first nation land code enacted under the *First Nations Land Management Act*

Calder (1973)

- When settlers came, Indians were already there → their rights already existed

Guerin (1984)

- Introduces the "the honour of the Crown" – Crown has a fiduciary duty to Aboriginals**.**

Tenure under statutory regimes:

- *Indian Act*
- *First Nations Land Management Act*
- *Metis Settlements Act (AB)*

Tenure under Modern Treaties & Self-Government Agreements:

- E.g. *Nisga'a Final Agreement* provides for fee simple interest in land under Nisga'a jurisdiction

Customary interests in land within particular indigenous communities

Features of Aboriginal land as *Sui Generis* (One of a kind, unique) Title (Delgamuukw v BC)

- Aboriginal land is **inalienable** (except to Crown,) **indivisible** (held communally) and **Aboriginal title pre-dates sovereignty**
- Can't use land as collateral **and can't use land in a way that is inconsistent** with the practices that ground the claim to title (but, at the same time, not restricted to traditional native uses)
  - *Indian Act* states that reserve lands can be used for any purpose that contributes to the general welfare of the band
  - **Remedies** for inconsistent use: group could forfeit their claim or Crown could get an injunction against that use
- These constraints put Aboriginal title at a disadvantage relative to fee simple

Proving Aboriginal Title

(Tsilhqot'in Nation v BC – nomadic nation claims large swathe of land)

1. **Sufficient occupancy** of the land: prior to and at the time of British sovereignty
    - Claimants must establish a connection to the group occupying the land at British occupation
2. **Continuity** between British sovereignty and present
    - No need for an unbroken chain of continuity
3. **Exclusive** connection with the land maintained and present at the declaration of British sovereignty
    - Excluded other groups, granted permission to pass over land, signing treaties
    - Where there is only one group claiming possession, only minimal possession is necessary
        - The standard of possession is contextual and flexible
        - Evidence includes dwellings, regular use for hunting, closure of fields, cultivation

- **Oral evidence** is accepted in cases involving aboriginal title
- Significant presence is not required, minimal control of territory is usually sufficient so long as the Aboriginal group can define borders through dwellings/cultivation of fields
- **Title comes from the unique estate in land,** *suis generis.* Was formally recognized in the *Royal Proclamation* but this did not create it

Aboriginal Rights Short of Title

- Non-possessory, site-specific rights: fishing, hunting, ceremonies, etc.
- The centrality and significance of the practice to the group's culture must be demonstrated
    - Must have existed prior to contact with Europeans
    - Customs/traditions that arose solely as a response to European intervention do not count

Extinguishment of Title

1. Rights can be extinguished under the principle of sovereignty by a clear, unilateral act by parliament.
    a. **No longer valid**, *Charter* s.35(1) prevents this unilateral act
2. Surrender of the land (bilateral) – most accepted
3. *Bona fide* purchaser for value? Maybe. (Chippewas of Sarnia)
    - Must prove the defendant is a good-faith purchaser for value of the land, then aboriginal rights may be extinguished without consent and without parliament's intervention

Justifying Infringements of Aboriginal Title

1. Infringement of the aboriginal right must be in furtherance of a **legislative objective that is compelling and substantial**
    a. Conservation, general economic development, agriculture, forestry, mining, hydroelectric power, infrastructure, settlement of foreign populations
2. The infringement must be consistent with the **special fiduciary relationship** between the Crown and aboriginal peoples (proportionality test)
    a. Must consider future generations of aboriginal people
    b. Doctrine of priority - government must take aboriginal rights into account and allocate resources in a respectful manner, but must balance with rest of society's interest
3. **Duty of consultation and accommodation** based on honour of the Crown to act in good faith
    a. Scope varies on a spectrum based on strength of the claim and seriousness of adverse impact to aboriginal peoples, but at a minimum must act in good faith

Haida Nation Case
– Honour of crown – duty to consult

Facts: Government transferred logging rights to a private company for a piece of land that Haida aboriginal group had an unsettled claim to

Decision: <u>Duty to consult</u> emerges as soon as the Crown knows of a potential credible claim by an Aboriginal group. Corresponding duty on aboriginal peoples to bring forward clear claims stating the nature of their interests.

Duty to consult: Amount of consultation required in a given context is a function of the degree of the encroachment.

- Minimum = discussion/notice & disclosing of information
- Maximum = find an interim solution, formal participation in the decision-making process, written reasons to demonstrate that aboriginal interests have been properly addressed

Legislation Re: Aboriginal Rights

Constitution Act, 1982 – s.35 "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed"

- **Protected aboriginal rights can no longer be extinguished by a unilateral act**

s. 91(24): Responsibility of Indians and Indian lands are exclusive to **Parliament**

Indian Reserves: a unique system of landholding under the *Indian Act* where a band gains possession of the land. The band allots individual parcels to members of the band who hold under a certificate of possession. These rights can be devised by will, and can be transferred in principal to another member of the group but only with consent of the counsel.

- Holder forfeits rights if he leaves and the land goes back to the counsel.
- Matrimonial act and dower act do not apply to the reserve (no protection for spouse).

Three types of Metis rights:

1. Metis Title – right to occupy and make improvements, build, develop. These rights can be transferred & devised, & lesser interest can also be granted (i.e. lease)
2. Provisional Metis Title – granted for a fixed term which can be renewed; if the provisional title holder meets certain criteria they can acquire "Metis Title" (would have to use it appropriately in accordance w/the wishes of the counsel)
3. Allotments – Granted for fixed term, intended for farming or business purposes (not for residential)

Aboriginal Title and Common law Estates Similarities and Differences

Similarities:

- Exclusive use/right to exclude non-holders of the interest
- Crown holds underlying title
- Crown asserts a right to govern and make laws in relation to the land (subject to constitutional restrictions)
- Aboriginal title is enforceable in the courts of the Crown (like other CL estates)

Differences:

- Unlike traditional CL estates which are presumed to derive from a Crown grant, Aboriginal title is based on occupation *prior* to the Crown's assertion of sovereignty
- Content of title is unique and distinct from any other CL estate (inherently collective, inalienable, restrictions on use)
- Content of title is based in part on Indigenous legal systems

CHAPTER 6: EQUITABLE INTERESTS

Background: The Decline of Feudalism

- Personal bond between lord and vassal no longer exists
- Incidents of tenure increasingly important
  - Relief – tenant inherited estate from father and must pay 1 month income from the land
  - Wardship – the right to control the estate and take profits when tenant is a minor
- Transformation of the economy in England so that land is no longer as important

THE EMERGENCE OF THE USE

General Notes

- The trust is the main contribution of equity to property law and arose out of the feudal concept of use.
- **Summary:** Nobody in England is holding title, all land is held under deeds to uses to avoid incidents of tenure.

Definition: Use – a device used to grant legal title to one person to hold for the benefit of another

- Used to make charitable gifts to religious institutions
- Avoiding relief, taxes, and other feudal incidents
- Designating heirs
- Conveying land without livery of seisin
- Shielding property from creditors, dower rights, and forfeiture

Terminology: feoffee, feoffor, cestui que use

"A to *Dewey, Cheatham, and Howe* and their heirs to the use of *B and his heirs"*

A is the **feoffor to uses**
D, C & H are the **feoffees to uses**, even if one passes away there is no inheritance
B is the ***cestui que use*** (the beneficiary)

Problem: "renegade feoffees" – because the *cestui que use* is not seised of the estate, she does not have legal title, the common-law court will not enforce the use. Luckily, equitable courts exist.

Solution: Equitable courts are under the jurisdiction of the Lord Chancellor, empowered to do justice. Feoffees bound to obligations under the deed of uses – must pay all the income or convey the land back to the *cestui que use* (the equitable beneficiary). Or else, the feoffee will burn in hell and stay in jail until they do the right thing.

Equity: Equity used as a separate set of rules, distinct from the common law, which gives rise to rights enforceable in a court of equity

Who isn't bound by the deed of uses?

The bona fide purchaser for value: Someone who didn't know and is a good faith purchaser for value. All other purchasers of land held under a deed of uses will become the feofee and have the same obligations to the *cestui que uses.*

The modern trust emerged from the deed to uses: 3 important acts

1) The Deed to Uses
2) The *Statute of Uses*
3) Legal loopholes and equitable estates

THE STATUTE OF USES, 1535

s. 1: "Where person A is seised to the use of another person B, or B corp., then B's equitable interest is enlarged by a corresponding legal interest and A's interest is executed."

The seisin is taken from the trustee and given to the beneficiary. The beneficiary now owns both the legal and equitable fee simple, so now the king could collect tax revenue

What are the implications?

- No more separation of legal and equitable title
- Doesn't apply to personalty*
- Doesn't apply to companies*
- Doesn't apply if there is a management component (active duty*)
- Doesn't apply to leasehold interests *

Example: to A and her heirs to the use of B for life, remainder to the use of C and her heirs

Before the Statute of Uses?

- A retains legal title in fee simple
- B gets equitable life estate
- C obtains the equitable remainder in fee simple

After the Statute of Uses?

- B gets a life estate in both the equitable and legal interest
- C gets the remainder in equitable and legal fee simple
- A is executed out

Unintended consequence of the Statute of Uses

- Delivery of seisin can be bypassed by execution of "A"

Escaping the Statute of Uses

1. Avoidance – A will not be executed
    a. To *A Corp.* in fee simple to the use of *B* in fee simple (statute only applies to persons)
    b. To *A* for 999 years to the use of *B* in fee simple (A only has a lease, no seisin, statute doesn't apply)
    c. To *A* to hold the property, and to manage it, and pay the rents and profits to the use of *B* in fee simple (active managerial duties)

2. Exhaustion
    a. To *A and his heirs* to the use of *B and her heirs* to the use of *C and her heirs.* Statute of uses was capable of executing only one fee simple of uses. Therefore, use upon a use would not be triggered.
        i. A is executed out, B takes legal title, and C takes equitable fee simple
        ii. When there are two levels of uses the statute is exhausted by the first use no matter what
    b. Unto and to the use of *A*, in trust for *C* (standard model of contraction of the previous example)
        i. The modern short form for trusts

THE EMERGENCE OF THE TRUST

Definition: Trust – a conveyance intended to create a separate equitable interest, can be created by a will, a deed of trust, or a declaration of trust

- Can consist of real or personal property, including intangibles such as intellectual property or stocks

In Alberta – ***Land Titles Act > Statute of Uses***

- Unregistered interests in land are not recognized as legal interests - exposed until interest is registered (good faith purchaser could walk away with interest)
- Accordingly, even when a use is executed the affected estates remain equitable until registered

Modern Terminology

Settlor - a legal persona who creates the trust. He/she owns the property in fee simple.

Trustee – the legal title holder who is responsible for managing and controlling trust property, investing in it or investing it in accordance with the settlor's express instructions but also subject to a range of fiduciary duties requiring the trustee to act in the best interests of the beneficiary.

Beneficiary – the equitable titleholder. The beneficiary has no control over the trust property and is only entitled to receive periodic income or distribution of payment from the trust.

Example: S: "Unto and to the use of my trustee in trust for B for life, then in trust for C"

- Unto and to the use of (effective language)
- S: Settlor
- B, C: beneficiaries (equitable life estate for B; equitable interest in fee simple in remainder for C)
- Legal fee simple in trustee

TYPES OF TRUSTS

Express Trusts

An express trust arises from the explicit instructions of the settlor

X has a legal interest in the land. At the same time, wants to nominate Y as the beneficiary. Right to use, possession, income, etc. Traditionally done in the form of a deed to uses. Becomes a proprietary interests when the courts say that anyone is bound. Statute of uses didn't like this. Deprives crown of useful remedy

- Now, when someone gets beneficiary interest, must get legal interest
- Now, create an arrangement that doesn't come within the ambit. Two ways for this:
    - Person who holds the interest is a corporation
    - Make the property which is subject to the use personalty – statute of uses only concerns real property
    - Must find language that makes it operates, then it rests (any further uses are inoperable) unto AND to the use (one use – uses upon uses are not subject to the statute)

A to the use of B for life, then to the use of C in fee simple. A is being seised to the use of B and C in succession – how interpreted.

Trusts that are created expressly and are subject to all formalities related to the *Statute of Uses*. They are most often used in wills to donate money, maintain wealth, etc.

Resulting Trusts

Where the equitable interest reverts back to the settlor or the settlor's estate.
Happens in 3 circumstances:

<u>**1. By Implication**</u>

E.g. "Unto and to the use of A in trust for B for life" – A has fee simple, B acquires an equitable life estate in possession – when B passes away this would create a resulting trust for A

<u>**2. Gap in Equitable Title**</u> – where there is an incomplete disposal of equitable entitlements. The equitable title will spring back to the settlor or the settlor's estate.

E.g. S: "Unto and to the use of A and his heirs in trust for B for life." – B has a life estate, A has a fee simple, and S has a resulting fee simple

<u>**3. Gratuitous Transfer of Property**</u> **-** Equity presumes that a trust results from a gratuitous transfer of property if there's no evidence as to the settlor's intentions.

- **Between spouses**, the presumption under Alberta's *Matrimonial Property Act* where property is registered in the names of both married persons, <u>joint ownership of the beneficial interest is presumed.</u>
- The presumption is rebuttable by bringing evidence of intention

Ex. X conveys property to Y without considerations. Equity **presumes that X granted the legal interest**, but retained the beneficial interest. Y is holding a resulting trust for X.

Ex 2. Title to property is purchased in Y's name, with X's money. Equity presumes that Y is holding a resulting trust for X.

<u>Modern Presumptions re: Gratuitous Transfer:</u>

1) Presumptions are **gender neutral**

2) Presumption of advancement only applies to a **minor** child.
3) Presumption of advancement **does not apply to spouses.**

Note: how to overcome the presumption – based on circumstances, e.g. write a note to say it's a gift, need to show it wasn't to retain beneficial interest in the property

Resulting Trusts – EXCEPTIONS to the Gratuitous Transfer Presumption

Pecore v Pecore

Presumption of Advancement – Parent/Guardian & a gratuitous transfer to a child

Facts: Father opened a joint ownership account with Paula with the right of survivorship. If the funds are a gift to Paula, they are hers to keep; but if the father retained the beneficial interest in the funds, they form part of his estate, and they must be split between Paula and Michael. In 1996, he wrote a letter stating he was 100% the owner of the funds and they were not being gifted.

Issue: Resulting Trust or Gift of Advancement?

Decision: Court began with the **assumption of a resulting trust but** ultimately determined there was **sufficient evidence to establish the intention for a gift of advancement.** Degree of disability, degree of dependence can be used as evidence to establish this intention.

