Property CAN – Fall 2013

# The Nature of Property – What is Property

## Definitions

**William Blackstone**

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe

**French Civil Code**

Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way contrary to law

**Mary Jane Radin**

To achieve proper self-development-to be *a person -* anindividual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights

**Walter Hamilton**

A euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth

**Kevin Gray**

[T]he ultimate fact about property is that it does not really exist: it is mere illusion

## What is Property?

* Talking about rights, not things
* What kind of rights, who can hold or exercise those rights
* Rights in what?

\*Any system of property rights is a created institution

What kinds of rights/duties exist?

* Right to exclude others, sell/transfer, change/modify, right to income
* Duty to pay taxes, prevent harm, not infringe on others’ rights

Limits on rights – eg. UBC hoody, copyright infringement if change

Limited by norms and laws

* Do no harm
* State place limits on powers of ownership
* Creditor can seize

### Right to Exclude

**Single-variable essentialism** – right to exclude is the core of property

**Multiple-variable essentialism** – right to exclude important but need other rights (to use/dispose/transfer)

* Right to possess/use/manage/income/capital/security/transmissibility

**Nominalism** – no fixed meaning of property, can be filled by each legal system (w/ different values/beliefs)

* Property is matter of social convention

*Yanner v Eaton*

Question of whether Y has right to hunt crocodiles by Native Act. If crown has full definition of property under Fauna Act, the native title not in effect, no right to hunt

Majority – adopted nominal definition of property

Dissent – full and absolute ownership (rights to everything)

Yanner’s right and legislature’s rights can co-exist

## Limits to Property Rights

### Harrison v Carswell

Woman charged with trespassing for picketing in mall outside Safeway.

Did the owner of the mall have sufficient possession of it for trespass?

* Essentialist view – the right to exclude of the property owner is absolute
* Dissent – said property rights should be balanced w/ other interests
	+ Right of autonomy, avoid tragedy of commons, efficiency, equity

Question of who should balance rights

* Courts or legislature?
* Majority decides not the place of the courts

Principles:

* Many ways of defining/conceiving property
* How you define property depends on how you view importance of property rights in relation to other interests
* It does matter how you define property

## Theories and Justifications for Property

3 types of Property: common, state and private

Used:

* To justify whether to grant property in a specific thing
* To justify type of property created
* Justify how rights are distributed (who will get them?)

### Labour Theory

By mixing one’s labour with the material world, one can claim it as private property

### First Occupier

Rights for discovery

### Economic Theory

Person who makes greatest profit is entitled to it

### Utilitarian Theory

Total happiness of society greater – social harmony

### Rights-based Approach (Waldron)

Individual interest is important morally – justifies holding ppl to be under duty to promote it

* Interests morally important to justify enforcement/protection by gov’t?

# Novel Claims

Why does it matter if something is labeled property?

* Gives rights – to exclude, transfer, get equity from it,
* rhetorical force,
* also in lots of statutes
* family law – divided?
* Wills and estates

### International News Service v Associated Press

Facts: INC use AP info to disseminate news in later time zones

Issue: Does AP have property right in the news?

Majority – said not about property but unfair competition

* Can’t have copyright in idea or information
* Didn’t directly copy - rewrote them

Created quasi-right in property – based on labour theory justification (worked hard, spent money)

Hot News Doctrine

* Imposes delay on info – have to wait awhile before put out news if not yours originally

Dissent (Brandeis’): just b/c something has value doesn’t mean it’s property – even if labored in creating it

* Doesn’t look like any sort of property, not property
* New property needs to be created by legislature
* Courts should not create

### Victoria Park Racing and Recreation Grounds

Facts: built viewing platform beside race track

VPR claimed had quasi property right in the view of the spectacle (spent money, labored)

* Majority – rejected argument – if property, only in metaphorical sense
* Just b/c spend money, doesn’t mean property right
* Rich’s dissent – may be property rights – nuisance
* Dixon’s judgment (application of Brandeis dissent in INS)
	+ Just b/c valuable, spent money, doesn’t mean property right
	+ Doesn’t fit w/ category of recognized property rights

### Moore v The Regents of University of California

Facts: Moore thought was treatment – uni took cells for research – no consent and intention of profit. Sued for conversion – needed to show ownership – property title

Majority:

* Moore didn’t have property rights
* Statute takes away property rights
* Cells are not unique (not like right in personality)

Dissent:

* Just b/c there are limits on rights, doesn’t mean they don’t exist anymore

Policy Consideration:

* Need for certainty
* Research on cells important – no economic incentive
* Should be dealt w/ by legislation, not court
* Say have physician’s disclosure rules, that’s enough

Principles:

Court is hesitant to create new property rights. There are limited property rights

* If trying to make something property, make it look like something already exists
* Or can refer to other areas of law (ex. Non-disclosure, nuisance)

Just b/c something is of value, doesn’t mean you have property rights (INS, Victoria)

Labour is insufficient to grant property rights (INS, Victoria)

If new property rights are created, should be created by legislature (Moore, INS)

It isn’t property b/c it looks like property

Shouldn’t be considered property b/c of economic consequences (bodily tissue in Moore)

\*\*Common law reluctant to create new property rights – once granted, difficult to roll back

## Redefining Property Rights

Irreversibility of commodification

* Hard to take away property rights

### McCallum Article – Property in PEI

Landlords rights became almost unenforceable – couldn’t rely on law to uphold their property rights over time

* Dramatic alteration of property rights

Four arguments:

1. Property rights only exist to the extent that the state is willing to enforce them
2. The act of conferring property rights on a person makes that person a better citizen
	1. (if own land, can support family and vote)
3. Sweat of the brow (labour) theory
	1. Land should belong to ppl who make it productive
	2. Inactivity is basis for loss of rights
4. When private rights impede the public good, private rights must give way
	1. Required public remedy or action
	2. Recognition that property rights created by state and dismantled by state

\*\*Any property rights that exist in society that should be dismantled/

* Property rights acquired unlawfully from indigenous populations
* Ownership of cultural property

# Sources of Property Law

What do property rules in different legal systems suggest about society in which they developed?

### Nanabush v Deer, Wolf et al

Nanabush disrespected deer before killing and eating.

Do his actions violate balance required by Law in relationship between animals and humans?

Anishnabek concept of property

* More about rights than obligations – only through duties, do you get rights
* Contractual relationship between animals, people and land
* Property rights part of a larger system
* Property may not be helpful in this way

### Gitxsan Nation

Terms:

Daxgyet

* Chief’s intital encounter with spirit of land

Yukw

* Feast to formalize social affairs

Adaawk

* Formal legal histories/legal precedents

Halayt powers

* Other spiritual powers that exist
* Brought to life in demos by chief

Naxnox

* Songs dances and masks used in performances

Property conceptualized by right to exclude – property related to governance relationships – between humans and land

* Infringe property rights by inappropriate use of song/dance/crest – no entitlement (similar to copyright)
* Property compensation for wrong, death – termination of property with time, mother’s death
	+ Or if can’t meet feast obligation (like mortgage)

Property has a political dimension – need to recreate property rights

* Expire after certain amount of time
* Ex. Cnd presence in Arctic “beating the bounds” – exercising rights
* Also trademark system

“[T]he ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters came power. The land, the plants, the animals and the people all have spirit – they all must be shown respect. That is the basis of our law”

Discussion Points:

* Linkage between concepts of property/governance
* Bundle of rights replaces or displaced by bundle of obligations
* Connections between property rights and environment
* Property rights embedded in larger context
* Respect: integral aspect of property regime

### System of Feudal Tenure

Doctrine of tenure describes relationship between tenant and lord

Feudal Tenure

* Subordination and protection

Freehold Tenure

* Owner and occupier law

Allodial land-holding system – individual is the owner

Tenurial system - individual holds the land to someone superior

Canada = tenurial in form, allodial in substance (crown has underlying ownership of land

System:

Crown --- tenant in chief (in capite) --- mesne lords (lord and vassal) --- tenant in demesne (vassal in possession of land)

\*all landholders tenants

Purpose of tenure system – allocate societal tasks/roles, tax system, justice system

* Obligations between lords and tenants – protection for loyalty

Types of tenure (free)

Security: knight service

Splendor: serjeantry tenure (grand and petty) (butlers, cooks)

Spirit: Frankalmoin tenure (priest)

Subsistence: free and common socage - residual tenure (fee simple)

Free tenure – always know role, what you have to do (aristocratic)

Unfree tenure (copyhold) – held by vassal-labourers – limited by custom

Incidents of tenure (obligations)

* Homage and fealty
* Aids (dowry, knight of eldest son, ransom)
* Relief
* Customary dues (taxes)
* Escheat and forfeiture – sole echo of feudal law today
	+ Expires from treason
	+ Today happens if die with no heir – goes to crown
	+ Company dissolved w/ no mechanism to distribute land

Subinfeudation – tenant transfers to someone else, pass down rights/obligations – attempts to evade – created more tenants/demense/etc

Response: Statute Quia Emptores Terrarum (1290)

* Prohibited subindfeudination (other than Crown)
* Could transfer land, but substitution not subinfeudation

Statute of Tenures – reduced vailable tenurial forms (only socage)

Tenure not abolished – convenience, fear of consequences

### British Settler Societies (Canada)

Reception: process through which England’s laws became applicable in colonies

For settled colonies – “laws of England form part of laws of the colony in so far as these are applicable to conditions in the colony

* Local law stayed in place until ruled by a new sovereign
* This was brought to Canada

Some areas not applicable (exception not rule)

Geographic factors – eg. NFLD fishery, sea beds

Why did Cnd Courts largely accept UK common law?

Convenience, sense of nobility (from England), prudence – don’t pull one thread and all comes apart – judicial conservatism

* Suggests colonies just extension of the UK
* Different context/circumstances – can make own laws

# Property, Class and Poverty

### Homelessness and Issue of Freedom

4 main points to focus on:

1. The right to exclude
2. The fact of exclusion (of homeless)
3. Consequences of exclusion (for homeless)
4. Necessity of common property (a space from which one can’t be excluded)

Society has mostly private property – no right to enter

Homeless excluded from PP – only have common property

* View of land as where you are excluded from

Implications of homelessness on theories/justification of property:

* Not argument against PP, but for common property – for freedom
* Labour theory – do we need to change our definition?
	+ Eg. Does tent city count as labour?

### Ellickson: “Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Row, and Public Space Zoning”

Open access spaces valuable – face-to-face communication, for comedy of the commons

Tragedy of the commons, public nuisance(panhandlers, bench sleepers) may occur w/ open-access public spaces

Points:

* Public spaces should be regulated – ppl have rights/responsibilities
* Ppl will flee common space if not regulated
* Different zones – red, yellow, green
* Rationales for open-access space
	+ Market failure (can’t charge for sidewalks, parks
	+ Democratic ideals – ppl from all background can enjoy
	+ 4 reasons trivial harms amounts to severe aggravation:
		- annoying act in public space – affects thousands
		- annoyance accumulates
		- broken window syndrome
		- violation of informal time limits – chronic offenders

Test for chronic street nuisance

* A person perpetuates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behavior, to the significant cumulative annoyance of persons of ordinary sensibility who use the same spaces

### Victoria v Adams

Legislation saying no structures for tent city – struck down

Court found not an appropriation of city public property

# Protections for Property

### Charter of Rights and Freedoms

No protection of property in Charter – excluded by Alberta, PEI

Protection in 1960 Bill of Rights – right to enjoyment of property – not deprived except by due process of law (legislature can override)

Charter does impact:

* Protects against unwarranted search and seizure
* Freedom of Expression – commercial ads
* Equality rights – discriminatory policies against property

Should Charter be amended to provide protection for property?

Yes:

* economic reasons – may restrict investment from fear of appropriation
* fairness – not fair to take away
* property rights fits w mandate of Charter to protect against “tyranny of majority”

No:

* granting unequal rights (not everyone has property)
* expropriation Act already protects
* vulnerability of environment and other societal interests

## Constructive Expropriation

Gov’t of BC – by rezoning, regulatory decisions – modify regulatory structure in such a way that value of property decreases

*Pennsylvania Coal* – at some point, excessive regulation constitutes a confiscation

US – regulatory takings – justifications that underlie protection of property

* fairness
* prudence required by gov’t
* promotes investment –assurance will be compensated
* Situations for compensation – economic impact, character of gov’t action, ad hoc basis – physical invasion, or regulation denies all economic/productive uses of land

\*Balance between excessive regulation that takes away value of property

Canada:

### Mariner Real Estate v Nova Scotia (AG)

Was regulatory action lawful? Did Expropriation Act entitle owner to compensation?

Principles:

* Fairness not a factor
* Stringent land use regulation by state is the norm

\*\*To constitute a de facto expropriation, there must be a confiscation of all reasonable private uses of the lands in question

* Must take away all incidents of ownership (full bundle of sticks)
* Look at what land is actually used for (not for potential use)
* Look at how regulatory scheme actually applied

For expropriation, must be both a taking away of land from owner, and acquisition of land by expropriating authority

* Here the province didn’t acquire interest in property, just put limits on it)

### CPR v City of Vancouver – Arbutus Corridor

City bylaw to keep CP corridor as public – CP couldn’t develop it.

Issue: Does bylaw constitute de facto taking of land?

Ratio: de facto expropriation requires both acquisition of beneficial interest in property and removal of all reasonable uses of property

* Prohibition on economic activity not de facto expropriation

Analysis

* City doesn’t gain economic benefit
* CP could still use corridor for other uses
* No transfer of interest to City
* Didn’t remove all reasonable uses of property – could lease land

# Physical Boundaries

## Airspace

Previously Latin Maxim “cujus est solum” – if own land, own everything from bottom of earth to the heavens

No longer common law rule

**Transient Invasion**

A transient invasion into the air space above another’s land at a height not likely to interfere with the land owner – will not constitute a trespass (*Didow)*

**Permanent Structural projection**

Constitutes trespass if it – in any way – impinges on the actual or potential use and enjoyment of the landowner’s land (*Didow)*

### Didow v Alberta Power

Facts: Power lines in P’s yard

**Ratio:** Intrusion that interferes with potential or actual use and enjoyment of the land constitutes trespass

P sought declaratory relief – no damages

### Ford v Zelmand

Cutting border tree not a trespass unless go onto land or airspace of neighbor.

## Subsurface Rights

Generally, when own land in BC, own surface of the property (including subsoil). Subsurface rights generally excluded.

### Edwards v Sims

Facts: Underground cave – survey ordered b/c under neighbour’s land. Sued to prevent survey

Majority: Caves like mines – have to give entrance to survey to see if land is trespassed

Dissent (Logan) – states cave belongs to person who owns the entrance

* Person who explores & labours cave has rights
* Worried about precedent for other caves
* Lee’s rights ended b/c couldn’t enjoy property

### Austin v Rescon Const

Trespass upon subsurface – steel rods under P’s property

### Land Act

S. 50 - ?? subsurface rights generally excluded from grant of property in BC

## Lateral Boundaries of Properties

Determining boundaries - look at:

Deed – what parties agreed to

If ambiguous look at (in order):

* Natural boundaries
* Lines run, corners marked at time of grant(boundary stick)
* Extend boundaries to lines and course of adjoining tract (if sufficiently established)
* Course or distance depending on circumstances

Conventional line doctrine

Elements:

* Adjoining land owners
* Dispute or uncertainty about location of dividing line between properties
* Agreement between these parties on a dividing line (ex. There is a fence)
* Recognition that this is a common boundary (oral, writing, conduct)
	+ Based on concept of estoppel – can’t go back on agreement)
	+ Onus on party claiming ownership of conventional line

Policy reasons:

* Reduces expenses, efficient, historical (not many surveyors)

### Robertson v Wallace

Facts: river and fence between property, fence separated cattle. Is it actual boundary?

Suggested conventional boundary didn’t exist – river actual boundary

Recognition of boundary can take form of conduct

* Fence worked to divide cattle, not necessarily boundary of land
* No evidence of prior agreement

**Right of Support**

If excavation on the adjacent or subjacent land causes damage by subsidence, the landowner whose land was damaged has a right of action.

* Includes protection against damage to buildings if can prove it was due to excavation, not weight of building (what caused it to sink)
* Action arises at point that damage actually happens
* Also applies to mining operations
* Can be waived by agreement
* Can be waived by necessary implication
	+ Where a mine can’t be worked or minerals extracted w/o resulting in subsidence, - express order to work the mines implies right to cause subsidence (Fuller v Garneau)
		- Look at terrain/technology
* Generally must bring action for violation of right of support on original excavator
* BUT dissent (Vecchio v Pinkus – Texas) duty runs w/ land – could sue future owners of land on which excavation took place

### Blewman v Wilkonson

Strict liability – can have due diligence to prevent action of right of support.