- Traditionally gratuitous transfers from a father to his child or from a husband to his wife were presumed to be gifts (presumption of advancement).
- In all other gratuitous transfers the grantor was presumed to retain an equitable interest (presumption of a resulting trust)

Constructive Trusts

Property is subjected to a trust by operation of law – trust that emerges notwithstanding the intentions of the person in question
- Can result in specific performance rather than monetary compensation
- Given priority over claims by general creditors against the legal title holder
    - But are not given priority over a *bona fide* purchaser for value without notice
- Often used as a remedy in Canada

2 Categories

1. **Remedial Constructive Trusts**: remedy crafted by the courts
    a. Unjust enrichment following breakup of a domestic relationship (*Moore v Sweet*)
    b. Fiduciary obligations? (*Bulun Bulun*)
2. **Institutional Constructive Trusts:** imposed in circumstances where one party acquires property for his benefit at the expense of a person to whom he owes a fiduciary duty. Court only enforces, does not craft.
    a. Sale of real property – equitable interest prior to closing sale? (*Semelhago*)
    b. Arising out of unconscionable conduct, theft – the thief becomes a trustee for the true owner

Semelhago (SCC)

- Will not automatically assume you have entitlement to specific performance when you are buying real estate. Must show that damages are not appropriate by establishing the uniqueness of the property

Bulun Bulun

FIDUCIARY OBLIGATION = remedial constructive trust? Possibly.

Facts: Sale of clothing material infringed intellectual property rights of artist. The artist sued and was settled. The tribe to which the artist belonged to also sued on the basis that the artist held the property in trust.
Decision: Tribe does not have the right to sue when Bulun Bulun had already claimed damages. Might regard **Bulun Bulun as a fiduciary** for the tribe. He might be required to act in accordance with their customs to take appropriate steps to protect the property and sue on their behalf.
Ratio: Indirect way in which equitable principles are made enforceable in court. Australian court emphasized that a **constructive trust is not imposed automatically as soon as we have a fiduciary**. In an extreme case, **equity might impress the property with a constructive trust**, only when it is necessary to achieve a just result and **prevent the fiduciary from retaining an unconscionable**

benefit. For example if Bulun Bulun had refused to protect the copyright from infringement, a constructive trust might have been created.
In Canada – is there a trust mechanism that would protect that Aboriginal group that created this knowledge? Every member of the group has the right to this culture but must potentially act as a fiduciary for the group (ensuring it isn't infringed, suing on the group's behalf, etc.)

CONSTRUCTIVE TRUST ARISING FROM DOMESTIC RELATIONSHIP (includes unwedded)

Traditional position: illegitimate cohabitation, no relief for unwedded spouses

Murdoch v Murdoch

- *Rancher's wife has no claim to assets even though she did lots of work, no resulting trust in the absence of financial contribution to the acquisition of the property or evidence of common intention to share the beneficial interest.*

Modern approach: constructive trust for unjust enrichment **(*Beblow, Moore, Kerr*)**

Peter v Beblow

Domestic labor sufficient for claim in unjust enrichment – remedial constructive trust
Facts: Lived together for 12 years, she assumed role of wife taking care of both his and her kids (he didn't have to pay for these services). She provided a lot of domestic work. He provided money and 'drunken abuse.' She claimed a proprietary interest in the house that he owned.
Decision: Claimant entitled to a proprietary remedy in the form of a constructive trust where there is 1) unjust enrichment, and 2) monetary damages are inadequate, and where 3) the claimant's contribution to the property is sufficiently substantial and direct.
Test for Unjust Enrichment:

1. An enrichment
2. Corresponding deprivation
3. Absence of juristic reason

Main issue is **"juristic reason."** Was the benefit conferred by the common-law wife conferred as a gift? However, court deals with this by holding that there is no obligation to provide domestic services. More likely that the couple expects to share in the wealth, rather than receive compensation for services. Both partners create something together and there is an expectation to share gains.
Public policy: domestic services should be recognized, don't want to impoverish domestic labour providers, equity can supplement the law when the law is unsatisfactory

Kerr v Baranow

Joint family venture required to allow interest in other assets
Facts: She provided domestic labour, she wants proprietary interest in the house, however she also wants a share in the other assets (millions made in the high-tech industry.)
Decision: Unjust enrichment may result following the breakdown of the relationship where one party retains a disproportionate share of the assets produced by a **joint family venture**. This is a **question of fact** and the claimant must show a nexus between his/her contributions and the assets accumulated by the JFV. Must demonstrate that they were building something together & relevant questions include:

- Mutual effort, Economic integration, Actual intent, Priority of the family
- "Could he have done it without her?" – **contribution must be substantial and directly linked to the property**

Unjust Enrichment – Remedy
Default presumption: monetary award – (i) where there was a joint family venture, and (ii) there is a link between his or her contributions to it and the accumulation of wealth/assets
Proprietary: must demonstrate that a monetary award would not be appropriate by showing a link/causal connection between his/her contributions and the acquisitions of the land

CHAPTER 7: QUALIFIED/CONDITIONAL TRANSFERS AND FUTURE INTERESTS

Overview

Absolute Interests:

1. x: to A and her heirs (fee simple in possession)
2. x: to W for life, then to C (life estate in possession; fee simple in remainder)

Qualified and Future Interests: to A's first daughter, to A on condition that the property be used for a school

Fundamental Concepts

Reversion – When an owner of an estate transfers a part of the estate, they retain residue in reversion. The property interest reverts back to the grantor upon some event.

Remainder – When a partial estate is transferred, with the residue to pass to another, it is a remainder. The person has present rights to future enjoyment.

Contingent Interest – interest that is contingent on an event that may or may not happen (not vested)

Vested Interest – the rights and interests can be sold at any time, even if enjoyment is postponed.

Fee simple subject to Executory limitation - "O: to A, provided he marries by age 25, otherwise to B"

- B's interest described as an *executory interest*
- And A's interest is described as subject to an *executory limitation*

3 Categories

A. Determinable Interests – interest reaches a natural end upon the occurrence of an event
"O: To A so long as used as a school."
"O: To A until A marries"

- A acquires a **fee simple determinable**
- O's interest is known as a **possibility of reverter –** a fencepost with a vested interest in the land
- A's interest is not absolute, but a *qualified* one. If the **eventuality materializes**, A's interest will determine (conclude) automatically and the right to possession will revert to O
- Common words with a temporal meaning: "while", "during", "so long as", "until"

B. Conditions Subsequent - defeasible interests that can be brought to a premature end on the occurrence of a specified event.
"O: to A on condition that the property be used as a school"
"O: to A but if A enlists in army, my estate may enter"

- A acquires a **fee simple subject to a condition subsequent**
- O's future interest is known as the **right of re-entry** (RoR) – a cloud NOT VESTED
- A acquires a present right to possession... but if the **condition is broken**, O can elect to end the estate by re-entering the land
- Common words: "but if", "provided that", "if it happens that", "on condition that"

C. Conditions Precedent (Contingent Interests) - the interest is delayed pending the occurrence of an event.
"O: to A for life, then to B if B graduates from law school "

- B has a fee simple in remainder subject to condition precedent
- Condition precedent is like a "bridge"
    - If B doesn't graduate, estate reverts back to O
- Contingent if the identity of the remainder person(s) cannot be ascertained at the time of the grant:
    - O: to A for life, then to the children of B
        - But what if B has more children?

Overview of Vesting from a Temporal Perspective

Vested in possession	Vested in interest	Future interests
-Life estate -Fee simple absolute -Estate subject to a condition subsequent -Estate subject to determinable limitation	-Reversions -Vested remainder -Possibility of reverter*	-Estate subject to a condition precedent -Rights of re-entry -Contingent remainders

Determining the kind of Qualified Interest

How do we ascertain the grantor's intentions? (*Caroline v Roper*)

- Look at the instrument as a whole
- The choice of language
  - DETERMINABLE LIMITATION: Durational language (so long as, while, until, during)
  - CONDITION SUBSEQUENT: External stipulation (but if, on condition, provided that)

The Rule in Browne v Moody

(McKeen Estate Case) – presumption of a vested remainder

Facts: Settlor's instructions: "in trust for my wife during her lifetime. Divide the residue of my estate equally between my sisters, A and B if they are both alive at the time of the death of me and my said wife. If only one of my sisters is alive at the time of death of the survivor of me and my said wife, deliver the residue of my estate to the surviving sister, the same to be hers absolutely." Widow outlived both sisters.

First Interpretation: the remainder is **contingent (subject to a condition precedent -** surviving the widow).

- Implication: neither of them met the condition, estate goes back to the settlor

Second Interpretation (the chosen outcome):

- **Condition subsequent**: if either sister passes away before the other, that sister's interest divests so the other sister gets everything. Since neither survived, neither was divested, and therefore the remainder goes equally to the sisters' estates and not the settlor's.
- This is favoured for multiple reasons
  1. First interpretation results in partial intestacy
  2. The rule in *Browne v Moody* - **If the only condition attached to a remainder is surviving the life tenant, then the courts will presume that the remainder is vested and not contingent**
  3. Better reflects settlor's intent
  4. Court desires earliest vesting possible
  5. **Court will only recognize a contingent interest if the language is absolutely clear**

Phipps v. Ackers (Kotsar v. Shattock)

Gift over rules

Settlor: "my residuary estate to Olime Kotsar if and when she shall attain the age of 21 years... In the event of the failure of the trust in favour of the said Olime Kotsar, to such charitable institutions as my trustees shall think fit."

Rule of Construction in Phipps v Ackers – condition precedent transformed into a condition subsequent when:

(1) Gift to A 'if/when/as soon as' A attains a specified age or fulfils some other condition in the future;

(2) With a gift-over to B on failure to fulfil that condition; then

(3) A's interest is regarded as vested at the date the gift becomes effective, subject to being divested if the condition is not satisfied by A.

- Can have ridiculous implications, consider:
  - "To the children of A **when** they turn 21, but if no child reaches 21, then to B. "
    - The rule of *Phipps v Ackers* applies.
  - "To the children of A, **who** turn 21, but if no child reaches 21, then to B."
    - The rule does not apply (no if/when/as soon as, etc.) so kids only have a future interest

INEFFECTIVE STIPULATIONS

Precatory Words – terms that fall short of establishing an actual condition or limitation

- i.e. requests, understandings

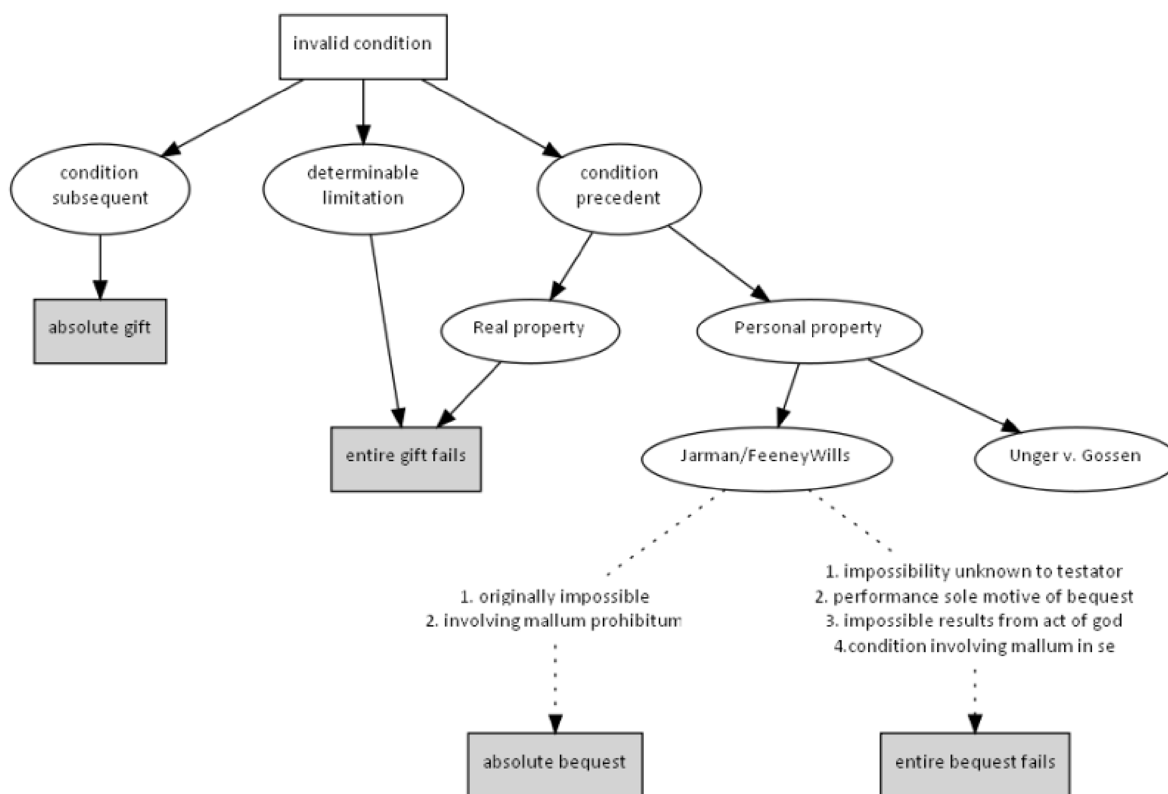
  Ex. "it is my wish that you set aside one-quarter of the residue to my niece"
- Sometimes these are binding and create a **precatory trust** (difficult to achieve)
  - Ex. "it is my wish that the charitable donations are to elderly people"
- Bottom line: Courts try to accommodate the testator's intentions
  - Did the testator intend the wish to be binding?

***In terrorem* Conditions** – intended to deter contests of the will and are generally regarded as idle threats not meant to lead to a loss of interest.

- However, if the testator provided for a gift-over, and the stipulation is not against public policy, the *in terrorem* condition can be upheld

INVALID CONDITIONS

- Conditions that encourage illegal activity, or are contrary to public policy
- Conditions that are uncertain
  - "On the condition that he marry a wife of German blood "
    - What %? The courts will ignore this condition.
  - Higher thresholds of certainty for conditions subsequent, lower for conditions precedent
- Conditions that violate rules related to remoteness
  - E.g. the rule against perpetuities (RAP)
  - "On condition that he never sells the property "



RESULTS OF INVALIDITY

1. Condition Subsequent: Recipient holds an absolute gift.

2. Determinable Limitation: The gift fails.

3. Condition Precedent:
   1. Attached to a gift of Real Property – gift fails
   2. For Personal Property, **2 different approaches (discuss both on an exam)**:

- Uncertainty in the law – before *Unger* we thought we would use *Jarman* – *Unger* seems to discard this and go with a different approach. Now we have a longstanding rule versus a judge saying what we should do

First Approach: Traditional Rule for Personal Property: Jarman/Feeney

a) If the condition was originally impossible (ex. drink up the ocean) or requires a violation of law, then absolute gift
b) If the impossibility of the condition was unknown to the grantor, or the condition has become impossible, then the gift fails.

Second Approach: *Unger v Gossen* – truer to the grantor's intention, but harder to apply

- Testatrix has 3 nephews in USSR, will receive money if they migrate to Canada within 15 years of her death. Canadian law made it impossible for her nephews to immigrate.
- **Decision:** Disregard Jarman/Feeney. Instead, ask **<u>what did the grantor intend</u>**? The gift or the condition? Court concludes intention to benefit her nephews & gift would not offend her wishes.

INVALIDITY: UNCERTAINTY

- Condition subsequent demands a higher level of clarity than condition precedent
- Condition precedent just requires that it be capable of being given some plausible meaning
- A determinable interest requires the same level of certainty as a condition subsequent (probably)

Sifton v Sifton

Condition subsequent void for uncertainty → absolute gift

Facts: Trustee instructed to pay settlor's daughter annually "so long as she shall continue to reside in Canada. "

Decision: Daughter's interest held subject to a condition subsequent, but the condition is void for uncertainty. The court only looks for a practical level of uncertainty. However, the event upon which the interest will be defeated must be stated precisely and distinctly. No guidelines as to temporary absences that might be permitted.

Ratio: Only the description of event is subject to the uncertainty examination.
Test: can the person with the interest ascertain when they will forfeit it from the outset?

Kotsar v Shattock

Distinguishable from Sifton because of continuity vs. precision

"Vested or divested at reaching age of 21 years and being a resident of a Commonwealth nation." …… vs. "**<u>continues</u>** to reside." This is sufficiently certain to be a valid condition.

<u>Other examples</u>

"To Bart for life, on condition that he remains vegan, otherwise to Lisa"

- This is a Condition Subsequent and is imprecise → Bart gets everything, no condition.

"To Bart for life, but should Lisa become vegan, then to her"

- Ok, this is about Lisa, will be treated as a condition precedent

Tuck's Settlement Trusts (1978) – arbitration clause can help render certainty

Facts: …in case of dispute or doubt, the *decision of the chief Rabbi in London shall be conclusive*.

Issue: Is the condition precedent certain enough?

Decision: Yes - the chief rabbi **arbitration clause was enough to cure uncertainty**. **Condition precedent** = lower threshold of certainty: person claiming the gift must only demonstrate that he has reasonably achieved the condition.

INVALIDITY: RESTRAINT ON ALIENATION

- Property transferred from someone to someone else on condition that it won't be sold out of the family or that it will only be sold to a particular class of persons, or maybe never (restraints)
- Conditions that contravene public policy will not be enforced

5 Objections to Restraints

1. They make property unmarketable
2. Perpetuate the concentration of wealth
3. Restraints discourage improvements to the property
4. Makes it difficult to obtain financing using land as collateral
5. Detract from business generally because creditors can't reach the property to satisfy debt

Valid Restraints

1) **Forfeiture –** terminates the fee simple and transfers the right of re-entry to the grantor (or the grantor's estate) if the grantee tries to alienate
    a. My property to X but if X tries to sell, my estate may re-enter
2) **Promissory restraints** – the purchaser agrees not to transfer the property, as part of the sale & purchase contract, making them personally liable for damages from breach of contract.
    b. O grants to A, and A promises not to transfer the land.
3) **Disabling restraints** –removes the power of disposal, if violated, doesn't divest the holder of the property, just voids the attempted transaction

Indirect Restraints (sometimes valid)

1) Right of first refusal at fixed price
2) Post mortem option to purchase at fixed price

To determine: assess the effect of the indirect restraint and determine if the effect is to take away the right to alienate (think about public policy). Need to make the case for this

TCS v Lyons – example of an invalid indirect restraint

Facts: Bennetts own land next to the school, special relationship between the parties. Contract signed in 1965 creating a post mortem option to the purchase property for $9375. School exercises the option when the property is actually worth 135K.

Decision: The option for a fixed price was unenforceable as an improper restraint on alienation of an estate in fee simple, citing *Rosher* - son was required to sell to his mother at ¼ of market price if he wished to sell. Effectively a full restraint on alienation, because the son would never want to sell. In this case, the college set the price during life even lower than in *Rosher*.

Ratio: Options that are effectively full restraints on alienation are invalid. Whether the option is valid, depends on the effect it has restraining alienation.

Powers of disposal may be abridged in 3 ways

1) Restricting the **mode** of alienation – Ex. May not be sold or mortgaged (but allowing leases)
2) By prohibiting alienation to some **class** of recipients
3) By precluding dealings only for a limited **time** period.

Test for invalidity – "does the condition take away the whole power of alienation substantially?"

INVALIDITY: DOCTRINE OF PUBLIC POLICY

- Courts have the power to refuse to enforce terms that are contrary to public policy
    - Some examples: stipulations that encourage criminal behaviour, undermine parental responsibilities, or seek to control marriage
- Charter may be useful in identifying core values
- **Public/private distinction – conferring to a family member is different.**

The Leonard Case

Racism in a trust → against public policy → condition void

Facts: The Leonard trust provided scholarships for a restricted class of students (only white protestants of British Heritage). Women could not receive more than ¼ of the amount given out. In the case of a required court application, the application must be made before a white protestant judge. Values embedded in the trust: progress & civilization, the British Empire, race, religion, philanthropy. The Human Rights Commission filed a formal complaint that the trust violated the human rights code and the trustee applied to the courts for guidance. Stated racism. Seems to be an important basis for interfering with the trust.

Issue: is the trust still valid?

Decision: We will take out all of the discriminatory provisions and leave it be besides that using the common-law doctrine of cy-pres. Proprietary freedom is balanced against this doctrine.

Ratio: Provisions cannot be blatantly racist or invoking religious supremacy, Courts will look at the preamble to determine motivation behind provisions.

Doctrine of Cy-Pres

When a trust is **charitable and fails** because it was **against public policy** or it has become repugnant to public policy at some later time, then the doctrine of Cy-pres will apply. The doctrine will remove the parts that are against public policy while maintaining the charitable intent of the trust.

McKorkill (SCC)

Can't give money to a dangerous neo-nazi organization. Daughter challenged. Only heir.

Spence v BMO (ONCA)

Testator can unconditionally dispose of property even on discriminatory grounds, didn't have to pass property on to daughter, even though his reasons were because she married a white man.

Re Esther G. Castanera Scholarship (MBQB)

Scholarship for needy women who want to pursue science is held valid. Valid because they are not motivated by a belief of superiority of race, gender, etc.

Kay v South Eastern Sydney Area Health Service (Australia)

Some of estate only to white people, gift was held valid because it is a charitable gift (but only because the Judge thought that the hospital could essentially provide more funds to all sick children.)

INVALIDITY: PERPETUITIES AT COMMON LAW

Rule Against Perpetuities (RAP)

- A <u>common-law rule</u> that establishes a period of time during which contingencies will be permitted to remain unvested

Rationale: promotes efficient transfer of property, clear title, and alienability. Balances the rights of current contingent owners with previous owners.

Avenues for Reform: (1) Abolition, (2) A flat statutory perpetuity period (80, 360 years, etc.), (3) "wait and see" approach.
Classify (identify the contingent interests) → Time (Establish the perpetuities period) → Prove (Prove that remote vesting is possible or impossible)

<u>Breakdown of the Rule:</u>

"No interest is good unless it must vest, if at all, not later than twenty-one years after the death of someone who is alive now"
Application: RAP only applies where there are **contingencies (interests not yet vested)** → conditions precedent, contingent remainders, rights of re-entry, executory interests, certain commercial options, the possibility of reverter
Perpetuity period: begins when the interest takes effect (at the creation of the interest) and ends 21 years after the death of some life in being, or lives in being.

- Will: on the death of the testator (*a morte testatoris*)
- Deed: when executed—signed, sealed, and delivered (*inter vivos*)
- Gestation period is added to the 21 years

Life in Being or Lives in Being (4 conditions)

a) A human who is mentioned in the instrument
   - Implicit – people who have relevant biological relationships to possible grantees
   - Explicit – lives of those who are outside of the transfer but are explicitly named (The Queen)
b) Person was alive when the interest takes effect
   - Includes a fetus who is subsequently born alive (period is extended by gestation)
c) If a group, the group's number is ascertainable and fixed at the date of the creation of the interest
d) If a group, the group must not be capable of increasing in number
   - Ex. 1: Devises "to all my grandchildren" will suffice
   - Ex. 2: Grant "to all my grandchildren" will not; grantor's children can't be lives in being

Remote Vesting: if it is <u>**possible**</u> for the interest to vest outside of the perpetuity period, the contingency violates RAP and the interest will be immediately void.

Examples of RAP Infringements

1. Fertile Octogenarian: *The testator devises Blackacre to trustees on trust for his wife, A, for life, then for A's children for their lives, ~~then for such of A's grandchildren who attain the age of 21 years.~~*
This part is void. The gift fails.
2. The Precocious Toddler: *The testator devises Blackacre to A for life, then for such of A's grandchildren living at T's death or ~~born within five years thereafter who shall attain the age of 21 years.~~*
This part is invalid because A could have a child after the testator's death, and the child could have a child within 5 years.

Rule Against Perpetuities – The Process

Step 1: Is the limitation contained in the instrument one to which the RAP may apply?
Step 2: What is the date of creation of the interest?
Step 3: Who is/are the life/lives in being? Do they fulfill the 4 conditions?
Step 4: Is it theoretically possible to construct circumstances in which remote vesting occurs?
Step 5: Can the limitation (which is invalid) be saved because of statutory modifications? (see next page)

Review Questions:

1. X transfers a sum "in trust for A for life, remainder to A's first child who reaches 21"

   Valid. A is a validating life, upon A's death, there can be no more children. A will reach 21 within 21 years of A's death.
2. X transfers a sum "in trust for A for life, then to A's first child who reaches 25"

   Void. Its possible for the child to reach the age more than 21 years after A's death.
3. T devises "to my grandchildren who reach 21" (T leaves 2 children and 3 grandchildren under 21)

   Valid. T's children are a fixed group, and their children will reach 21 within 21 years of their deaths.
4. T makes an *inter vivos* gift (same as in 3)

   Void. T could have more children, group could grow and are not valid lifes-in-being
5. A trust "unto and to the use of A for life, then to the use of A's widow"

   Valid. No problems with vesting whether there is a widow or not.
6. T devises "to my son Marshall for life, then to his widow for life, remainder to Marshall's surviving children"

   Void. Marshall's life estate is vested, widow is contingent because we don't know who the widow is, remainder is contingent because we don't know who the children are. We need to apply RAP twice. We know the widow vests when Marshall dies, so the life estate is good. Remainder is void because widow might not be a life-in-being, and she could live more than 21 years after Marshall dies.
7. T devises "to A for life, then to A's children for the life of the survivor of them, then to A's grandchildren" (at the time of T's death, A is an 80-year-old woman with two living children)

   Void. A's life estate is vested, A's children's life estate is contingent, and A's grandchildren is contingent. After T is dead, A could have another child 21 years after his death so remote vesting.

INVALIDITY: PERPETUITIES UNDER ALBERTA STATUTE

- **Applicable to interests created July 2, 1973 or later**
- **Statute presupposes that the common law RAP applies EXCEPT as provided by the Act (s.2**)
- S. 11 – **The remedial provisions** shall be applied in the order of s.9, s.4, s.6, s.7, s.8

s.3 – **No disposition is void** for only the possibility of vesting beyond the perpetuity period. The mere conceivability of remote vesting is no longer the benchmark for invalidity.
S.4 – **Wait and See**: don't treat limitations as invalid automatically based on possibility of remote vesting, instead wait to see if remote vesting occurs. Contingencies CAPABLE of vesting either within or beyond the perpetuity period until ACTUAL events establish either (A) remote vesting is impossible, In which case it is valid, or (B) the interest will not vest in time, in which case the interest is void, unless it can be saved by ss 6, 7, or 8.
s. 5 – **Lives in Being:** cannot use the royal line to lengthen the perpetuity period. The "wait and see" period is 21 years + any lives in being. Only persons referred to in 5(2) can serve as lives in being (grantor, grantee, those capable of producing grantees). Must be alive at the outset, and must not be so large as to make it impractical to identify the last survivor. This section eliminates the unborn widow problem.
S.6 – **Reduction of Age:** if age is the ONLY issue, reduce it to be valid

- Ex. to grandchildren who reach 30 is void at common law
  - Under this section, the position shall be read as the nearest age that will work, so vests when grandchildren reach 21
- Ex. to grandchildren who reach 30 and marry isn't valid even if it said 21
  - S.6 doesn't apply

S.7 – **Remedial Class Splitting:** exclusion of class members to avoid remoteness - if a member of the group won't vest in time, statute allows them to be cut out. Common law insisted that ALL parties necessarily vest in 21 years.

S.8 – **General Cy-Pres:** can bring the issue before a judge who can re-write the devise to best meet intentions of the grantor as best as possible

S.9 – **Reproductive Assumptions**: rebuttable presumptions as to fertility – contrast to common law, where there is an irrebuttable presumption of fertility.

- Males can have children at age 14 or over
- Females can have children between ages of 12 and 55

S. 11 – **The remedial provisions** shall be applied in the order of s.9, s.4, s.6, s.7, s.8
S. 17 – **Options to Acquire Reversionary Interests** (i.e. leases)

- RAP doesn't apply to options to renew a lease of real or personal property

S.18 – **Commercial transactions** (ex. options) the perpetuity period is 80 years. If a contract stipulates a longer period, the option is still only exercisable within 80 years. Ie wait and see for 80 years.

S.19 – **Interests determinable or subject to a condition subsequent** - the period is 40 years after the interest becomes **absolute**

- Ex. "my house to the Edmonton library so long as it is used as a library"
  - The Edmonton Library only has to use the house as a library for 40 years, afterwards, they can do whatever they want with it.
- Section 19(5) states that the 40 year limit does not apply to mineral leases.

EXAMPLE of s. 5:
O transfers a sum in trust for the first of my children or grandchildren to graduate to take a selfie with Bieber J.
VOID UNDER THE PERPETUITIES ACT if not vested in 21 years – Bieber J can NOT be a life in being.

Scurry-Rainbow Oil (Sask.) Ltd. v Taylor (2001)
Facts: Top lease - oil is discovered on Farmer's property. Imperial Oil negotiates the original deal. Scurry Rainbow makes an agreement w/ farmer that will allow Scurry Rainbow in after IOL's lease ends. The agreement with Scurry Rainbow includes a 42-year limit and is a determinable interest. This interest violates RAP.

Issue: whether the appellants' oil and gas top lease with the late Harry Taylor is rendered void by RAP.

Decision: **RAP does not apply in commercial settings**. In modifying RAP, Court considers the policy behind the rule, and concludes it should not apply here. Purpose of RAP is to promote exchange of property. Based on this case, in Saskatchewan, RAP does not apply to top leases.