## Water Boundaries

Presumption: ad medium filum aquae – “to the centre thread of the stream”

* If water forms boundary between two properties, one owned by A, one owned by B – presumed each owns bed of river to the centre thread of the stream

In Canada – doctrine only applies to non-navigable waters

Navigability defined: (*R v Nikal*)

“to assess navigability, the entire length of the river from its mouth to the point where its navigability terminates must be considered

* Look at if it is substantially navigable throughout. (ok if some parts not)

Presumption rebutted?

* Look to the grant of land
* Is there intention to exclude or retain the riverbed? Fishery?

### R v Nikal

Facts: native fishing in river that flows through reserve

Issue: was river part of reserve? Does doctrine apply? Is Bulkley river navigable?

Navigable so doesn’t apply

### Land Act – Section 55

Despite a rule of law to the contrary, if Crown land bordering on a lake, river, stream or a body of water is or has been granted by the government, in the absence of an express provision in the Crown grant to the contrary, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the land, and the Crown grant must be construed accordingly.

### Water Act – Section 2(1)

The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

**Law of Accretion**

(*Southern Centre)*

Where land is granted with a water boundary, the title of grantee extends to that land as added to or detracted from by accretion, or dilution

* Where changes are gradual, title will change – title shifts to accommodate the river
* If change rapid, original location of the river defines the boundary

# Fixtures

Governs the process through which a chattel becomes a fixture (part of real property/land?)

Significant b/c fixtures are passed from sale/transfer of property, chattels aren’t

Test:

1. Degree of annexation (attachment to land)
2. Purpose of annexation

Objective test – hard to apply

Presumptions:

* Chattel attached to the land by more than own weight? – prima facie fixture
* Chattel not attached to ground – prima facie chattel
* Presumptions can be rebutted- onus on party claiming contrary
* Strength of presumption varies in proportion to extent of attachment
	+ Weakly attached or strong?

Purpose of annexation

* Look at purpose to enhance the land? (fixture)
* Or better use of the chattel as a chattel? (chattel)
* Also look at how much damage would result from removal of item

Chattel/fixture can’t be conclusively controlled by contract – protects third parties (subsequent owners)

### La Salle Recreations

Used test to determine carpets were fixtures

## Tenants’ Fixtures

Right to reclaim fixtures installed – subject to considerations

* Must have been installed for purposes of trade/ornamental in nature/domestic convenience
* Possible to remove w/o damaging land/item
* Must be exercised before tenancy expires – timely removal
* Might be limited/precluded by contract
	+ But this is read strictly against landlord

### Diamond Neon v TD Realty

Facts: TD bought land, with signs.

Signs were fixtures at time TD bought land – got to keep

No timely removal of fixtures by Diamond neon

# Property Rights in Ideas

Pros for granting property right in ideas:

* Encourage ppl to disseminate ideas broadly
* Reward effort/labour – difficult to come up with ideas
* Encourage creative thought/originality

Cons:

* Evidentiary issues
* Hard to divide
* Maybe restrict ideas
* Intellectual land grab

Copyright

* Ideas not protected
* Has to be expression of idea
* “Idea/expression dichotomy”

### Desny v Wilder

Facts: P had idea for movie – orally gave to secretary – made movie based on idea

Issue: is there property interest contained in an idea?

Property implies something that may be owned and possessed to the exclusion of others

* ideas are non-exclusive – not limited to one person
* ideas are non-rivalrous – numerous ppl can use at one time

Courts reject property rights on idea – copyright doesn’t work

Still issue of fairness – frame as contract issue – implied contract

### INS v AP

Hot News Doctrine

* quasi-property rights in news
* limited duration
* only between competitors
* May negatively impact speech, knowledge, flow of info if property in news

## Originality

### CCH Canadian et al v Law Society of Upper Canada

Facts: LS has self-service photocopies, also call up for sending articles. Legal publishers objected -sued for copyright infringement

Issue: Are publisher’s materials “original works” protected by copyright?

TEST: to be original a work must:

1. Originate from the author
2. Be more than a mere copy
3. Be an exercise of skill and judgment that is more than trivial

Different than US approach “Spark of creativity”

Creativity is too high

Cnd – utilitarian – protect public domain for vibrancy of public life

Protecting data not involving copyright?

* Contract law (but not 3rd parties)
* Tort of unfair competition – only in US, narrowly
* Criminal law? (can’t steal info
* Doesn’t protect databases

## Copyright

Copyright is bundle of exclusive rights in works, performances, sound recordings, communication signals

Works: literary, musical, dramatic, artistic

Two sets of rights – economic and moral

Economic: - sec. 3 of copyright act

Benefit for the owner to benefit from their works – sole right to reproduce, translate, disseminate, etc. – bundle of rights in sec. 3

Purpose of copyright

* Balance between promoting public interest in disseminating work of art and intellect, and obtaining just reward for creator

### Copyright Act

Sec. 5 What do you need for subsistence of copyright?

* Citizenship requirement – must be resident at date made, or citizen of treaty country
* Work must be original (3 part test)
* Must be literary/dramatic/musical/artistic work
* Capable of being copyrighted – no facts/ideas
* Must be fixed (ie paint on canvas)
* \*\*No registration requirement
	+ artistic = work that finds expression in fixed medium

Sec. 6 Term of copyright

* Life of author, plus 50 years

Sec. 13 Ownership of copyright

13(1) author is first owner of copyright in a work

Exception – 13(3) create something in employment, employer is author

* can assign copyright

Sec. 27(1) Copyright infringement

* against anything only the author has right to reproduce

Right to reproduce – under Sec. 3

* reproduction can be of an entire work, or part (ex. Chapter in novel)
* must be substantial part
	+ ex. Music, must be “hook” of song
	+ “in any material form” – doesn’t need to be in human readable form as long as can compare copy w/ original – ex. Computer printout

### Theberge v Galerie d’Art

Facts: P sold copyright to gallery to make posters. They transferred ink onto canvas so it looked like original. Sued for c’right infringement.

Majority (Binnie J): no reproduction – needs to be increase in number of copies (only transferred from one medium to another)

Dissent (Gonthier J): reproduction shouldn’t be defined by increase in # of copies, rather refixation (more protection for author\_

* shift towards : Copyright’s purpose to balance between public interest and author’s rights
* Moral vs economic rights – Theberge is more moral rights

### Defences to Copyright Infringement

1. Copyright doesn’t subsist in the work (onus on D, see 34.1)
2. Copyright expired
3. P doesn’t own copyright (onus on D – 34.1)
4. No infringing act took place (Theberge)
	1. Argue not substantial
	2. Just idea, not expression
5. Defences set out in s. 32.2

## Fair Dealing

* Allows individuals to use substantial portion of copyright-protected expression w/o permission for certain purposes – fair + established criteria
* Not defined in Copyright Act – judicial interpretation
* S. 29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright. – criticism, review, news reporting (29.1/2)

### CCH Canadian v LSUC

Prima facie – copyright infringed – onus on LSUC to defend – argued it was for research

1. Does it fit in one of categories?
	1. Yes research – courts find research can be commercial (not just private)
2. Where the dealings fair? Look at factors:
	1. Purpose of dealing (created for one of purposes?)
	2. Character of dealing (multiple vs. single copies)
	3. Amount of dealing (how much copied, whole works?)
	4. Alternatives to the dealing (purpose achieved in other way?)
	5. Nature of the work (published, confidential, needs accessibility?)
	6. Effect of the dealing on the work (evidence of decreased profits?)
* User’s right – must not be interpreted restrictively

### SOCAN v Bell

Facts: Bell using music previews to sell songs online

Principles:

1. Confirm shift away from author-centric approach
2. Idea of fair dealing as a fulcrum between protection/access
3. Affirms CCH – FD is user’s right, not interpreted restrictively
4. Broad view of research – can be exploratory, for personal interest (maybe more categories)
5. Look at FD from perspective of user – ex. Lawyer, music user (not intermediary – Bell/CCH
6. Fairness analysis – focus on commercial competition/individual use, not aggregate

## Moral Rights

* Protect author’s honour and reputation
* Based on idea that author’s work is extension of author – attack is attack on author themselves
* Different rights (varies by country)
	+ Right of paternity/attribution (name)
	+ Right of integrity (prevent substantial changes)
	+ Right of disclosure – (whether to be published)
	+ Right of withdrawal – (limited right)
	+ Right of association (prevent work used w/ cause/institution that hurts honour – ex. Tobacco comp.)
	+ Right to regain control of unused work

### Copyright Act – Canada

For authors and performers

Two rights protected:

Right of attribution – s. 14.1(1)

Right of integrity – s 14.1/17.1/28.2

Infringed in 2 situations:

* Where work is distorted, mutilated or modified to the prejudice of honour or reputation of author
* Where work is used in association with a product, service, cause or institution to the prejudice of the honour or reputation of the author

s. 28.2(2) Deeming provision

Painting/sculpture mutilated – deemed to have prejudice

s. 28.2(3) Change in location/restoring – not distortion/mutilation alone

Moral rights:

* Can’t be assigned – s.14.1(2)/17.1(2)
* Last for the same term as copyright – 14.2(1)/17.2(1)
* Can be inherited s. 14.2(2)/17.2(2)
* Can be waived – s. 14.1(2)/17.1(2)

\*\*Note- fair dealing not a defence to moral rights

Right of Attribution (14.1(1); 17.1(1)

* Right to be associated w/ work/performance by name (or pseudonym where reasonable)

Right of Integrity

* “to the prejudice of the honour or reputation of the author”
* both objective and subjective test
* association element – offended where the work/performance is used in association w/ product, service, cause or institution to prejudice of author
* ex. Music played at a political rally

### Snow v Eaton Centre

Facts: ribbons placed on geese’s necks

Applied subjective/objective test

* Snow felt it affected his honour
* Opinion shared by respected artists, ppl knowledgeable in field
* Moral rights violation
* Now have provision where the ribbons would have “deemed” that prejudice occurred – easier to show

### Prise de Parole v Guerin

Facts: Pris published stories and use Guerin’s work. Used him name. Changed some aspects.

Was there mutilation or distortion or modification? – yes

Subjective test: Guerin believed it was offensive – didn’t want name associated with it

Objective test: not satisfied – there was no damage to the author’s reputation or honour.

* No change in amount of his lectures
* No ridicule or mocking by associates
* No evidence harm done – economic data
* Different application of objective test

# Property in Personality

Commercial value in name/likeness – protection through defamation, passing off

Also tort = misappropriation of personality

Proved if:

* You are recognizable
* Public assume you are endorsing a product
* As a result, your ability to market yourself is reduced
* Krouse: only successful if public assumes you are endorsing product (can’t endorse competing product)
* Athans: may be successful (even if no implied endorsement) if D unjustly enriched – clearly used for commercial benefit

### Krouse v Chrysler Canada

Facts: Football player has image of ountline of body w/ number visible on cardboard scorecard “spotter”. Sued Chrysler for use of image w/o consent. K is recognizable, has some commercial value to his personality. No one looking at spotter would think he was endorsing cars. Abilities to get other endorsements not lessened.

* Courts focus on Krouse himself – there was no harm
* \*\*doesn’t matter if Chrysler may have benefited
* He was athlete and some fame comes with the territory.
* Implied consent in photo being taken
* Not the best player – maybe needed to be more famous
* Courts recognize tort of misappropriation of personality
* No harm = no damages

### Athans v Canadian Adventure Camp

Facts: famous water skier, camp used line drawing of photo in brochure – not successful.

Used test of Krouse for tort of misappropriation of personality

* No one looking at brochure would think he was endorsing camp
* Ability to endorse other water ski camps not affected
* BUT still damages – Camp used image for commercial advantage, benefited, so should pay
* Invasion of his exclusive right to market his personality
* Shift from compensation for harm done to unjust enrichment? (benefiting unjustly) – broadening of tort
* Different than Krouse b/c more recognizable in photo, and used the photo commercially (his signature photo)
* Similar to Krouse b/c both photos had commercial value

### Gould Estate v Stoddard Publishing

Facts: Reporter published book w/ photos and interview details from Gould’s earlier years. Family argued misappropriation of personality

* Tort of M of P shouldn’t be interpreted too broadly. Look at public interest (freedom of expression)
* Free speech – is purpose for educating public or commercial value?
* Restricts scope of tort to where there is interference for P’s right to control and market their own image – right to profit from celebrity (and how)
* Sale v Subject distinction
	+ Personality used to sell product, or subject of work that offers insight

Survivability of right – right passes to heirs after death + 50 yrs

ALL THREE CASES (successful is used in advertising w/o consent if:)

* You are recognizable
* Public would assume you are endorsing the product
* Your ability to market yourself is thus reduced

### Privacy Act

### Unauthorized use of name or portrait of another

**3**  (1) In this section, **"portrait"** means a likeness, still or moving, and includes

(a) a likeness of another deliberately disguised to resemble the plaintiff, and

(b) a caricature.

(2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

**Action does not survive death**

**5**  An action or right of action for a violation of privacy or for the unauthorized use of the name or portrait of another for the purposes stated in this Act is extinguished by the death of the person whose privacy is alleged to have been violated or whose name or portrait is alleged to have been used without authority.

* Can argue both on common law tort and privacy law statute
* One may be broader than the other
* Sec. 3
	+ Statutory reflection of CL tort
	+ Caricature or evoking someone’s personality
	+ Group photo – not liable unless a person’s image is highlighted
	+ Extinguished by death – can still bring in CL tort
	+ If commercial can plead both CL and statute
	+ Recognizability requirement

# Concept of Possession

Possession important to establish trespass – also various property torts

Test for possession:

* Physical control
* Intention to possess

Constructive Possession

Person w/ constructed possession treated same way in law as actual possession

* Used in instances where physical/mental elements of possession watered down
* Factors that impact how the test for possession is constructed:
	+ Custom and practice of the industry
	+ Public policy concerns (efficiency, economic considerations, resource conservation, labour)
	+ Concept of fairness and justice

Abandonment

* Sufficient acts of abandonment
* Intention to abandon
	+ The opposite of possession
	+ Owner to relinquish rights

Custody

* May be w/ legal possession of your employer – employer still has physical control
* Keeping, guarding, watching over something
* Possession includes custody – custody doesn’t necessarily include possession

### Nakhuda v Story Book Farm Primate Sanctuary

Facts: woman lost monkey in Ikea – escaped and taken to sanctuary. Signed contract saying gave up possession.

Ownership of wild animals – only owned while they are possessed

* Nature of the animal matters if it is wild – behaviour and characteristics
* Animus reverendi – for animals who don’t generally return home
* Possession lost when animal regains natural liberty
	+ May be moment break away from confinement
	+ Regaining liberty in natural habitat (limiting if not natural)

### Pierson v Post

Facts: Post pursuing a fox, Pierson intervened, killed it, took possession

Issue: did post acquire possession in the fox by virtue of his hot pursuit?

 Majority:

* Need pursuit plus sufficient action to bring animal under control
* Justice and fairness – certainty, preserving peace and order
	+ May be flooded w/ “I saw that fox” cases

 Dissent:

* Livingston – proposes not just seeing, not higher standard of control, but reasonable chance of bringing under control

### Clift v Kane

Facts: Brothers sealer ship kills 3000 seals, then went to gets carcasses from ice. Barbara (ship) took the seals.

Issue: Did Barbara interfere w. Brother’s possession?

Majority:

* Property right is vested in the pelts – broad view of possession

Dissent:

* Narrow view of possession – the first ship had abandoned

### Popov v Hayashi

Facts: baseball flew in air, kind of caught it but then tackled, H grabbed ball.

Issue: What constitutes physical control in the context of a baseball hit into the stands?

* No one knew if he had possession
* It isn’t known when he lost the ball
* Would not know if P would’ve kept the ball if the crowd had not interfered
* Gray’s Rule: ball caught when complete control at time momentum of ball and fan ceases. Ball dislodged by incidental contact not intended is not possessed. First person to pick up loose ball and secure it becomes its possessor
* Courts use equitable division
	+ Where more than one party has a valid claim to a piece of property, the court will recognize undivided interests in the property in proportion to the strength of the claim.
		- Simple test
		- Fairness
		- Custom and practice
		- Absurd if popov got the ball by having his glove touch it

# Finders’ Rights

Demonstrates the relative nature of title in Cnd property law

* True owner, if hasn’t abandoned, always has best claim
* Just tertii defence – 3rd party – generally not relevant
* Policy reasons:
	+ Economic efficiency (incentive to “find”)
	+ Of value to society – reward for reintegrating
	+ Environmental concerns – reuse
	+ Can help return object to rightful owner
	+ Need it for chain of title to be correct
	+ Nemo dat principle – can’t pass on better right that you have

### Armory v Delamirie

Facts: chimney sweep found a jewel – apprentice stole the stones – had to give back

Sweep acquires better title than anyone else (not absolute property right) – if owner returns, has to give back

* \*\* If there is no owner (ie abandoned) – finder has title good against the entire world except for those who have a prior continuing claim

Where the true owner isn’t involved

* Finder v Stranger (Armory case)

#### Finder v owner/occupier

* + Cases where good is embedded in the soil/underwater
	+ \*\*\* Where person has possession of land with the intention to exercise control over it and the things which may be embedded within it, then if something found attached to /under land, presumption is that the owner has possession
		- rebutted by showing no intention to exercise control over land
		- generally. if chattel is found embedded in soil, occupier of the premises will prevail over finder
		- it is fixture – part of title of land, better title of item

### Trachuk v Olinek

Facts: Oil company leased land to farmer, who built fence around well. Not part of lease. 3 contractor’s found money in plastic bag, buried.