There is no similar authority in Alberta. **However, an option to renew a lease is subject to the rule.**

CHAPTER 8: LEASES, LICENSES, AND BAILMENTS

NATURE OF A LEASE

Leasehold (Estate in Land) – Not a freehold estate, but allows you to recover possession (Chattels REAL)
- Conveyance of **exclusive possession** for a **certain period of time** (even against the owner)
- Estate is alienable and survives the tenant
- Modern leasehold is a *hybrid* of contract and property
- Use terms landlord (reversioner)/tenant. Tenant is short hand for tenant for years.

|--------Leasehold-------|---------reversion---------|

Lease
- Created by a "Demise" or "Term of Years"
- Legal relationship where title is vested in one person but right of possession is vested in another person
  - Tenant has **Exclusive Possession** (THIS IS THE KEY FACTOR)
    - Not seised of the land (not captured by *Statute of Uses*)
  - Landlord has a legal "reversionary interest"
    - Remains seised of the land
- While the lease continues, the landlord retains a reversionary interest; landlord's right to actual possession is suspended during the term of the tenancy

Real Actions – can recover property, not just damages. (Writ of ejectment – process for litigating it, if you were correct, you received your possession back)

TYPES OF LEASES

1. By term:
   (1) Fixed term lease (terms must be certain, though it can end prematurely – e.g. 1 day, 50 years)
   (2) Periodic lease (enjoyed for some recurring period of time, i.e. month-to-month)
      a) Common law presumption is a periodic tenancy
   (3) Tenancy at will (which may be terminated at any time by either the landlord or tenant)
      b) Can become periodic on payment/acceptance of rent, if fairly implied by circumstances
4. Commercial and residential leases

CATEGORIES OF LEASES

Commercial
- Governed almost *solely* by the common law

Residential
- Usually governed by remedial legislation
- Offers standard lease arrangements and provides certain content usually for the protection of the tenant. Sometimes those terms cannot be opted out of
- Governed by statute, due to unequal bargaining power, and the consequences of eviction on the tenant
- The belief that property law is the appropriate vehicle of redistributing wealth between owners and tenants
- *Residential Tenancies Act*, *Mobile Home Sites Tenancies Act*

ESSENTIAL ELEMENTS OF A LEASE

(If void due to missing element and tenant pays rent and there is a presumption of periodic tenancy)

1. Description of parties (identification)
2. Description of property ("demised premise")
3. Demise of the premises for a certain term
4. Date of commencement (present or future)
5. Rent, if any – indicia, not requirement, can make a gift of a lease
6. Written requirement
    a. If 3 years or longer – *Statute of Frauds & Land Titles Act, Alberta*
    b. If over 3 years: Leases must be in writing and signed by lessor otherwise tenancy at will is created
    c. Failure to comply results in a tenancy at will that can be terminated at any time
    d. Some relaxation of this rule - if possession conveyed without written lease and the landlord accepts rent, then the CL will presume that this is a month to month rentor

LEASES VERSUS LICENSES (FATAC)

Lease	License
Exclusive Possession	**Only a Right to Use** (can't sue in trespass)
Non-Revocable (statutory protection against eviction)	Revocable at any time – only recovery in equity
Estate in Land	Not an Estate – purely contractual
Quality of lease: Binding on subsequent purchasers of land	Landlord can sell without obligation
Notice is required before eviction	No notice is required

Street v. Mountford

(Intention of parties as to substantive rights conferred is what matters)

- If the agreement has **all the elements** of a tenancy, it will be regarded as such
- Whether the premises are being used for business or residential doesn't matter
- The question is not whether the parties intended to grant a lease/license, it is whether the parties intended to grant the essential ingredients of the lease/license, ie exclusive possession for term.

Required elements to create a Lease (*Fatac Ltd v Inland Revenue*):

1. Intention to be bound by statutory protections limiting eviction
    - Excludes relationships of generosity or friendship
    - Rent can be evidence, but it is not necessary
2. Right to exclusive possession
3. A defined term – fixed or periodic

Where the right to exclusive possession can be terminated pursuant to some legal relationship extraneous to the legal relationship of landlord and tenant indicates license.

- Ex. concierge has **right to exclusive use dependent on** his/her employment → license

Metro-Matic v. Hulmann

(Limit on type of use does not detract from it being a lease)

Facts: Metro-Matic operates a laundry room in a residential building – original landlord sells the building. New landlord claims he is not bound because he didn't sign the agreement.

Issue: **License or Lease**?

Decision: Lease – new landlord is bound.

- **Minor derogations and restrictions on the tenant's exclusivity does not destroy the lease in its entirety**
- **Occupancy demonstrating possession → having machines there**
- Language used suggests a lease ("rent"; "demise") indicated duration of the term.
- Common to assign use of premise in commercial leases.

NATURE OF THE LANDLORD'S AND THE TENANT'S INTERESTS

ASSIGNMENT VS. SUBLEASE

- At common law, the tenant has the right to deal (e.g. transfer) with the unexpired part of possession. However, the agreement may restrict these common-law rights
  - Assignment is a transfer of a tenant's full interest in the lease is conveyed
  - Sub-Lease is a transfer of a shorter period less than full term (even one day less)
- **The important distinction: assignment allows for a privity of estate and for covenants to run with the land**

ASSIGNMENT

- Tenant's full interest in the lease is conveyed (horizontal transfer)
  - T2 (assignee) has no privity of contract with landlord, but there is **privity of estate**
    - Per **Spencer's Case**: if T2 took T1's legal estate – there is privity of estate – therefore, only the terms of the lease that concern the land are binding against the assignee. Does not include terms of a personal nature only real terms, e.g. "covenants that touch and concern land."
  - T1 remains contractually bound to the landlord

3 Ancillary Tests for Covenants that Touch and Concern the Land (not determinative)

1) Does the covenant affect the landlord as a landlord and a tenant as a tenant? (Personal capacity)
2) Does the covenant affect the nature, quality, value of the land or the use to which it may be put?
3) Would the covenant lose its value if it were severed from the property?

Eg. Obligation to pay rent, duty to repair, restriction to the right to alienate.

If you want to protect yourself, say that in the case of assignment, a new lease should be signed.

***Law of Property Act*, s 65(1) (codifies Spencer's Case):** Persons who acquire reversionary interest or the leasehold interest of the tenant have all the rights and are subject to all the obligations based on the real covenants of tenancy

SUB-LEASE

- The landlord has no action against Tenant 2 (assignee), but he does against Tenant 1 (assignor). No privity of contract or estate.
  - If he should breach a covenant, Landlord will go after Tenant 1
  - Can insert a clause that says no subletting or no subletting without the landlord's permission

THE CONCEPT OF "TOUCHING AND CONCERNING"

Merger Restaurants v. DME Foods Ltd.

(Application of Privity of Estate)

Facts: Lakeview wants to permit Bonanza and its patrons to exclusively use spaces in a parking lot that was originally common to all tenants. Lakeview and Merger stand in direct relationship through the assignment.

Issue: Is the term to use all the parking lots in common a term that *touches and concerns the land*?

Decision: Yes – it is a term that *touches and concerns the land.* The extent and availability of parking spaces in a shopping plaza are so essential that they will directly affect the nature and value of the land. Merger can enforce against Lakeview, because Lakeview is an assignee to the contract

Anderson v. BC

(Parking not specified in lease → cannot be implied; no privity of estate)

Facts: Government expands the highway and buys 1/3 of a parking lot from the owner of the plaza; businesses lose money. Tenant sues landowner claiming implied term in the lease giving them the right for parking

Issue: Is the tenant entitled to any compensation?

Decision: Can we imply the term of a right to parking? No – can't demonstrate that the parking spots being expropriated were specifically for Anderson's business. Parking rights must be explicitly stated in the lease.

LIMITS ON THE TENANT'S RIGHT TO ALIENATE – RIGHT TO ASSIGN THE LEASEHOLD

- At CL a tenant may sublet the interest unless the lease agreement states otherwise – usually have to obtain written consent of the landlord
- This kind of clause is usually qualified by the proviso that the landlord will not withhold consent unreasonably or arbitrarily

Rule:

- **At CL, if the lease is silent on the right to assign your sublease, then the tenant may do as they please (assign, sublet, etc.)**
- **If the lease stipulates the consent of the landlord to assign is required, then the landlord may withhold consent for any reason**
- **If the lease stipulates the consent of the landlord is required, but it shall not be withheld arbitrarily or unreasonably, then in a case of dispute the court must decide if the case is unreasonably or arbitrary in the circumstances**
    - NOT CORRECT that the landlord must never be reasonable – all about what the lease says

Sundance v. Richfield

(It's on the tenant to establish unreasonable refusal – economic impact: reasonable)

Facts: Two tenants leasing separate premises in the mall. Lease says

1. Consent to sublet or assign the lease requires permission of the landlord, but the landlord cannot withhold consent unreasonably or arbitrarily
2. If the other major tenant (Beaver Lumber) objects to the nature of the business, it will constitute reasonable grounds for rejection

Restaurant tried to sublet to Swiss Chalet, but landlord refused to allow it, claiming that the typical customer spends too much time there and would take away from the parking spots for Beaver Lumber.

Decision:

Majority - Reasonable for Beaver lumber to object because the new assignment would affect its business. Even without the clause, the landlord could refuse because their pecuniary interest would be affected. The onus is on the tenant to establish unreasonableness.

Dissent - The phrase "nature of the business" is vague and isn't validly raised as a concern in this case. Beaver is concerned about location, not selling chickens.

Factors for determining whether refusal is unreasonable:

1. Burden is on tenant: tenant must show that the landlord has unreasonably withheld consent;
2. Test is whether a reasonable person would withhold consent, regardless of reasons of specific landlord
3. Court can only use information available to landlord at time of refusal
4. Must consider existing provisions of lease → rights of tenant to assign and right of landlord to deny
5. Landlord may withhold consent if assignment diminished value of rights or its reversion
6. Probability that the assignee will default is reasonable grounds for withholding consent
    - Financial position of assignee is a relevant consideration
7. Must consider commercial realities of the market place and the economic impact

NOTE: In Alberta, there is no legislation that mandates a landlord must be reasonable in his rejection of a sublettor or assignee.

OBLIGATIONS OF LANDLORDS AND TENANTS (Commercial)

Covenants

- **Examples**
    - To pay rent, to repair, to supply premises with heat & water (presumed by statute)

- To Insure, not to assign without consent, quiet enjoyment
- Can be on **express** terms – if not in the lease, question if it was agreed upon **implicitly**
- Parties can also incorporate the **usual covenants**
    - E.g. if the lease says "with the usual covenants" we have a standard set of covenants supplied by the CL
- In Alberta there are covenants inserted by short reference – scheduled to the ***Land Titles Act***
    - E.g. says "the tenant will fence" – the *Act* gives full contents that are defined, so just have to incorporate the basic statement
- Covenants are considered **independent** of the estate
    - **Failure by one party to perform does not give the other party a right to terminate the estate**
        - Unless, a covenant is framed as a **condition** of the lease. Estate is a property thing, covenants are a contract thing.
            - Ex. Covenant to pay rent or face eviction (commercial property)
                - Leasehold interest subject to a condition subsequent.

TERMINATION AND REMEDIES

Landlord Remedies

On a breach of condition by the tenant, the landlord may:

- Re-enter the premises (thereby terminating the lease) OR
- Maintain the lease and sue for damages
- Levy distraint (Seize goods of the tenant until rent is paid) – don't have to know this

Ways to End the Lease

1. **Expiration -** lease runs out normally.
2. **Disclaimer -** tenant denies the title of the lessor. This gives right to termination.
3. **Merger -** through the purchase of the reversionary interest by tenant.
4. **Frustration -** if something that is no one's fault, substantially changes the subject matter of the lease then the lease is viewed as coming to an end.
5. **Breach -** breach of a covenant by the tenant that gives landlord option to re-enter
6. **Surrender -** by mutual agreement (can't be unilateral); *abandonment*.
    - A lease can be brought to an end by surrender as a consequence of an express act of repudiation by the tenant, and acceptance of the surrender by the landlord
    - **Act of surrender/acceptance can be ambiguous**. Opens up problem to be explored in case law
    - **Rule set out in *Goldhar***

ABANDONMENT/ SURRENDER – repudiation by the tenant.

When abandonment occurs, the landlord has **4 options** available (1-3: ***Goldhar***; 4: ***Highway Properties***):

1. Enforce the Lease - refuse surrender and sue for arrears & rent as it comes due
2. Accept the surrender - terminate tenant's interest in the property
    - All terms and covenants of the lease are obliterated
    - No longer a lease so can only sue for arrears
    - Problems: need to find a new tenant and bear the loss of potential monthly rent difference
3. Prior to taking possession, provide notice of intent to sublet or assign lease on their behalf, then sue for the difference once another tenant is found. Landlord becomes an agent for the ex-tenant.
4. **Accept surrender and notify the tenant that a claim may be brought for prospective losses caused by repudiation over the unexpired portion of the term. (*Highway Properties v. Kelly, Douglas & Co.*)**

Goldhar v Universal

(Outlined first 3 options under abandonment; applied #3)

Facts: Tenant stuck in a lease they want out of, sent notice of termination. Landlord rejected the claim but tenant moved out anyway. Landlord sued for 3 months it spent searching a new tenant and the difference in rent

Issue: Since the parties did not agree to terminate the lease, did surrender by law occur?

Surrender by Law:

- Can result when the party's conduct is inconsistent with the continued existence of the lease
- Two categories:
    - When landlord takes some possession: If equivocal, tenant must prove that landlord intended to take possession back and surrender possession of the lease
    - Landlord signs new lease with a different tenant: This is unequivocal because it can only be valid if the first lease was terminated
        - **Exception:** the landlord may, **with notice to the tenant**, take possession on tenant's behalf and sublet or assign it; suing for the shortfall once another tenant is found

- Landlord did not give notice so it could not claim option #3
- Anticipatory Breach or Duty to Mitigate DO NOT APPLY à they are part of contract law → this changes in *Highway Properties*
    - Make a distinction between a lease and another agreement - if parties sign an agreement for a lease and it starts next month, you are in the world of contract law. Once possession is conveyed, you are in the world of property (so no duty for the landlord to mitigate their damages as required in contract law)

Highway Properties

(Leading landlord/tenant case, introduced option 4: future damages after abandonment)

Facts: Supermarket leased a large space in a shopping mall on condition that the business operates continuously (covenant). Business was not successful and within 2 years, tenant abandoned the property. This undermined the profitability and viability of the entire plaza. At trial, no prospective damages were given. Landlord did not give the specific "*Goldhar*" notice that they are seeking a tenant.

Issue: What type of damages/remedy can the landlord claim?

Decision: Option 4 - allows landlord to sue contractually for future damages, not just past. Damages are claimed as the present value of the unpaid future rent for the unexpired period of the lease less the actual rent paid by new tenant. Can also sue for provable losses resulting from repudiation. (Basically anticipatory breach – Laskin is saying there's no difference between Goldhar approach, and option #4 to terminate the lease and provide notice that they're seeking damages)

Laskin found support in older Australian decisions without waiting for future months (also law in USA) to change Canadian law.

CL makes a distinction between acts of the landlord that are equivocal and unequivocal

- E.g. landlord signed a lease with a new tenant, you can't claim anything under the new lease because then it is obliterated and you would be estopped because the second lease is only valid if the first lease was surrendered
- Options less than signing a lease - e.g. changing locks, removing belongings
- **Need to look at the circumstances and conclude whether or not the lease was surrendered by implication -** which would allow for a claim under the lease

Resulting Important Changes to Common-Law

- Still no duty of mitigation in commercial leases
    - **But, there is one in residential leases***
    - *Kaplinsky thinks this duty of mitigation should be imposed in all leases.*
- Re-letting **does not** have to be on the tenant's behalf
- Harmonizes contract law with leases (Court allowed plaintiff to sue for ANTICIPATORY BREACH)
    - SCC decided that it was no longer sensible to preclude a commercial landlord from the range of remedies available on breach of a regular commercial contract
- Can only apply option 4 when there is a covenant to operate continuously
- **If no notice, only options 1 & 2 are available**
    - **Landlord can pursue all the remedies, provided they send a notice**
    - **Landlord must give a clear indication of which remedy they are pursuing**

DOCTRINE OF EFFICIENT BREACH

Evergreen v IBI
(Landlord breach – doctrine of efficient breach potentially applies to commercial leases)
Facts: Building in Vancouver, leased by a designer company (IBI). Landlord wants it to become a residential building, but there are still 3 years left on the lease. Landlord notified the company that it would not be able to comply with its obligations under the lease, IBI refused to move and alleges that the building has special architectural value that merits the remedy of specific performance.