Issue: Was physical control established?

Principle: if embedded in soil, occupier has the title over finder

BUT – finders have better title than Trachuk

* he had no occupation of well area
* no intention to exercise control over that part of land – no possession
* no prior continuing claim – no dominion/control
	+ Cases where the good is on the land/in a house (unattached)
	+ \*\*\* Where a person has possession of land with the intention to exercise control over it and the things which may be upon it, then, if something is found on that land, the presumption is that the owner has possession

### Graftstein v Holme & Freeman

Facts: Employees found money on premises in box – informed owner, told to put on shelf. Two yrs later, broke padlock, found money. Owner refused to give them $.

Issue: Did G have right to ownership?

Courts find: Graftstein had right

* he exercised control over it – came into possession when it was brought to him
* told him to put on shelf – took custody & assumed legal responsibilities
* always had possession
* not automatic that if possess container, then possess contents (presumption)

Property owner trying to claim title to object – say have constructive possession from owning property

### Parker v British Airways Board (UK)

Facts: P found gold bracelet in lounge – gave to worker, said to return if couldn’t find owner – sued and won

* Spectrum of control w/ respect to intention of occupier to assert control over lost articles lost on premises
* BA didn’t have intent to exercise control over lost articles in lounge (only who entered)
* Spectrum from bank vault/house ………….to ……………Park
* Lounge in middle of spectrum

\*Note – no recognized obligation on finders to take reasonable measures to inform true owner of finding – addressed somewhat in Parker

### Bird v Town of Fort Frances

Boy found money while crawling under property –trespassing

Issue: Does it matter that he was trespassing? – “wrongful taker”, but doesn’t bar claim – he’s entitled to $

* If owner laid claim, he would win (Graftstein)

### Baird v British Columbia

Facts: P deposited large amt of cash, admitted stolen – police had $, he sued

Principle: *ex turpi causa* – no cause of action from illegal/immoral act

* Different than Baird b/c illegal act directly related to $
* Degree of criminality – Bird not enough on spectrum

### Charrier v Bell

Facts: amateur archeologist found artifacts on private property, Trudeau plantation Exacated burial site – 2 ½ tons. Indian band claimed true owners

Issue: was property abandoned (then true owners wouldn’t have ownership)

Courts:

* Objects buried with dead are not abandoned (policy reasons)
* Goods not abandoned – no intent to give up ownership

### Heritage Conservation Act

Sec. 13 – can’t damage or remove heritage site, or remains, heritage wreck

Sec. 1 – definitions section

* Heritage wreck – 2 more yrs passed from crash/sinking, abandoned
* Heritage object/site – designated or not, personal property/land w/ heritage value to BC, community or aboriginal

Sec. 19 unclaimed objects in heritage collections

* Museum can apply to SCC to have ownership vested in them

Sec. 34 – civil remedies that respect contravention

* Restrained by conjunction, order to restore property

Sec. 36 – commit an offence if contravene other sections

* Impose fines to ppl & corporations – criminal consequences

# Gifts

Gratuitous transfer of the ownership of property (re Bayoff Estate)

* Giver=doner, recipient= done
* Donor must have good title (nemo dat principle)
* Some gifts prohibited by statute
* Legislation may impose requirements for gifts – some gifts must be in writing

3 types of gifts:

* Testamentary gifts
* Inter vivos gifts
* Donatio mortis causa

## Testamentary gifts

Transfer property from donor to done, with will – effected at donor’s death

## Inter vivos gifts

Gifts made during life – verbally/writing

3 elements to perfected gifts: - then irrevocable (can’t change mind)

1. Intention to make a gift
2. Acceptance of gift
3. Sufficient act of delivery

### Nolan v Nolan

Facts: P claimed S. Nolan had given paintings to her mother C as inter vivos gift. No delivery before death.

Ratio: requirements for inter vivos gift

* No evidence of donative intention – must be concurrent w/ delivery
* Must have done everything possible to effect delivery – give up present/future control

Intention to give up gift

* To give up dominion/control
* Mental capacity required (high threshold)
* Words of gift usually necessary to demonstrate intention, but not required
	+ Otherwise need to show intention, w/ certainty as to object, extent and whether the gift would take immediate effect (Nolan)

Acceptance of gift

* Presumed to exist – can be rebutted if gift rejected
* Person needs to understand transaction and have desire to assume title

Delivery of gift

* Must be effective delivery of property (or substitute) – owner must part w/ dominion & control over gift
* Delivery usually perfects the gift
* Until delivery occurs, donor can retract the gift (Nolan)
* 2 exceptions for less than perfect delivery (physical transfer)
	+ exceptions based on rules & principles (Strong v Bird)
	+ exceptions based on factual concessions
		- delivery may follow/precede intention to give
		- can be effective even if done originally held property in different capacity

### Thomas v The Times Book Co

Facts: late wife tried to claim ownership of manuscript. BBC producer said gift – copy of Thomas’s manuscript lost, asked producer to give copies – said “if you find original, you can keep it”. Found in pub, then Thomas dies.

Issue: was there sufficient delivery?

* Did get possession – w/ permission of Thomas
* Found to be perfected when he found it
* Intention, acception, then time passed, then delivery – sufficient, so gift made

Constructive Delivery

* Accomplished where donor transfers means of obtaining possession, control over property to the done
* Elements:
	+ Has donor retained means of control – if so, no delivery
	+ Has donor done all that can be done to divest title in favour of done?
	+ Sometimes actual delivery isn’t possible – due to item/circumstances

### National Trustees Executors and Agency Company v O’Hea

Facts: employer gave carriage to coachman – in same house

No gift – no delivery in common establishments

### Re Cole

Facts: husband said to wife “it’s all yours” for chattels in house.

Not a gift – policy reasons to ensure delivery requirement isn’t watered down (Nolan) – too many claims between cohabitants/trustees in bankruptcy/executors

No intent or delivery

Note - \* symbolic delivery is separate from constructive delivery – courts are skeptical

## Donatio mortis causa (DMC) Gifts

The delivery of property in the contemplaction of the donor’s death upon the express/implied condition that the gift is not to be absolute and complete until the donor dies

4 requirements:

1. Contemplation of death
2. Conditional on death
3. Delivery
4. Property capable of passing by DMC (usually can’t have DMC in land)

Contemplation of death

* In near future, death impending (subjective belief/actual danger – debatable)
* Donor doesn’t have to die from peril they’re afraid of

Conditional on Death

* Gift must be made on the condition it’s only complete on donor’s death
	+ Present gift, but looks ahead to future event
* Revocation can be automatic when risk ends, or express – tells done, or takes control – not just possession/custody, but retake control
* DMC can’t be revoked by will – title complete before will in effect
* Gift absolute only when donor dies

Delivery

* Delivery must have intent to part w/ dominion/control
* Can be to done or someone on donee’s behalf
* Lower threshold for successful delivery than in inter vivos
* Courts more likely to accept constructive delivery (ex. Bank book for $ in account, key in safety deposit box)
* Must give donee method of obtaining it

### Re Bayoff Estate

Facts: Bayoff terminal cancer – gave P key to safety deposit box, saying wanted her to have it. Still needed paperwork but B dead.

Issue: Did P receive valid gift?