Doctrine of Efficient Breach: If there is a contract between 2 parties, and it is no longer in the interest of 1 party to maintain the contract, they will breach the contract and pay damages. The law is unclear on whether this doctrine applies to commercial leases.

This is a lease – not a contract, but an estate in land. The landlord cannot unilaterally cancel the estate. Nevertheless, the BCCA permitted Evergreen to cancel the lease. The case was settled before it got to SCC. In Ontario, the case law went the opposite way (ONCA TNG Acquisitions – lease is an estate in land, there should be no efficient breach). On the other hand, there is a lot of commentary supporting the BCCA decision – Kaplinsky thinks the doctrine of efficient breach should apply
Tv G Acquisitions
One party to a lease cannot unilaterally end its obligations under the lease (saying the Court of Appeal in *Evergreen* got it wrong)

LICENSES

- Not an interest in land or proprietary interest, but merely permission to do what would otherwise amount to trespass.
- **Good faith purchaser for value** is not bound by a license given to another
- Can be express or implied
- Cannot be assigned
- Not binding on a buyer from the licensor

Forms of Licenses

1. Bare License – permission to be on land
- Fully revocable at any time– not supported by contract
- Includes **implied licenses** – allowing someone to knock on your door
- If someone makes a mean comment about potatoes being undercooked, licensed can be revoked.

2. Contractual License
- **Supported by contract** – revocable subject to terms of the contract
  - Ex. Baseball ticket could not be revoked for failure to produce, as the terms of ticket contract didn't allow for revocation in these circumstances (***Davidson v. Toronto Blue Jays***)
  - Removed for not producing ticket was NOT misbehaving

3. Irrevocable License
- *Stiles v Tod Mountain*
- Usually only elevated under unjust enrichment or proprietary estoppel

Significance of License
- **Can be expressly conferred or implied.**
- Implicit consent to enter premises, unless told to leave
- License can be elevated to irrevocable equity interest in *specific* circumstances
  - Usually under unjust enrichment or **proprietary estoppel – established by encouraged deprivation (*Stiles*)**
    - If an owner requests or allows a person to spend money on the property on the expectation that they will allow them to stay, the owner is prevented from revoking that promise (***Toronto v. Jarvis & Stiles v Tod Mountain)***
    - Future purchasers BOUND by irrevocable license WITH notice
- ***Cowper-Smith v Morgan* 2017 SCC 61. An equity capable of estoppel can arise where there is:**

1. A representation or assurance by a property owner on the basis of which the claimant expects to enjoy a right or benefit over the property;
2. Reasonable reliance on that expectation; and
3. Detriment resulting from the reliance such that it would be unfair or unjust for the property owner who made the representation to renege.

Good faith purchaser for value would NOT be bound – because NO notice.

The failure of one party to perform does not provide the other party a right to terminate the estate

RESIDENTIAL TENANCY REFORM

(a) The impetus for reform - To address the power balance between landlords and tenants
(b) Areas of reform

1. Greater security of tenure
2. Increate notice periods for termination
3. Fixing of standard obligations of landlords and tenants to fairly allocate responsibilities
4. Increase available tenants' remedies
5. Curtailment of landlords' self-help remedies
6. Establishment of prohibitions on bargaining away of statutory rights
7. Elimination of various anachronisms affecting general landlord/tenant law
8. Establish dispute resolution procedures to be informal, effective, expeditious, and inexpensive
9. Creation of landlord/tenant advisory boards
10. Rent control mechanisms

(d) The rent control debate
1. Rent controls are economically wasteful. Forces landlords to rent out premises at less than market value, which restricts incentive to maintain proper upkeep and creates incentive for the wealthy to create black-markets where money is extracted as 'key money" before a tenancy is re-assigned.

2. On the other hand, nothing in statutes prevent landlords from enacting once a year increases to such an exorbitant amount to get around other obligations in the RTA. Security of tenure is therefore significantly impacted
without such rent control measures.

RESIDENTIAL TENANCIES ACT

Purpose of the residential tenancy reform is to REDUCE the cost of contracting. It would be economically inefficient to have each landlord and tenant draft their own agreement. Also, to standardize the terms in order to protect tenants against terms that may be entered into voluntarily. Important to protect vulnerable persons – low means, victims of domestic abuse.

S.1: Definitions/Interpretation

- Substantial Breach – breach under ***S.21*** or series of breaches that have a serious cumulative impact

S.2: Application

- (e) Doesn't apply to group dorms rented by educational institutions,
- Doesn't apply to mobile home parks, campgrounds motels/b&bs (if <6 months), social care facilities (nursing homes), Uni Residences
- (b) Does not apply to premises rented to an employee as part of their employment contract

S.3: Act Prevails

- Any release or waiver by tenant of the rights, benefits, or protections under this Act is void
- If there is any conflict between the Act and anything in the lease, the Act prevails

PART 1 – PERIODIC TENANCIES – no terminations for fixed terms.
S.6: Termination by Landlord

- (1) Termination must be for a reason in ***S.11*** or ***S.12***, or for personal use by landlord, major renovations, conversion to non-residential uses, or a student is no longer a student

S.7/8/9: Notice to Terminate

- By LANDLORD: Weekly Lease → 1 week; Monthly Lease → 3 months; Yearly Lease → 3 months
    - (Common law: Monthly Lease à1 month)
- By TENANT: Monthly → 1 month; Yearly → 2 months

S.10: Requirements of Termination Notice

- Notice is of no effect unless it is in writing & signed, & must set out reasons for terminating tenant
- Must also identify the premises and state the date

S.11: Notice to Terminate Tenancy of Employee

- Is subject to Alberta's law applicable to the tenant's employment, or as agreed in the contract, or 1 week whichever is longer or in accordance with regulations

S.12: Notice to Terminate for Condo Conversion

- 6 months' notice

S.14: Rent Increases

- Maximum of one time within a calendar year
    - 12 weeks' notice required (week to week); 90 days for all other periods

PART 2 – OBLIGATIONS OF LANDLORD AND TENANT

S.15: Notice to terminate not required for a fixed term tenancy

S.16: Landlord's Covenants

- (a) tenancy available first day of lease (b) quiet enjoyment (c) must meet minimum standards under *Public Health Act*

S:17: Copy of Lease Agreement must be provided within 21 days

S.21: Tenant's Covenants (violation = substantial breach)

- Rent & vacate on time, not interfere w/ rights of other tenants, keep reasonably clean, no illegal acts, no damage

S.22: Assignment and Sublease (modifies common-law; different requirements than for commercial leases)

- Requires written consent from landlord
- Landlord cannot unreasonably refuse; must provide written reasonable grounds for refusal; no response in 14 days constitutes acceptance; cannot charge a fee for giving consent.

S.23: Entry of Premises

- Must provide notice or obtain consent, unless reasonable grounds indicate an emergency or abandonment

S.25: Prohibition re Termination of Tenancy (Retaliation)

- No retaliation against tenant for filing a complaint

PART 3 – REMEDIES OF LANDLORD AND TENANT (again modifies common-law; different than commercial leases)

S.26: Landlord's Remedies

- Recovery of rent, sue and take possession if tenant fails to vacate, damages, for substantial breach → termination
- Substantial breach = s. 21 violations

S.27: Repudiation of Tenancy

- Landlord may accept or refuse surrender and continue the tenancy, but landlord has a duty to mitigate
- If acceptance, Landlord is still entitled to claim damages resulting from a substantial breach (amount of damages for rest of term, etc)

S.28/29: Termination for Substantial Breach by Landlord/Tenant

- Right to terminate for any substantial breach (14 days' notice in writing & signed with reasons and termination date)

S.37: Tenants' Remedies: May apply to a court for damages, abatement of rent, recovery of costs, termination of lease

BAILMENT

ELEMENTS OF A BAILMENT

- **Bailment** is the temporary transfer of possession (not title) in personalty from owner to bailee with an expectation of reversion back to the bailor in the future
    - **E.g. Change of possession WITHOUT a change of ownership**
    - Can be contractual or gratuitous
    - A bailment does not require consent, you are a bailee anytime you possess someone else's goods
    - Law requires bailee to take reasonable care to that of prudent owner
    - Generally, must be redelivered in their original or altered form
        - Exceptions: repairs or parts replaced, delivered to a 3rd party,
- Quasi bailment – a finder may be deemed to be a "quasi-bailee" on the basis that the true owner would probably agree to the finder taking possession on his or her behalf
- Involuntary bailment – when goods are imposed on a party who then assumes control
- Unconscious bailment – person takes possession under the mistaken impression that they own the goods

Steps for bailment claims:

1. Bailor must show that the acts complained of occurred during the course of the bailment, not before or after

2. Once #1 is shown, **burden is shifted to bailee, because bailee is in a position to shed light on the facts**
3. Bailee must disprove that his negligence caused the injury. Show either that:
   - They acted as a prudent owner and undertook reasonable precautions – standard of care is reasonable care taken
   - What standard of care are we concerned with?
     - Traditionally, depends on for whom the bailment is beneficial. Different if for bailor, bailee, or both. If for bailee's benefit, high standard of care. If for bailor's benefit, moderate to lower standard of care. If for both, regular standard of care.
     - Now, Letourneau suggest that there is one standard of "reasonableness"
   - Any failings in that regard were not the cause of the loss or injury (causation)
   - Formerly the law demanded higher standards of care for a reward bailee compared to a gratuitous bailee
     - This is no longer the case – there is one standard – *simple negligence*

Economic Perspective on Bailment

- Must give incentives to people to avoid risks and take precautions
- The owner is the only one who knows the value of the items on bailment
- Not efficient to put the onus on the defendant, because the owner is best positioned to take precautions

Waiver of Liability

- A bailee by contract may insert a waiver clause
- These are strictly construed – if for negligence then it must be explicitly made or implied unambiguously

OBLIGATIONS OF A BAILEE (*Letourneau v Otto Mobiles*)

If there is a bailment contract, obligations of parties are set out in contract.
If there is no bailment contract, then courts take the following approach:

Modern Approach – Negligence

- Obligation of bailee generally is to take the same care of the goods received as would a prudent owner, acting reasonably, be expected to take of his own goods. **Duty of care owed is simple negligence**

Strict Liability

Minichiello v. Devonshire Hotel *(bailee liable for contents of car, if he has knowledge)*

- P had a case full of jewellery in the trunk of his car when he left it in a lot with the keys in the ignition (as instructed); Defendants were made aware of jewellery but accepted the bailment nonetheless. The car was stolen
- Court: Bailee is liable for the contents of the trunk (jewellery included in the bailment)
  - **Liable for reasonably expected contents or if he has knowledge of unexpected contents**
  - Reasonable care was NOT met because of the statement that there were valuables in the car.
  - *Bailee for reward* - car has valuables in it, enough to make D liable for the value of the goods.

Who should bear special losses?
Rule that makes them responsible for the special loss in *Minichellio* is not consistent with the rule in *Hadley v Baxendale* - there the defendant is excused from losses that aren't generally foreseeable - BUT consider the rule in tort law in *Vosburg* (thin skull) - need to take the plaintiff as we find them

OBLIGATIONS OF A BAILOR

- Bailee is only responsible for contents reasonably expected to be within the personalty AND anything that is drawn to the attention of the bailee
- If leaving a car with valuable diamonds in it, notice must be provided to bailee before bailment take effect, or bailee is not liable for any loss (innkeeper exception)
- Bailor for reward has duty to ensure chattels are reasonably fit and suitable for the purpose of the hirer

Letourneau v. Otto Mobiles Edmonton
(issue of when transfer of possession occurred)
Facts: Plaintiffs left their trailer to be repaired by the defendants. It went missing.

Issue: Is there a bailment?

Decision:
1. Transfer of Possession? **Yes** - Letourneau acted pursuant to D's instructions and according to the standard practice, possession was transferred when the key was left and the trailer parked in the adjacent lot

2. Waiver Clause? **Court said this applies to initial repair transaction but not future work.** Wouldn't have applied regardless because waiver clauses may be inserted by the bailee but **will be strictly construed** (negligence must be explicitly waived and in this case waiver did not mention loss by theft).

3. Contributory Negligence? No, because they acted in line with provided instructions

THE ONUS OF PROOF IN BAILMENT CLAIMS

(i) General rule: Once bailment is established on a balance of probabilities, presumption of negligence arises

(ii) The elements of a reverse onus clause

- Presumption has 3 components:
  1) Triggering facts - bailor must prove the essential facts, including that the acts complained of occurred during bailment. Not easy to do.
  2) Short-cut to proof- the facts are then presumed against bailee
  3) Escape Route - the matters that the bailee must prove in order to overcome the shift in onus

- To pass through escape route, bailee must prove its negligence did not cause the injury
- Does not need to fully explain what happened, rather must show (a) the system to care for the goods was reasonable and up to proper standards, or (b) any failings or negligence were not connected to the loss
- Reversing onus is appropriate since only bailee knows what actually happened with goods

SUB-BAILMENT

(PUNCH V. SAVOY)

SUB-BAILMENT

- A bailor has a direct right of action against a sub-bailee where:
  - Bailor has an immediate right to terminate the principle bailment, and
  - Sub-bailee accepts goods knowing that they belong to someone other than the sub-bailor
    - There is a right to sue even where there is no direct contractual privity

Bailor's Rights against Sub-Bailee

- Modern position is that the bailor does have a cause of action against the sub-bailee for either damage or loss, in circumstances that would give rise to a right to terminate the sub-bailment *as long as they accepted the goods recognizing that the bailee doesn't have title*
- Basis of the claim not on contract (no contract here) so the only option is that the bailor would move against the sub-bailee on the basis of the terms of the sub-bailment
  - Suggests the terms of the sub-bailment is binding on the bailor, but this is not the case (*Punch*)

Punch v. Savoy's Jewellers Ltd

(SUB-BAILMENT – BAILOR'S RIGHTS)

Facts: Drops off ring for repair at Savoy's; they send it out to Toronto for repair (without asking the owner); Postal strike ensues, sub-bailee in Toronto hires CN Rapidex to courier the ring back to Savoy's; Ring never makes it. Obtaining insurance for the value of the goods was a term of the contract for transport.

- **Walker and Savoy** liable b/c did not pay for the extra insurance and did not declare the value of the ring. They Trusted an unfamiliar carrier to transfer it, without obtaining instructions from the owner

- **CN Rapidex** because it failed to explain loss of ring

Decision: CN could not hide behind the waiver clause for two reasons:

1. **"Lost or damaged" did not include employee theft**
   - Exemption clauses will be strictly construed and must explicitly state the liability exempted
   - CN must show that there was no theft, because it's a bailment and the onus is reversed
2. **Punch never signed the clause** (Problematic for CN Rapidex)
   - But problem: Punch can step into shoes of Walker to sue CN in bailment, BUT, then wants to say she did not sign a waiver clause, despite stepping into Walker's shoes who did sign it to claim against CN. She should be held to the terms of the bailment.

Ratio: *Punch* suggests that even if you have a waiver clause, the bailor might still come after you and the clause might not be binding

Rule: Unless the plaintiff authorized the terms of the sub-bailment, then the plaintiff is not bound by them

The Pioneer Container

- Privity of contract not present. Agreement between bailee and sub-bailee wouldn't be binding as per *Punch v Savoy*. However, Privy Council found in K that they consented to any terms.