Courts find:

* Not DMC
* Intent to give up control/delivery satisfied (key to box, instruction to lawyer)
* Didn’t meet requirement for conditional on death – terminally ill, thought immediate
* Said inter-vivos gift – intention, yes, acceptance, yes
* Delivery:
	+ Thought he did everything, but could’ve done more
	+ She didn’t have access

Used exception based on rules and principles : rule in Strong v Bird

* Incomplete gift will become complete if donee is executor of donor
* She takes control, delivery occurs – perfects the gift

# Resulting and Constructive Trusts

Trust – “use” created to soften rigid common law - transfer property to trusted friend (held for the use of)

Cestui que use (beneficiary) conveyed land to feoffee to uses

Advantages:

* Evade feudal burdens
* “uses” could be disposed of by will – circumvent CL
* overcome rigid rules of CL – flexibility for more outcomes

Major issue:

* CL didn’t recognize use
* Person w/ beneficial ownership recognized by Courts of Equity

Passed Statute of Uses (attempt to vest legal title in beneficiary) – interpreted narrowly

Terms:

Use=trust

Feoffe to uses = trustee

Cestui que use = beneficiary (equity interest)

Person creating trust = settlor

Role of trusts:

* Organize mngt of family property – transmission
* Minimize tax liability
* Acquire land for development
* Protect land from development (land trust)

## Resulting Trusts

* Arise by implication
* Beneficial/equitable interest in property results back to the settlor (person creating trust) or that person’s estate (if settlor died)
* Recognized 2 areas:
	+ Where trust document doesn’t dispose of all beneficial interest in property
	+ Gratuitous transfers

#### Gratuitous Transfers

“Equity prefers bargains, not gifts”

* A purchases property – asks title be placed in name of B – equity assumes A intended to retain equitable interst by making B a trustee – holding legal title for A’s benefit
* Exceptions: where equity presumes intention was to make a gift
	+ \*\***presumption of advancement**

Presumption of advancement – A buys property, asks title to be placed in name of B – if presumption applies, states that B has both legal and equitable title, A has nothing

### Pecore v Pecore

Facts: Father, daughter had joint bank account. Helped daughter and disabled husband. Divorced, husband said joint account part of estate. Joint account – was it intended to go to daughter alone, or become part of estate?

Issue: Did daughter has beneficial interest in accounts?

* CL presumptions still have role to play in disputes around gratuitous transfers
* Gratuitous transfers: Presumption of resulting trusts – BUT some situations where presumption of advancement applies
* Said was gift – intention, acceptance, delivery
	+ Deliver – when account set up, takes effect on death of father
	+ Divested control when signed bank docs

Note \* - different than *Madsen Estate v Saylor* (similar facts, different outcome – siblings not behind her)

Right of survivorship – transferred to one party upon the other party’s death, prior to descending to that person’s will

Situations for Trust:

* Transfer between father, minor children = advancement
* Transfer between mother, minor children = advancement
* Transfers between parents, adult/independent children = resulting trust
* Transfers between parents, adult/dependent children = resulting trust

Policy reasons:

* Adults have to look after elderly parents – help manage affairs
* Dangerous to presume making a gift
* Too hard to define independent
* Parents have moral obligation to advance their children

## Constructive Trusts

Trusts be used to ensure if contribute to family property, but not name in title, compensated if family unit dissolved?

No longer “common intention” resulting trust. (Kerr)

#### Institutional Constructive Trust

Imposed when person acquired property for his benefit, at expense of another to whom owes fiduciary duty (don’t look at this )

#### Remedial Constructive Trust

Used to provide remedy when title holder of property would be unjustly enriched unless equity compelled him to share property w/ someone who contributed to acquiring/improving property

**Unjust enrichment**

* Main method to address claims of inequitable distribution of assets on breakdown of domestic relationship
* 3 steps
	+ 1. enrichment or benefit of D
		2. corresponding deprivation of P
		3. absence of juristic reason for enrichment

### Kerr v Baranow; Vanasse v Seguin

* provision of unpaid domestic services constitutes enrichment, and deprivation
* Absence of juristic reason:
	+ A) look to established categories – intention to make gift, contract, legal/equitable/statutory obligations
	+ If not, then D can look to other reasons to dney recovery – look at mutual expectations of parties (keeping affairs separate), public policy reasons (ie autonomy)

*Vanasee* – found there was JFV – direct link between P’s contribution (householding/child rearing responsibilities)

 - D wouldn’t have been able to accumulate wealth w/o her contributions

Remedies for unjust enrichment:

**Monetary award:**

* fee for services approach – value for unpaid services
* takes into account mutual exchange of benefits

**Proprietary award (remedial constructive trust)**

* must show monetary award not sufficient
* need link between contribution and specific property – direct, causal

**Joint Family Venture**

To see if exists, look at several factors:

* mutual effort (parties work collaboratively toward common goal?)
* economic integration (more extensive, more likely JFV)
* actual intent (lives to be part of larger venture)
* priority of family (detrimental reliance for sake of family?)

First show JFV. Then…

Also needs to be link between P’s contributions and accumulation of assets/wealth

* monetary compensation reflecting P’s proportionate share

# Matrimonial Property

### Family Law Act

Sec. 1,3, 81. Definition of spouse – married or in common law relationship for 2 yrs.

Part 5 Property Division.

Sec. 81 – Family property and debt the same

Starting point- equal division of property/debt.

Sec. 83 – what constitutes separation – not separated within 1 yr, live together w/ intention to reconcile.

Sec. 84 – Family property

What is it? (1) All real and personal property, on date of separation – owned by at least 1 spouse. – also shares in corp, business

Sec. 85 – excluded property. Property acquired before relationship began, inheritances.

Sec. 86 – Family debt what is it? All financial obligations incurred by spouse during period together.

Ability to make agreements

Sec. 92 – spouses aren’t bound by Act – can divide property unequally

Sec. 93Agreements between spouses can be set aside

3(a) take improper advantage of vulnerability - didn’t disclose

Sec. 95 – Unequal division

If significantly unfair to equally divide, Court can order unequal division

Look at:

* contribution of spouse
* duration of relationship
* if spouse caused increase/decrease beyond market trend
* if spouse disposes/converts property
* unjust enrichment
* “any other factors”

Sec. 96 – Division of excluded property

Court can’t include excluded property unless spouse directly contributed to maintenance/operation of it

Sec. 97 – Types of Action Courts can take

* determine right of ownership/possession/division of property/debt
* transfer to trust
* compensation
* require sale – payment given to spouse

### Asselin v Roy

Used BC Family Act to divide up property .

# Property Torts

## Trespass to Chattels

3 steps:

* intentional
* direct interference
* with possession

**Intentional**

Don’t need to intend wrong, just intend to interfere w/ possession

*384238 Ont v Canada –* dept. of Revenue seized horses, held for 3 days. Realized mistake, returned. Honest and reasonable mistake not a defence .

**Direct Interference**

Putting nail in car tire vs leaving nails on road. (indirect)

**Interference w/ Possession**

Trespass is interference w/ individual’s legal possession of personal property (*Costello v Chief Constable of Derbyshire Constabulary)* – wouldn’t return stolen car.

* Owner of personal property who is out of legal possession when interference occurs can’t bring action
* Ex. *Penfold’s Wine*
* Possession = Physical control + intention to control
* Actionable per se
* Can have action w/o dispossession

### Fouldes v Willoughby

Facts: P misbehaved on boat, they took his horses. Moved to shore.

Issue: Is this trespass to chattel?

Yes, intention, direct interference with possession.

## Conversion

Conversion must result from:

1. Intentional
2. Direct act which is either
3. A) a serious interference w/ person’s legal possession or right to immediate possession of goods, or B) denial of title of goods
* Doesn’t protect ownership, only right to possession
* If have right of possession, but out of immediate possession, can still bring claim.

3rd requirement:

* Were the D’s dealings serious enough to constitute conversion?
* Did the D’s act result in a substantial interference w/ the owner’s rights so serious as to warrant forced sale? (*Fleming)*
* *(Prosser*) Look at:
	+ extent and duration of exercise of dominion/control
	+ intent to assert a right in fact inconsistent w/ possessor’s rights
	+ good faith of D
	+ extent and duration w/ right of control
	+ harm done to chattel
	+ expense, inconvenience caused

Principles:

* temporary detention of chattel w/o intention to exercise dominion over it doesn’t amount to conversion (*384238 Ont Ltd v Can)*
* detention of chattel under mistaken claim of ownership w/ intention to exercise dominion over it amounts to conversion (but if returned quickly, nominal damages) (*Mackenzie v Scotia Lumber Co)*

**Denial of Title** – wrongful sale, refusing to give something back

Generally, value of chattel assessed at time of conversion.

* Increases in value of goods can be awarded as “consequential losses”

### Aitken v Gardiner

Facts: Didn’t realize share stolen, converted. Shares went up a huge amount in value. P wanted to capture some of amount.

* Conversion deprived P of ability to obtain profit
* Purpose of buying shares is for them to increase
* \*\* P must act to mitigate damages by replacing chattel as early as reasonably possible.