CHAPTER 9: CO-OWNERSHIP

Note: Common law loves joint tenancy. Makes it easy to determine who owns property. Who is alive? Easy to determine who has seisin. Tells us who is responsible for the incidents.

Example: O devises Greenacre "unto and to the use of Ally and Jack in trust for Cardy and Wiz". Jack dies.
Answer: Jack's interest is extinguished, leaving the whole interest to Ally through survivorship. S 8 LPA doesn't apply because it is a trust.

Example: O devises Blackacre "unto and to the use of Ally and Jack in trust for Cardy and Wiz". Cardy dies.
Answer: Jack and Ally hold the estate in trust for Wiz, and Cardy's heirs.

Example: O devises Whiteacre "unto and to the use of A and B In trust for A and B" A dies.
Answer: A's legal interest passes to B through survivorship. A's equitable interest is passed to A's heirs. B retains his equitable interest.

Wills and succession act – If die at same time, joint tenants become tenants in common.

JOINT TENANCY

- Each party owns the whole of the land (JTs are considered one person in law) – legal fiction where all of them are one single owner.
- Right of survivorship ("winner take all" scenario)
  - When one party dies, his interest is extinguished and the survivor's interest is enlarged by the corresponding amount (no actual interest is passed)
- Joint tenancy requires: The "Four Unities**": interest; title; time*; possession**; AND **Intention.**
- Joint tenancy is presumed for pure personalty.
- Common law presumption "to A and his heirs" is "to A and his heirs in joint tenancy".

Four Unities (ALL are required to make a joint tenancy)

1. Possession: rights must relate to the same piece of property
   - Each possesses the whole of the land (has to be equal)

2. Title: each joint tenant's title must be derived from the same document or occurrence (i.e. grant)

3. Interest: the holdings of each joint tenant must be equal in nature, extent and duration

4. Time: must vest in *interest* at the same time
    - ***Exception** for **when contingent interests are created through a will or deed to uses**
        - I devise to my sons, when they turn 18 (can vest at different times).
    - Can vest in *possession* at different times

Intention: Even where all 4 unities are present, JT vs. TIC depend on intentions of the grantor. Must be intention to create JT (right of survivorship)

TENANCY IN COMMON

- Split Shares (no right of survivorship) – notional shares in the property. Upon death, the notional shares form part of their estate.
- Only **unity of possession** is mandatory
- ***Even when 4 unities are present*, equity presumes tenancy in common in the following situations:**
    - Partnership assets
    - Mortgages – a burden on your legal title
    - When money to purchase property is provided in unequal shares
    - If possession is shared by individuals pursuing separate commercial enterprises
- **At common law → Joint Tenancy is presumed**; however, the slightest indication that property was meant to be held in common is sufficient rebuttal
- **In Alberta → Tenancy in Common is presumed** to be created unless otherwise stated (***LPA,* s. 8**).
    - This statutory presumption does not apply for transfers of land to executors or trustees
    - It also doesn't apply to personalty. Only to interests in land.

Differing co-ownership at legal and equity title:
It is possible for parties to hold legal title to a parcel of land in one form of co-ownership, while holding equitable title to the same parcel of land in another form of co-ownership.
- O: "Unto to and to use of A and B, in trust for A and B" - A and B are joint tenants in law, and tenants in common in equity
- If B dies first, then A assumes full legal title by survivorship – B's equitable interest, being held in common, passes to B's estate, leaving A to hold legal title as a trustee for the equitable owners: B's estate and A.

Ways a Tenancy in Common is created:
- Express Creation, pursuant to Statutory Presumption, resulting from "failed" or "imperfect" tenancies (lack of unities), by Operation of Law (ex. Intestacy – person dies with no spouse but multiple children)
- Through acts or words of severance

Matrimonial Property Act S.36
- Presumes joint tenancy in marriage unless proven otherwise when legal title held in joint

SEVERANCE

Onus to demonstrate that there has been a severance lies on the party contending it (*Sorenson*).

Words of Severance (used to determine initial co-ownership plan)
- At common law: "Equally", "Share and share alike", "To each", "Amongst", "Between", "Respectively" = Tenants in Common
- E.g. "To A and B equally" – so that if A died, the property is owned by B and A's heirs and vice versa.

3 TYPES OF SEVERANCE OF JOINT TENANCY

1. **Unilateral Conduct** that results in the destruction of any of the 4 unities
    - Unilateral severance under legislation – ***LPA 12(1)(d)***
        - A Joint Tenant can convey to himself, becoming a TIC
        - Must give notice to the other JT first – ***LPA S.65***
    - Ex. transfer of an equitable interest severs the equitable "title" unity ***(Sorensen)***

        - *A, B, C hold title jointly; C conveys to himself; A & B hold 2/3 as joint tenants; C holds 1/3 as solitary tenant in common – unity of title has been negated for C. C acquires interest at a different TIME, and UNITY.*
2. **Mutual Agreement** (Equity Only)
    - Parties have mutually agreed to sever but have not destroyed the 4 Unities, doesn't sever at common law, but equity will impose severance as a means of avoiding of imposition of survivorship rule on co-owners who might not have been aware of survivorship
    - Only operates in equity, as equity regards as done what ought to have been done
        - Ex. sale does not result in severance, but sharing proceeds does in equity
        - Joint tenants both devise property in their wills separately – equity will sever JT
3. **"Course of Dealing"** (Equity Only)
    - Negotiations falling short of mutual agreement or a binding contract can still be sufficient to create severance of joint tenancy (at equity)
    - Negotiations are more demonstrative of intention to sever in matrimonial disputes or divorces (*Havlik v Whitehouse*)
    - These negotiations must be sufficient to demonstrate that both parties mutually treated the property as constituting a tenancy in common

Sorensen v. Sorensen
(severance of a joint tenancy through creation of a trust) – This was poorly decided. She really had a life estate. He had a reversion. The interests were not the same. The joint tenancy was broken.
Facts: Married couple. Husband tries to assert survivorship in the family home. Mrs. Sorensen prior to death declares herself as trustee for her son. Equitable interest goes to her son (severs joint tenancy → equitable title now shared as tenants in common); father still has sole legal title.

Other facts. Mrs. Sorenson sues for partition. Passes before trial. Husband sues for caveats on all of the property as a joint tenant. Separation agreement was not enough, because neither party viewed that as severing the tenancy. Charge or mortgage does not operate as a transfer of the estate. The wife's will? You cannot, by will, dispose of assets that do not form part of your estate. The action of partition commenced by the wife? Lease does not sever the tenancy.

LPA S 19. If the interest in land that is subject of an order is held in joint tenancy, the order on being granted severs the joint tenancy. Here, wife died. Consequently, couldn't sever with that.

Metro-matic: Just because you take extra precautions does NOT mean they didn't intend something to be sufficient.

<u>Attempted Methods of Severance in *Sorensen*</u>
Separation agreement - Not sufficient for severance via ***mutual agreement*** method of severance

Action for partition - Would have been valid if completed and ordered by the court before she died (*LPA* s. 19)

Gift Mortis Causa - Gifts of real property in Canada not permitted impending death.

Via Will – Right of Survivorship trumps wills.

What about charges on property? In AB - mortgages create an encumbrance on your title (but doesn't sever JT). In common law a mortgage could sever title.

Lease - A lease, succeeding the life of the tenant, would destroy one of the unities → creating a severance because the right of survivorship does not supersede the leasehold interest. But, a lease for life does not disrupt the unities.
- ***Kaplinsky:*** lease for life is effectively a life estate, which breaks the unity of interest, causing a severance

Declaration of Trust – this only severed the equitable title - Intention to sever joint tenancy without further action does not sever the joint tenancy of legal title, unless there is communication & acceptance by the other party

Inter vivos gift of title: no severance at common law. **Recall:** any time a gift is made, equity presumes that the gift or intended to keep the beneficial interest. This must be rebutted by the evidence. **UNLESS** the gift is parent to a minor child (presumption of advancement), **OTHERWISE** equity presumes a gift was NOT intended
- Son takes gift because of the presumption of advancement

RESOLVING CO-OWNERSHIP DISPUTES

- Even after severance, the co-owners only lose the right of survivorship. Each still has the right to possession of the whole property. This often results in issues for the parties - how to resolve these issues?

Old Rule: If one person in a concurrent ownership situation leaves for a number of years, the common law position is that he has no rights should he return. This applies even if the one who stayed, decided to lease it or earned profit from the land.

Statute of Anne (1705) – applies to joint tenants or tenants in common

- Co-owner is liable to the other co-owner for renting the property, but not liable from his/her own use of the property or sole occupation
  - If you grow crops → you keep all the profits, just as you assume all risk
  - If you take a tenant → rent is divided between the co-owners → *LPA* s. 17(2)(c)

Common Law Actions

Waste: unreasonable use of property by one tenant is actionable for waste (only equitable waste)

- Unlike a life tenant or a lessee, a co-tenant in fee simple may use the property in the same manner as would an owner who did not share title with co-owners, subject only to a duty to act reasonably (not maliciously, not destructively, etc)
- Sue for damages to recover

Ouster: liability is incurred by a co-owner if he/she excludes the other co-owner from using the property

- Also, liable if excluded by force or by threats that make it intolerable for the other to remain
  - Domestic violence, etc. (not just playing loud music at night)
- Expanded interpretation if between spouses (ie. make it difficult to live there)
- Now governed by Family Law
- Sue for occupation rent → other party pays you to rent your share of the property

Adverse Possession of Joint Tenants: Generally no adverse possession as you cannot be adversely possessing what you already own and have title to.

Modern Statutory Remedies

LAW OF PROPERTY ACT

S.15(2): Partition or Sale - Co-owner may apply to court for termination of co-ownership (Also requires subdivision approval for 15.2(a)

- Court shall choose one of 3 options
  - A. Physical division of all or part of the land (partition).
  - B. Sale of part or all of the interest and distribution of proceeds.
  - C. Sale of part or all of the interest to the other co-owner(s).

S.17: Accounting, Contribution, and Adjustment

- Court may direct an adjustment to be made and compensation be paid for an unequal division of the land
- Considerations (court can take others into account):
  - Exclusion from land
  - Status of co-owner: tenant, bailiff, or agent for the other co-owner
  - If one co-owner receives more than their just share from a third party
    - Lease from mineral rights, renting to a tenant, creating a hotel, etc.
    - (OK if you work the land yourself though)
  - Waste
  - Improvements or capital payments that increased value
  - Compensation for non-capital expenses spent
    - If you claim non-capital expenses, you need to be required to pay fair occupation rent

S.19: Order severs joint tenancy: As soon as court makes one of three decisions right of survivorship is extinguished

S.21: Discretion to stay partition/sale of matrimonial home

- Court can defer a decision, notwithstanding section 15(2), to defer on matters going to matrimonial home

        - Let family law courts make an order, and once that is settled, we can order partition and sale

Verhulst Estate v Denisik – AP in alberta for JT/TIC is almost impossible. Would have to rise to the level of ouster, essentially. Must be active exclusion. No ouster in V v D. No abandonment. Mere indifference.

No statutory arrangement for adult-interdependent parties. Can only show unjust enrichment. Deprivation + Benefit w/ absence of juristic reason.

In order to get non-matrimonial real property, must show that there was a "joint family venture".

Bill 28 – gets rid of the matrimonial property act in January 2020. Change to Family property Act 2020. Includes adult interdependent partners. Assets prior to marriage but while living together in common law will be subject to equitable division.

CHAPTER 10: SERVITUDES

INTRODUCTION

Servitude: right of use over property that belongs to another. **Servitudes can be attached to, and pass with, a transfer of realty.** Function to improve utility of the land while not overburdening the ST. Example: Easement.

Easement: an agreement between two property owners that results in a privilege without profit annexed to and to utilize the land of a subservient tenement or to prevent the ST from utilizing his land in a particular manner for the advantage of the dominant tenement.

Incorporeal Hereditament: generally, an intangible right in land, such as an easement which is non-possessory

Easement versus License:

- License to do something might be transformed in some circumstances into a proprietary interest in the nature of an easement
    - Privilege to go through the land (license) may satisfy the condition of easements and become proprietary in that a buyer would be entitled or burdened by the right

FOUR ESSENTIAL ELEMENTS OF AN EASEMENT
Ellenborough Park

Was the right that was granted a mere license, or an easement that continues on with the land?

1. ***Must connect a dominant tenement (which enjoys the benefit) and servient tenement (which is burdened)***
    a. **If only a personal advantage, it is a license. Must be some connection between the concession and the value of the land**
        i. Policy underlying – easement as opposed to license reduces the value of the land. Only continues insofar as value is gained by the other land
    b. Easements must be connected to a DT, but not necessarily adjacent.
        i. Don't need to be contiguous, but must be close enough for some benefit to be gained
        ii. **Can't hold an easement "in gross"** - meaning "up in the air", an easement not connected to any parcel of land
            1. Value concerns
            2. Information concerns
            3. Re-negotiation concerns
    c. ***Land Titles Act*** **s. 69(3) -** on registration, allow grantee to use land with terms of grant notwithstanding the benefit of the right is not annexed to any land of the grantee.
        i. Allows municipalities and utility companies to have easements over property despite not owning property connected to it

2. ***Easement must accommodate the dominant tenement***

a. **Test** is whether the right makes the DT a better and more convenient property
    i. *Ellenborough* – the right to use the park makes those houses better & more convenient
b. Right must be reasonably necessary for enjoyment of the land, not merely confer an advantage
c. "Accommodation" requirement of reasonable proximity between dominant and servient tracts
    i. They need not be adjacent, closeness depends mostly on type of right involved
d. *Hill v Tupper* – owner of a canal leases land on the bank to the plaintiff. Part of the lease includes "the sole and exclusive right to put pleasure boats on the water." This is a license and not an easement. Easement must relate to an attribute of ownership that's normally associated with land, this right is not connected with the better enjoyment of the land itself
    i. Reasons:
        1. If trying to create a new property right - limited by numerus clausus
        2. Need to consider the right to accommodate business and not the land
        3. Property law should promote competition
e. Many rights can be subject to an easement, e.g. the right to park on someone's land
    i. Positive easements
    ii. Negative easements

3. ***Dominant and servient tenements must be owned by different persons***
    a. **BUT: Land Titles Act- s. 68**- Owner of land may grant himself an easement or restrictive covenant for benefits of land and against the land the owner owns. Easement in this case IS NOT MERGED.
        i. Useful for developers to give all subdivision owners the right to an alley prior to individual sale of the lots
    b. If easement exists over ST, and owner of DT purchases the servient lands, the easement merges. (this is not anticipated by **s. 68 of Land Titles Act**)
    c. ***Land Titles Act* ss 68-69** also modify the common law:
        i. One allows municipalities, utility companies to own easements that are not pertinent to a dominant tenement
        ii. The other is important for residential development, allows easements and covenants to be inserted by one developer over different parts of the project while the developer is still the owner of all the lands so the developer can sell lots to buyers already burdened or benefit from these easement/tenements

4. ***Easement must be capable of forming the subject-matter of a grant***
    a. Maintains the fiction that all easements originate in grants. Must be capable of transferring in a grant.
    b. Easement must be sufficiently certain as to be recognized as property right. Can't be too broad or too vague.
    c. Other rules: must be a capable grantor and grantee, grant cannot require servient owner to spend money (apart from fencing easement), cannot be for recreation or amusement, and cannot confer right of possession or control of servient lands contrary to possessory rights of servient owner.
    d. Requirement of non-possessory poses some problems but is meant to prevent possessory rights that could sterilize the servient lands. Better way may be to phrases it as "substantial interference" with servient land is not allowed
    e. Novel claims, even one that meets the above requirements, may not succeed (new positive easements more easily recognized than negative)

Easements and Possession: The Pipeline Example

- Typically, easements cannot include rights of joint occupation that substantially deprives the servient tenement of proprietorship.
- Pipelines, however, have a permanent physical presence that prevents the servient owner from using the land anyway that they desire
    - Grantor is prevented from disturbing top soil (no cultivation) or erecting works on the strips of right-of-way – nevertheless, pipelines are a valid form of easement in Alberta
    - At common law, the pipeline under Kaplinsky's garage would not be an easement

Negative Easements – Closed list. Can prevent the owner of the servient tenant from acting in a manner inconsistent with the easements.

- Right to light.
- Right to lateral support.
- Right to ventilation.
- Right to continue to receive water from an artificial stream.

CREATION OF EASEMENTS

Express Grant and Reservation

- Should identify the dominant tenement, the servient tenement, the nature and scope of the easement, the time period for which the easement continues, and any rights and responsibilities of either party with respect to the easement.
- Express reservation: grantor retains a right of access over the land he is selling.
- *Any ambiguity is interpreted in favour of the grantee*
- Requires clear language
- Grantor is presumed not to derogate from a grant

Implied Grant and Reservation – Not automatically implied. Must be a reason for them to be applied.

i. Easement of Necessity: Internal limits on the easement granted. Must be what was NECESSARY at the time. Ie won't allow Nelson to claim full use over the road and what not.

- These arise out of public policy to ensure that all land remains accessible and usable, or from the implied intentions of the parties (*Nelson*)
- **If dominant lands are sold off such that DT is otherwise landlocked at the time of transfer, an easement of necessity of access will arise in favour of the landlocked land (almost granted in *Nelson v 1153696 Alberta*).**
  - Case turned on the order in which the lands were subdivided. To show an easement of necessity, you must be able to show who should be the servient tenement. Cannot prove who is the servient tenement, so Nelson loses.
  - **No dedication of a highway here because no clear intent to dedicate**
    - Intent must be apparent – giving up ALL proprietary rights in the highway, unlike an easement.
    - Land under a lease will RARELY be dedicated, if ever. Can't relinquish property interest you're of which you're not in possession, and the intent must be of the owner in fee simple.
  - Possible hostility to Shalom Park.
- This form of easement is based on a rule of construction, so it yields to contrary intention. Here, explicit language is usually required before this implied right will be excluded.
- If another means of access is available, this right is sometimes denied.
- Can also arise as the result of an **implied reservation:** where servient lands are sold, land-locking the dominant tenement

i. Intended Easements:

- **Easements will sometimes arise give effect to the common intention of the parties, considering the purposes for which the land has been granted or retained**
- Eg. *Wong v. Beaumont*- leased a basement for a restaurant – original tenant leased the basement for a restaurant – even before the lease was executed, leasee signed a covenant that dealt with the prevention of odours - intended easement for property ventilation was found because without it the premises would not meet public health codes nor the terms of the lease. Analogous to landlocked properties. Must have been the intention of the parties to allow such a duct to be built.
- Denning: an easement was necessary given the purpose of the lease. The interest the tenant acquires is no good unless the tenant has the right to run that duct
- Need to ask if the easement arises from necessity, or from the implied intentions of the parties

SW 7 1901	*SE 7 1901*
NW 6 1897	*NE 6 ???*

iii. Rule in Wheeldon v Burrows (Consumer protection easement) – NOT on exam

- If an easement runs between two properties of the buyer, it serves as a quasi-easement and becomes an easement when you buy the land (implied, even though not made expressly)
- Requires consideration of how a parcel of land was used before it was divided into separate parcels under separate ownership. While the property was a single parcel, the owner may have established lanes known as *quasi*-easements. When the property is divided into separate parcels, these *quasi*-easements may become actual easements by implication in the grant.
- Requires that the *quasi*-easements meet 3 criteria: (easements, but not be because there's only one owner)
  1. The *quasi*-easement must have been in use at the time of the grant.
  2. Existence of the *quasi*-easement must have been continuous and apparent.
     - Must be some observable physical evidence of its existence
     - Ex. drain pipe, well-worn path or road
  3. The *quasi*-easement must be necessary for the reasonable enjoyment of the property.
- Note: Operates ONLY in favour of the grantee. This rule is generally not applicable for implied reservations because the grantor of lands ought to have bargained for the easement in contention.

iv. Estoppel – Claimant must establish that there was something in their use of their neighbour's land for access to their own that would make it unconscionable for their neighbour to now insist on his or her legal right to deny that access.

If a representation is made to the prospective purchaser of the land that certain lanes will be set aside for the use of the land offered for sale, and on this representation the land is purchased, the grantor is estopped from preventing the grantee from using the lane as the right of way

v. Statutory

- In Alberta's condominium legislation, an easement lateral support is implied in favour of every unit capable of enjoying these rights.
- The legislation also creates easements over common areas, and right of ways of water, sewage, draining, gas, electricity, garbage, artificially heated and cooled air, telephone, and television services.
- ***Surface Rights Act* –** for municipalities, companies

vi. Prescription

- **No longer possible in Alberta; Law of Property Act- s. 69(3)**
- Law pretends an easement was granted at some time in the past, as evidenced by long, uninterrupted use. Doctrine protects reliance on, and enjoyment of, long-held and unchallenged rights.
- In the past, has included things like right to prevent neighbour from erecting large structure due to uninterrupted light reaching your window for 20 years.

EASEMENTS BY OPERATION OF LAW

- Rambling rights
- Utility rights of law
- Condominium law

TERMINATION OF EASEMENTS

1. **Natural termination** → Dominant tenement intended to abandon or surrender the easement.
   - **Condition precedent.**
2. **Express release**
3. **Implied release/abandonment** (*Costa v Jenikas*)
   - E.g. if gov't opens up a tunnel or something to the land, then it's implied that the dominant no longer needs an easement (so no longer out of necessity).
4. **Proprietary estoppel**; e.g. Person says they no longer need the easement so the servient tenement owner starts putting money into. Ex-dominant tenement can't go back on their word.
5. **For easements of necessity, when easements no longer necessary**?

SCOPE OF EASEMENTS

General Principles

- The prime consideration is the purpose of the original grant; considers factors such as: physical nature of servient lands, extent to which an expansion would throttle activity on the servient tenement
- Generally, grantee cannot increase the burden on the servient lands beyond the rights initially conveyed.
  - BUT, if it was contemplated or can be implied that the easement's use could change over time, the grantee can increase the burden → *Laurie v Winch*
- Courts considers **wording of the grant** and **external circumstances**

Laurie v. Winch- 1953 SCR

Dominant tenement can be inferred from the circumstances.

Facts: Farmland (DT) was subdivided into residential lots. The original easement granted was a perpetual right-of-way over Lot #33, which was split into a large number of easements, one being attached to each new lot. The easement was also widened. One party now seeks to prevent the others from gaining access to the easement, or alternatively, limiting the easement to the original scope.

Issues: (1) what is the dominant tenement, (2) what is the SCOPE of the easement?

Reasons:

- While there is no mention of dominant tenement in grant, words "over lot 33" can be given meaning through introduction of extrinsic evidence to identify the DT as contemplated by the parties – in this case – the farm was the intended dominant tenement.
- **Nothing in the language of the easement to restrict its scope as was argued by the appellant**
  - At time of the grant, what was contemplated by the parties?
  - Considering the other land had already been subdivided to the west of lot 33, court holds that the idea of future subdivision is built into the original grant because the land east of lot 33 might be subdivided too.
  - So, intention of parties doesn't restrict easement to its traditional use.
  - Lot 17 was already itself subject to an easement.

Note:
- **An easement attached to every part of the dominant tenement**
- **Need to ask which tenement *benefits* to determine which is the dominant tenement**

Malden Farms v. Nicholson- 1956 Ont CA

Facts: Original easement allowed a "free uninterrupted right of way" for private use of a duck sanctuary. Sometime later, the owner of the right-of-way opens the gates as a public use area resulting in hundreds using the easement.

Decision: Fee is not burdened as originally contemplated. The original scope did not contemplate public use of the easement, it was meant to preserve the duck sanctuary. Original use of the easement is put back in place. The use of the easement is now fundamentally different than the original intention.

Differences between this case and *Laurie*:
1) Fundamental change in the scope of the activity, not just more people, **but fundamentally different.**
2) In this case, the easement is for a specific purpose, while in *Laurie* the grant used much broader language
3) Here the right of way to the sanctuary was **strictly controlled and exclusive in use. The owners of the beach property were put on notice to maintain rights to the gates** so it wasn't contemplated that the right of way would be used for this kind of use

The Rule in Harris v Flower
- An easement over the servient land which is appurtenant to Lot A may not be used by the owner of the dominant tenement to benefit another property, Lot B
  - This means: colourable use of the right-of-way appurtenant to Lot A to benefit Lot B is prohibited
- BUT an ancillary use of the easement to benefit lot B is tolerable

OTHER SERVITUDES AND SERVITUDE-TYPE RIGHTS

Profits a prendre:
- **A right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry**
- This is a non-possessory interest, and can be an interest in land
- The interest consists of the right to remove natural resources from the land of another
- May be appurtenant to a dominant tenement **or held in gross**
  - This depends on the grant
  - E.g. oil and gas companies usually hold in gross and don't have a dominant tenement
- A profit includes **by default the right to enter the land**
  - But recall the *Surface Rights Act* – if the profit in question is minerals or access is required for energy, the Act says that an operator never has by default access to enter. Need to negotiate for surface rights. If this fails then under s 12 of the Act need to appear before the Surface Rights Board to get this access
- Typically, a mineral or working "lease" is a profit
  - Not a lease – a lease is a possessory interest. What is actually given is a profit a prendre
- Status of things removed from the land
  - E.g. diamonds – you own if you have those rights initially
  - When they are **in situ they are your property**
  - When they are **severed then they are the companies profit** – only change hands when severed from the land

Eg. Energy operator, another party has mineral rights under the land. You pay them for the right to work the minerals. When that right is made to last for a term, a working interest or a mineral lease will be created, but the technical term is called a *profits a prendre.*

- Unlike easements, they can be held in gross.
- They are extinguished by a unity of seisin – if the holder either:
  - Releases it in favour of the owner of the land in which the profit subsists; or
  - Becomes the owner of the land in which a profit subsists

Tener case

- BC transferred ownership of minerals in an area that is later turned into a park. BC enacts legislation that basically bars owners from mining the minerals.
- **Wilson J**: compensation because right in the nature of a *profit a prendre* was taken by the government.
  Kaplinsky: incorrect → P owns the minerals so it <u>can't have a *profit a prendre* in something that it already owns</u>

Rhubarb on Kaplisnky's property can be a profits a prendre – can NOT be an easement – for his neighbour – can be annexed to neighbour, OR to neighbour's property.

If you own mineral rights, you must pay separate sum to go get oil/minerals. E.g. pay surface holder

Dynex Petroleum v BMO SCC 2002

Overriding Royalties are valid property interests despite common law. Ratio: An overriding royalty can be a proprietary interest in land. The ORR has to be carved out of some interest in land (possessory or otherwise)

Facts: Dynex is bankrupt. BMO is a secured creditor so claims first dibs on Dynex's resources. Some of Dynex's suppliers had overriding royalty interests and registered in the Land Titles Office. BMO argues that this *profit a prendre* is not a property interest because it is derived from an incorporeal hereditament. Enchant offers a service for an overriding royalty interest in an oil+gas lease – profits a prendre. If lease is profitable, enchant gets 2%. Mineral leases = profits a prendre. Profits are an incorporeal hereditament. Non-possessory – cannot be an interest in the land.

Decision: New rule – court will recognize that an overriding royalty interest is a valid property interest and so the caveat is valid, recognizing this new rule is necessary given the realities of the oil & gas sector in Alberta. Overriding interest may become an interest in land IF the language is sufficiently precise to demonstrate that it is an interest in land, not a contractual interest. Must piggy back off another interest in land, ie the profit. Promise here is to get money out of a specific profit.

The following conditions must be met:

1. The language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land (property right), and not merely a contractual right
2. The interest out of which the royalty is carved has to be an interest in land (doesn't have to be possessory, but it must be an interest in land and a *profit a prendre* is an interest in land)

Mineral rights are owned by some company, Dynex has leased the rights from these parties – one of the assets up for grabs in bankruptcy.

MUST register the profit – only bound by interests registered on the title – exception is an easement of necessity.

- Must register the interest for it to be binding for someone else.

Definitions:

- **Royalty:** an unencumbered share or fractional interest in the gross production of a working interest
- **Overriding royalty**: a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include money or services (e.g. drilling)

VARIOUS OTHER NOTES ON SERVITUDES

Encroachments: a form of easement. Useful for eliminating the possibility of adverse possession. Must have something along the lines of "shall be binding upon the City and Owner, their successors and assigns respectively" otherwise it is just a license.

Note: At common law → operator of oil and gas in Alberta would get an automatic access with a profit, but statute has changed this. They must get a separate agreement of access from the landowner.

The Rule in Harris v Flower: Servient land is subject to easement for access to lot A, but servient land can't be used to access lot B next door. A colourable use of the right-of-way to Lot A in order to access Lot B is prohibited. Different from farming because the dominant tenement doesn't change in *Winch* (just expands to more people).

COVENANTS RUNNING WITH PROPERTY

If you want a covenant to run, you want an INJUNCTION, not damages. Generally will go through equity – only place where burden runs with the land.
Problem with restrictive developments – can't just grant someone something and say must not use it in A/B/C ways. Violates rule against perpetuities.

Difference between easement/covenant

- Covenants principally affect **servient** land while easements only do tangentially
- Covenants are more difficult to enforce against successors in title than easements
- Due to the court's reluctance to recognize new negative easements, covenants are potentially much wider in scope than easements

Background:

- When a freehold covenant is successfully entered into, it runs with the land
- Covenants provide a legal mechanism for ensuring that contractual promises concerning the use of land are binding on successors in title of the contracting party
- Covenants are important in large scale residential projects – e.g. promise buyers that amenities are protected in the future, create private land use controls

E.g. Covenantor makes a covenant to the Covenantee. X and Y are successors to their respective titles

- **Y must be entitled to the benefit of the covenant. X must be bound by the burden of the covenant. The subject matter of the covenant is enforceable** (e.g. under public policy)

TERMINOLOGY

(i) Covenant - a valid contractual undertaking made by a covenantor in favor of a covanentee

(ii) Covenantor (or) - assumes the burden of the promise – makes the promise (under seal)

(iii) Covenantee (ee) - assumes the benefit of the promise – has a promise made to them (under seal)

(iv) Burdened land - Servient tenement is the land burdened

(v) Benefited land - Dominant tenement is the land benefited

(vi) Annexation - benefit is annexed so it will automatically run with the benefitted land

(vii) Express (contractual) assignment - benefit may be expressly assigned in the absence of annexation.