## Detinue

* Action for wrongful detention of goods initiated by individual who claims to have a greater right to their immediate possession that person currently in possession of goods.
* Test:
1. D intended to interfere
2. P had better right to possession of chattel than D
3. P demanded, D refused to return the Chattel
* Detinue doesn’t occur until P demanded goods be returned and demand is refused
* Not required to immediately comply – reasonable amt of time to verify
* Don’t have to demand if can show demand would be refused
	+ Refusal must be either deliberate rejection of P’s claim to goods OR
	+ Result from fact that D has wrongfully or improperly given up possession of goods (so can’t comply w/ request) (*Aitken)*

**Remedies**

* Recover specific personal property
* D has option to return goods or pay their value (at time of judgment) while maintaining P’s right to apply to the court to recover property

Torts in Canada – may be disincentive to find goods and bring back into circulation

Broad interpretation of intention – may punish morally innocent

 Maybe should narrow to wrongful act, or modify damages

### Limitation Act

Sec. 6 (1) – Can’t bring claim after 2 yrs.

Sec. 8 – Claim is discovered by person on day they knew, ought to know, that damage or injury occurred.

Property Law – Term II

# Estates

* Segment of ownership that last for specific period of time (4th D)
* Need to balance rights of different property holders

**Leasehold estates:** estates of certain duration

**Freehold estates:** estates of uncertain duration

* **Life estate =** estate not of inheritance
* **Fee simple and fee tail** = estate of inheritance

Life Estate

Duration

* Measured by life of person granted interest
	+ “life estate pur sa vie”
* Measure by life of another
	+ “life estate pur autre vie”
	+ can be anyone, can be more than one
	+ Life estate ends when last measuring life dies
	+ If transfer, the measuring stick stays the same

*Reversion* – granted to A for life. After A dies, property reverts back to grantor

*Remainder* - granted to A for life, then to B – B gets remainder of estate

How Created

* No longer CL presumption – previously needed magic words “to A and his heirs” -
* Property Law Act – s. 19(2) – must expressly state for life estate

Rights/Responsibilities for Holder

* Rights: 2 - Possession, Profits (sometimes right to alienate if power to encroach)

Fee simple – Duration

Duration

* Largest estate, potentially unlimited duration – large bundle of rights
* Not absolute ownership – ends w/ conditions of escheat (no will)

How created

* CL presumption of life estate in grants/wills
* Need magic words for F/S – “to A and his heirs” “to A, her heirs & assignees”
* In wills – rule relaxed – need to show intention to create F/S
* Property Law Act – reverses this presumption – s. 19(1)
	+ Don’t use magic words, still F/S
	+ Applied in *Thomas v Murphy*

Rights/Responsibilities for Holder

* Rights: all 3 - Possession, Profits, and Right to alienate
* Responsibilities

### Thomas v Murphy

Facts: words “heirs” missing.

* In CL would’ve been life estate. PLA – s. 19(2) means f/s
* Together with LTA s. 186(4-8), WESA, s. 41(3) – presumption that f/s passes in wills

Fee Tail

Duration

* Descends to lineal descendant – lasts as long as there are direct descendants of holder
* Abolished in BC – Property Law Act – s. 10

How Created

* To A and the heirs of his bod

## Ambiguities in Estates

Ie: to Jack absolutely during lifetime, then to Annie.

3 options:

1. First gift absolute (strike out 2nd stipulation)
2. First gift is L/E, remainder to donee of 2nd gift
3. First gift is L/E w/ power of encroachment

### Re. Taylor

Estate to use during her lifetime, then go toward her daughters.

* Courts say L/E, but limited power of encroachment – for maintenance
* Intention to give L/E – clear language – not absolute title

### Re. Walker

“to all my property…at time of her decease, remainder disposed of”

* Courts say absolute gift – dominant intention to give all to the wife
* Try to take Re. Taylor approach – uphold both intentions if possible
* Principle: whether intention of the grantor was expressed w/ sufficient clarity to override default presumption of f/s

### Christensen v Martini Estate

Gave wife property house for use, when she no longer needed, give to friends

* Drafter was layman – intention to benefit wife and friends
* Courts say L/E to wife, then F/S to friends, no power of encroachment

**Statutory Reform –** protects interest of one spouse when the other spouse has passed away

* Land (Spouse Protection) Act, s. 4(2) – despite will, if spouse dies, L/E arises in favour of other spouse

**Shelley’s Case**

* “to A for life, then to the heirs of A”
* A receives F/S – heirs receive nothing
* Trap for unwary

## Responsibilities

Waste limits extent to which life tenant can encroach on capital

*Ameliorating Waste*

* Acts that enhance the value of the land
* Anger and Honsberger – unless character of property is completely changed, damages unlikely
* Can’t pave paradise to put up a parking lot – may award damages

*Permissive Waste*

* Damage resulting from failure to preserve, repair property
* No positive obligations by tenant for repair, unless built into instrument

*Voluntary Waste*

* Conduct that diminishes value of the land – positive wrongful action
* Tenants liable - prevents timber cutting (some exceptions), destroy building, open mine

*Equitable Waste*

* Severe and malicious destruction (ex. Taking all fixtures from house)

**Remedies**

* Damages – (decrease in value of reversion/remainder)
* Exemplary damages, injunction (if ongoing and more than minor), accounting of profits

\* Grantor can make life tenant “unimpeachable for waste” – not equitable waste

*Law and Equity Act* – s. 11 – must explicitly state that tenant can commit equitable waste

### Powers v Powers Estate

Powers had equitable life estate with power of encroachment (maintain, provide service to property) – limited power.

Issue: who pays the expenses? Life tenant (LT) or remainderperson (RP)?

* Heating costs : LT
* Repairs: Structural – RP ; Minor/recurrent – LT
* Insurance: no obligation, but trustee should - negligence
* Premiums of insurance: Fire – LT ; Property – RP
* Taxes: LT
* Mortgages: LT – pay interest ; can be reimbursed by RP for capital

Leasehold Estates

Rights – to possession of land for certain period (duration of lease)

* F/S or life estate holder retains reversion – transfers right to possession
* Once lease finished, right reverts back to landlord
* CL applies to tenancies, - statutes apply to residential tenancies (not commercial)

## Types of Tenancies

**Fixed term**

* must have valid start and end date
* can end prematurely with specific event – must be certain
	+ ex. 10 yr lease, but will end if person dies

**Periodic tenancy**

* enjoyed for recurring period of time (weekly, monthly) until terminated by notice
* CL – notice = length of tenancy period (but 6 mos notice for yearly)

**Tenancy at will**

* Overholding tenant, with consent – as long as both want it
* No set time – may convert to periodic tenancy
* Created by implication – terms of original lease apply
* Ended by implication – conduct, reasonable notice

**Tenancy at sufferance**

* No right in land – no consent/permission
* When tenant remains on property after other lease ends
* Landlord can evict at any time – tenant liable for use and occupation

**Perpetual lease**

* by statute or Crown grant – not permissible at CL
	+ otherwise will create periodic tenancy or sale (w/ rentcharge)

**Requirements for Valid Lease**

* grant of exclusive possession (licence)
* Identify: parties, property, term (max duration must be certain), start date, rent (if any)

**Formalities for Lease**

* Under 3 Years: none, can be oral – rent must be 2/3 annual market value
* Over 3 Years: modified by statute
	+ *Property Law Act* – s. 5(1), (2) – require standard form (C) from LTO + terms of the agreement

**Lease vs. License**

*Licence =* permission to do that which would otherwise amount to trespass

* If tenancy precluded by statute, then no lease
* If right to possession terminated by outside factors, then no lease (ex. Employment housing, exclusive occupation of small area)

*Lease =* grant of an interest

* Right to exclusive possession
* Indication to be legally bound (rent is good indicator)

\* Note – terminology by parties, restrictions on land not relevant

 - key is intention for occupier to have right to exclusive possession = lease

### Fatac v Commissioner of Inland Revenue

Facts: P granted A right to use quarry. Was this a license or lease? Right to use the property for quarry.

* Does the party enjoy exclusive possession? – no landlord can stay, right to add lodgers
* License if owner provides services that require constant access
* Key – is it actually exercised – not just reservations – look past agreement to actual situation

\*Note, landlord may try to make it look like licence (not lease)

* Greater power/authority
* Can evict
* No legal recourse if interference with possession
* Licensee may not get same protections as tenants (depends on BC law)

**Obligations of Landlords and Tenants**

* Freedom of contract – commercial leases
* Terms implied by CL:
	+ Covenant by landlord not to derogate from lease
	+ Covenant by tenant to pay rent, keep up repair, pay taxes, allow landlord to enter/view state of property

*Covenant for Quiet Enjoyment*

* Gives tenant protection against substantial interference w/ use/enjoyment of premises by landlord or others claiming under landlord
* Includes:
	+ Direct physical interference (*Kenny v Preen*)
	+ Indirect action in certain circumstances (*Pellatt v Monarch Investments –* renovating apt during bar exam)
	+ May include regular excessive noise/odour/mess

### Southwark LBC v Tanner

Facts: 2 separate properties, two separate P’s. Neighbour’s noise reasonable – paper thin walls. No sound insulation.