(viii) Assignee of the covenantor - action enabled when (i) covenant touches and concerns the dominant land and was taken for its benefit, (ii) the assignment occurs contemporaneously with the transfer of the dominant lands, and (iii) land is ascertainable, at least by extrinsic evidence.

(ix) Assignee of the covenantee (ee') - Benefit is allowed to be assigned

- **The benefit of a covenant can run at law and in equity**
- **The burden of a (restrictive) covenant can run in equity but never in law**

COVENANTS AT LAW

- Relatively unimportant because of the law's general approach to contracts – a contractual promise is only enforceable against those who made it, and the remedy for breach is damages
  - If the covenantor broke his promise to the covenantee, then the covenantee would be entitled to enforce the contract by damages because the law doesn't enforce contracts any other way
- For freehold covenants, covenantees will want to enforce the covenant with an **injunction**
- At CL, **the burden never runs at law**
  - No one but the covenantor can be sued on the covenant
- **Permitting otherwise could: *(Keppell v Bailey)***
  - (1) create new modes of occupying and enjoying land (contrary to numerous clauses) – e.g. new form of real property interest
  - (2) overburden land and make it unmarketable
    - Value and information concerns
    - Encumber land to the point of reducing alienability
    - Bar subsequent buyers from ascertain what binds their land

The running of the benefit at law

1. The benefit of a covenant is an assignable chose in action (*Judicature Act,* s 20)
   a. This legislation explains why a collection agency may enforce a debt to some other party
2. Successors to the covenantee may sue the covenantor for damages if:
   a. Original covenantee held a legal estate in benefitting the land;
   b. Successor holds the same legal estate;
   c. The benefit was intended to run with the land; AND
   d. The covenant touches and concerns the land

Smith and River Douglas: Work not done competently. Years later the river burst, and the plaintiff (who was a successor of one of the original owners) sued on the contract. Denning held the covenant could run.

COVENANTS IN EQUITY

Tulk v. Moxhay

Negative covenants – rule that a good faith purchaser for value will not be bound by a covenant if he had no notice of it

Facts: Plaintiff purchased an area in Leicester Square with a covenant that requires upkeep of the square and to maintain it as a garden. Purchaser knew about the covenant at time of purchase, he had been given notice, but wanted to violate it anyways.

Decision: Overrules the earlier case law and says that from now on, we will enforce covenants in equity (the burden **will** run – plaintiff cannot develop the land.)

Cites: *Keppell v Bailey* – best known for numerus clausus – no type of estate which is subject to a limitation to transport goods for a particular quarry.

Possible alternative explanations for this decision: unjust enrichment, clean hands doctrine (unconscionable to allow party to buy with knowledge of the burden and simply act against that burden), or nemo dat – gave away a stick in the bundle, can't give it away.

General requirements

Requirements for the Running of the Burden in Equity

1. Covenant must be restrictive
   a. Negative in substance – compliance must be possible by doing NOTHING. Ie. Cannot impose positive duties.
   b. Covenant is judged by its substance, not its form, so a covenant to use property only for residential purposes is a restrictive covenant (doesn't compel, just means you can't use the property for any other use)

2. Burden must have been intended to run with the covenantor's land as sufficiently described in the covenant. Courts will otherwise presume against a finding of a restrictive covenant

3. Covenant must be taken for the benefit of the land of the covenantee (***London City Council v Allen***)
   a. Easily ascertainable from the deed containing the covenant.
   b. The benefit "touches and concern" the land, **no personal covenants allowed** (*Spencer's Case*)

c. Whole idea is that the land is granted with some assurance that land being sold won't be used in a way that negatively impacts the remaining land in the general proximity
d. *Galbraith v Madawaska Club* – the right to choose the person who will occupy the servient land has nothing to do with the use to which the land will be put – doesn't touch and concer the land

4. Principles of Equity must be met
   a. Must come to the court with clean hands
   b. No jurisdiction over *bona fide* purchaser for value
   c. Notice of the covenant must have been given in accordance with statutory requirements

Galbraith v Madawaska

Professor Madawaska – didn't like the agreement – precluded his wife from owning/living in the cottage. Sold the land to himself and his wife as joint tenants without the covenant. Covenant did NOT touch and concern the land. Right to choose who operates the servient land. NOTHING to do with the use. Relates only to the kind of person who may be given occupation. **Covenants concerning OWNERSHIP and not USE will not touch and concern the land.**

Covenants in Edmonton

1. Carruthers Covenant
   a. Prevents some uses and developments of the property to maintain an exclusive character of a neighborhood (Glenora)
2. Hudson's Bay Company Covenant
   a. Restricted the development of any lots to single family homes
   b. In the 1960s and 1970s it was rezoned to allow for development
   c. *Szymanski v Excel Resources:*
      i. Building owned by Excel Resources society, wanted to make it into a group home. Some of the neighbors tried to enjoin this use on the basis of the covenant
      ii. Para 1: the covenant says that only one private dwelling house shall be erected on any of the said lots. Any building constructed to accommodate more than one household is not deemed to be a private dwelling house
         1. This limitation applies to form - this is a big residential house, but was still built as a single family household, so the court determined that the use by the group home was not in violation of this paragraph
      iii. Para 7: applies to use - the court acknowledges that HBC was trying to create a residential neighborhood of a certain class, but since this use is not for trade or manufacturing it is residential and consistent with the covenant's purpose
      iv. **Shows why covenants have been abandoned in favour of zoning**

The running of the benefit in equity

- Equity DOES allow the benefit of a covenant to run with the covenantee
- Successor must demonstrate an entitlement to the benefit
- A successor of original covenantee may be entitled to the benefit by:
  - (1) Annexation of the benefit to covenantee's land;
  - (2) Assignment of the benefit from the covenantee to the successor; *or*
  - (3) A building scheme (restrictions and benefits being part of a building scheme)

1. <u>Annexation</u>
   a. **Intention:** The affixing of the benefit to the dominant land with the **intention** that it be passed automatically on the sale of the dominant property
      i. Intention is usually stated by language such as "the benefit is annexed to these dominant lands"
   b. **Benefitting land must be ascertainable from deed**
      i. Otherwise is a personal right of the covenantee and doesn't bind
      ii. NO annexation by implication (*Sekretov v Toronto*)
   c. **Touch and concern:** benefit can only be affixed to the dominant tenement if it touches and concerns those benefitting lands

Note: Assignment vs annexation

- The benefit of an assignment is a chose in action (capable of being assigned in Alberta, s. 20 Judicature Act), but assignment isn't very useful b/c the burden must be annexed to the land of the covenantee for the burden to run

- So if there is no annexation but there is an assignment, the benefit will pass but the covenant is only enforceable against the original covenantor
- Will only bind successor if the benefit is annexed - in which case we don't need an assignment
- Bottom line: assignment will only allow you to sue the original covenantor, not an assignee of the covenantor

2. Building Schemes (plan of subdivision)
    a. **Common Vendor:** person who develops and sells the lots to different purchasers. They don't need agreements between themselves. All of the restrictions put in place prior to any sale
    b. Parcels laid out subjects to restrictions that can only be **consistent with a general scheme:**
        i. E.g. preserving common neighborhood amenities, no one shall use lands in a particular way or develop outside certain guidelines
    c. **Restrictions intended for the benefit of all parcels within the scheme:** every lot owner is entitled to enforcement of the covenant against any other buyer or property owner
    d. **Parcels acquired on the understanding that restrictions would inure to the benefit of all parcels**

See *Berry v Indian Park Association*

Enforcement and Termination

- ***Land Titles Act, s 48(1):*** you can register against any servient lands and for the benefit of dominant lands, any condition or covenant that is in fact capable of running with the land
    - Says you can register the covenant and there will be constructive notice, but whether or not it is actually capable of land is resolved by substantive land
    - ***(4):*** the first owner and every transferee to the original covenantor is deemed to be effected with notice simply because the covenant is registered
        - B/c it deals with enforcement, will also allow the successor of the covenantor a way out - to persuade the court that the covenant should be modified or discharged
        - 2 reasons why the court might do so: that the modification will be beneficial to all the persons principally interested in the enforcement of the covenant (change is for all the covenantees benefit) OR the covenant now conflicts with the local statutory plan/zoning bylaw, and the modification is in the public interest

- ***Amar Development (2016) -*** *modification or discharge of a covenant*
    - If, for example, one neighbor breaks the covenant, the other neighbors can take them to court. They would have two defences:

      (1) A valid covenant might become spent, obsolete or unworkable
        - Significant change in neighborhood character, or widespread acquiescence in violations might signal that the purposes of a building scheme are defeated
        - When does a conflict between a covenant and municipal bylaw arise?
            - A conflict between a covenant and a municipal bylaw arises only if compliance with the covenant would mean violating the bylaw

      (2) Enforcement of the covenant would lead to such harm that it would be inequitable for an injunction to be issued
        - It is true that the value of a covenant lies in enforcement, not in damages
        - Because the value of covenant lies in observance, an injunction and not damages is the default remedy
        - An injunction is a discretionary remedy and will not be granted where inequitable
        - Sometimes courts weigh in the burden of an injunction against the benefit to the applicant
            - E.g. if the construction of a house is substantially complete and the financial harm to the violator would be very high

BURDEN OF POSITIVE COVENANTS

- A **positive covenant** is one that compels the covenantor to spend money or perform an active obligation
- The traditional position is that the **burden** of positive covenants **does not run in equity**
- *Keppell v Bailey:* arguments against any burdens running
    - This case was disregarded in *Tulk,* which allowed the burden of restrictive covenants to run in equity
    - After *Tulk,* we have another case (*Austerberry*):

- Rule against positive covenants is sometimes referred to as the *Austerberry* Rule
- Several landowners who decide to build a private toll road running through their lands. Later, the municipality expropriates the road. Mechanisms by which owners whose property abuts the road are made liable to pay for the cost of repairs. This owner says the trustees covenanted initially to maintain the road, since the municipality is a successor since they expropriated, they have to pay for it themselves
- Court says no - **positive covenants will not run**
- Where there is a restrictive covenant, the burden and benefit of which do not run at law, courts of equity restrain anyone who takes the property with notice of that covenant from using it in a way that is inconsistent with the covenant, but will not enforce a covenant in such a way as to require the successors in title of the covenantor, to undertake a burden upon themselves in accordance with what the original covenantor bound himself to do

Attempts to Relax the *Austerberry* Rule

- The law in Canada is summarized in *CDD 123 v Amberwood (2002)*
- The benefit and burden principle:
    - (1) Mutual benefit and burden (*Halsall v Brizell*)
    - (2) Pure principle of benefit and burden (*Tito v Waddell)*
    - (3) PPBB rejected (*Rhone v Stephens)*
    - (4) The Canadian approach? (*DCC 123 v Amberwood*)

Halsall v Brizell

- Facts: Developer of the subdivision granted lots in the gated community, maintaining a seawall, public promenade, and some others. These are private. Every lot in the subdivision is granted easements to use the common amenities and they agree to pay a proportionate share of the cost of the amenities. 100 years later one of the lot owners splits the lot into thre
- Issue: Do each new owner pay a price of the fees?
- Reason:
    - **The burden of the positive covenant was unenforceable against a successor in title, but the successor would not be entitled to the benefit of the deed without assuming the burden (rule in *Harsall,* or the benefit and burden rule)**

Tito v Waddell

- Facts: Company was granted phosphate mining rights on an island. In the same instrument the company covenanted to replant worked lands and return them to islanders. Company's rights assigned to the British Phosphates Commissioners. Commissioners say they aren't bound because it's a positive obligation
- Reasons:
    - Distinguished "conditional benefits" (here is a benefit granted to you on condition that you assume the burden, link between benefit and burden) from "independent obligation" (agreement between A and B, each agree to do certain things, independently - burden must be assumed only under a principle of pure benefit and burden). The latter may be tethered only under the principle of **pure benefit and burden**
    - As a matter of construction, it was held that the mining rights were not granted conditional on replanting; nevertheless, under the pure benefit and burden (PPBB) the Commissioners were bound by the burden having received the benefit
    - Establishes a pure principle of benefit and burden

Rhone v Stephens

- Facts: The roof which covers Walford House also covers part of the Walford Cottage. The owners of both properties sold the Cottage. The terms state that all easements are conveyed and the adjoining property (house) shall continue (means that if there is a right of support and a right to enjoy protection of the roof, that right will be enjoyed by the buyer of the Cottage and their successors in title). Vendor covenants for himself to maintain to the reasonable satisfaction such part of the roof as lies above the property (lateral right of support for both properties, owner of the house agrees to maintain the roof)
    - 26 years later the roof leaks and damages the house. Owner of the cottage sues the owner of the house for not maintaining. Owner of the house says they're a successor, positive obligation so don't owe anything
- Reasons:
    - Judge rejects the principle of pure benefit and burden
    - Restrictive covenants deprive of a right
    - Equity couldn't comply an owner to comply with a rule - person cannot be made liable on a contract unless he was party to it
    - Enforcement of positive covenant lies in contract - a positive covenant makes an owner to exercise his rights

    - Restrictive covenant lies in property - deprives of a right in property
- Principle in *Tito* is rejected
- Creates the English position - allows a conditional benefit on a burden to run
- **The English Position**
    - The benefit must be conditional on the burden
    - The burden must relate to the benefit
    - A successor must be in a position to reject the benefit
    - The benefit is exercisable as of right under the agreement

Positive Covenants

From *Amberwood:*

- If the facts establish that the granting of a benefit or easement was conditional on assuming the positive obligation, then the obligation is binding
- Where the obligation is framed so as to constitute a continuing obligation upon which the grant of the easement was conditional, *the obligation can be imposed as an incident of the easement itself, and not merely a liability purporting to run with the land*
- Owner of condo lands #1 granted owner of condo lands #2 - have to pay fees
- If their successors fail to pay, the easement may automatically be terminated

From *Halsburry's Laws of England:*

- If the facts establish that the granting of a benefit or easement was conditional, then the obligation is binding
- The obligation may be framed or construed so as to constitute a continuing condition and to render the easement itself conditional on the dominant owner for the time complying with an obligation to repair or to contribute to repair, *and so be determinable or defeasible on non-compliance*
- This sounds like a determinable limitation, or condition subsequent
    - Not a covenant, but rather the benefit granted is made subject to determining event

- If you bought land knowing of an obligation, there is no reason why you shouldn't be bound by it

Options for positive covenants to run:

1. Leases
    a. Covenant to pay rent is a positive obligation. If a tenant assigns their interest to the successor, they are bound to pay rent
2. Statutes
    a. Legislation that authorizes the enforcement of positive obligations, e.g. condo legislation, pay condo fees
3. Chain of covenants
    a. Covenantee promises personally to pay/maintain/repair and also promises to exact a similar obligation from a successor in title
    b. If the covenant is breached, they will sue the original covenantor who has no choice but to sue its successor in title
4. *Halsall v Brizell* after *Amberwood*
    a. Not completely settled
5. True conditional benefit
    a. Estate subject to determinable limitation or condition subsequent
    b. *Amberwood* -
6. Rentcharges
    a. Rent payment which arises out of freehold land, annexed to the land
    b. If you live in the neighborhood need to pay these fees, even though its freehold land not condo land