Issue: breach to right to quiet enjoyment?

* Right doesn’t cover paper thin walls – disturbance there at beginning of term, so not covered – no breach
* Different approaches to whether disturbances by other tenants is breach:

1) Disturbances caused by tenants in circumstances where landlord could’ve taken action but didn’t – breach (*Albamor Construction)*

2) Where tenants cause disturbance, landlord must have consented or actively participated (*Curtis Investments)*

# Survivorship

### Wills, Estates and Succession Act

Part 2, Division 2 – Survivorship Rules

*Order of Death in Common Disaster*

* Doctrine of lapses – gift to a beneficiary who predeceases the testator, will lapse
* BUT – if survives testator, even for instant, it passes into their estate
* In CL – had to prove order of death (hard, lots of lapses)

S. 5 (1) – presumes that beneficiary dies before testator does – so gift will lapse – presumption that each person has survived the other

S. 5 (2) – Joint tenancy – deemed to tenancy in common – so descends to each of the heirs of those individuals – more fair, each descendant gets it

S. 6 – Deference to instruments – if explicitly describes when someone dies before someone else, at same time , or if hard to know (so can opt out) – deems that person to whom provision applies has died before other – alternative disposition provision applies

*Survival of Beneficiaries*

S. 9(1)(a)+(b) – If right to beneficiary to receive is conditional on them surviving someone else, and it’s impossible to tell, beneficiary deemed to predecease

S. 9(2)(a)+(b) – gift to 2 people, then to survivor of them, but both die at same time – share gifts equally between their successors

*Five Day Survival Rule*

S. 10(1) – For gift, if beneficiary doesn’t survive person by 5 days, then deemed to predecease (so gift would lapse) – more likely will-makers wishes honoured

Part 3 – When a Person Dies without a Will

Division 1 – Distribution of Estate w/o Will

**Intestate Succession**

* What happens when person dies, no will
* Or will, but doesn’t deal with specific property

*Spouses*

S. 2- Spouse definition – (a) married (b) – common law for 2 yrs

S. 20 – if there’s a spouse, but no descendant, intestate estate goes to spouse

S. 22 – if 2 or more spouses, share to which they agree (or court decides)

S. 21 – spouse + descendant – spouse gets household furnishings and preferential share of intestate estate (2)(a)(b)

* (1) – definition of household furnishings
* (3) If descendants from both intestate and spouse, preferential share of spouse is $300,000 or greater if prescribed
* (4) if children not all from spouse, preferential share = $150,000
* (5) If less than preferential amount, then all goes to spouse
* (6) If greater, (a) spouse gets preferential share, and (b) residue is distrusted as (i) 1/2 to spouse, (ii) 1/2 to descendants

*Parentellic Distribution – No spouse, but Descendants/Relatives*

s. 23 (1) person dies w/o will and w/o spouse

* (2)(a) – all go to descendants
* (b) – no descendants, then to parents
* (c) – no descendants, no parents, then descendants of parents (siblings, nieces, gn’s)
* (d) – none of these, then to grandparents (or descendants – uncles, cousins)
* (e) – if no grandparents, not descendants of grandparents (uncles, cousins) – then try great-grandparents, (or their descendants)
* (f) – if no one, then Escheat Act
* (3) – people to 5th degree of relationship deemed to have predeceased estate
* (4)(a) – (3) doesn’t impact intestate’s direct descendants – cut off at 5, but not for direct descendants (b) can still claim under Escheat Act on basis of legal/moral claim (mechanism if cut off)

*Distribution to Descendants*

S. 24(1) – where money given to descendants, it would be distributed equally between children (a) - if alive)\

* (b) if one descendant dead, then children get it and it’s distributed equally

Division 2 – Spousal Home

*Right to Spousal Home*

S. 26(1) Right of spouse to acquire spousal home – satisfy part or all of spouse’s share of estate

S. 27(2) Spouse must acquire right to spousal home within 180 days

s. 29 – How the spouse can exercise their right to acquire the spousal home (see statute….too long) – share is dollar value, notice provided to other beneficiaries

S. 30 – How to resolve a dispute over the value of deceased person’s interest (see statute)

S. 31 – (1) Gives spouse ability to purchase remainder of deceased person’s interest (see statute) – right to purchase at fair market value if preferential share not sufficient for full amt

*Adopted Children*

S. 3, WESA 2(a) - Once children are adopted, they cease to be descendants of their pre-adoption parents ((3) exception – step-parent adoptions)

*Adoption Act –* s. 37 – Adopted children become descendants of individuals that adopted them (and vice versa)

# Qualified Transfers, Future Interests

Harry (fee simple owner) conveys property to Hermione for life.

* Hermione has life estate
* Harry retains **reversion interest**
	+ Like rubber band, goes back to will maker

Harry (fee simple owner) conveys property to Hermione for life, then to Ron in fee simple

* Hermione has life estate
* Ron has **remainder interest**
	+ goes on to third party
* Harry has nothing

\*\* Remainders and reversions are both considered “present rights to future enjoyment” (Stuartburn v Kiansky – P still considered to have interest in land for remainder interest. Co-exists w/ L/E even though can’t use land)

## Defeasible Interest

* Can be brought to premature end with specific event – called condition subsequent (not given – “might”)
* Dark cloud hanging over complete estate

Harry grants property to Hermione, on condition that if she studies 14 hrs, my estate may re-enter.

* Hermione – has defeasible fee simple interest
* Harry – right of re-entry

**Rights of re-entry must be exercised**

Need:

* Formal entry
* Demand for possession
* Under CL – no limit to how far in future right of re-entry exercised
* *Limitations Act* – s. 3(1)(d) – no limit

## Determinable Interest

* Upon occurrence of “determining event”, fee simple ends automatically

From Harry to Hermione until Hermione begins to study for 14 hrs day on regular basis

* Hermione – determinable fee simple
* Harry’s estate – possibility of reverter

To Harry for life while Harry remains a Quidditch player

* Harry – determinable life estate
* Grantor (or heirs) – reversion in fee simple

**Determinable vs. Defeasible**

* Question of intention – based on words used
* Words associated w/ determinable:
	+ While, during, so long as, until, words of duration/time
	+ “fence post”; limited by a condition
* Words associated w/ defeasible:
	+ On condition that, but if, provided that, if it happens that
	+ “dark cloud”; independent clause added to complete f/s

### Caroline (Village) v Roper

Facts? Land granted to community center. “shall revert back to the late Thomas Roper Estate if used for other than community center”

* Court found – defeasible interest in fee simple – condition subsequent
* Uses future tense, based on something that might or might not occur

**Effect of breaching the clause**

* Defeasible –
	+ condition subsequent breached - grantor must exercise right of re-entry (optional)
	+ forfeiture clause – if invalid, clause is struck out – seen
* Determinable –
	+ estate lost automatically
	+ If forfeiture clause invalid, entire grant/estate is invalid
		- Reverts back to grantor

**Applicability of rule against perpetuities**

* Possibilities of reverter – in Canada, seen as vested
	+ RAP doesn’t apply to vested interests – so doesn’t apply
	+ RAP – s. 23 – says that treated as condition subsequent
	+ Rights of re-entry – seen as Contingent interest
	+ RAP does apply
	+ See *Roper*

## Vested vs. Contingent Interests

Vested Interest

* No limitations or conditions
* Need certainty
* Ex. Devise by Harry to Hermione for life, then to Ron
	+ Hermione – life estate, vested in possession
	+ Ron - remainder, vested in interest

Contingent Interest

* Vesting delayed pending occurrence of a condition precedent
* Conditions precedent = conditions of eligibility
* Bridge must be crossed before estate can be enjoyed

From Harry : to Hermione for life, remainder to Ron but only if Ron marries

* Hermione = life estate, vested in possession
* Ron = contingent fee simple remainder
* Harry = reversion in fee simple, vested in interest

\* Note – condition can serve both as condition precedent and condition subsequent

Transferability – can transfer essentially every type of property interest.

* Can transfer contingent interest – *Property Law Act* – s. 8(1)
* NOT possibility of reverter (although there is one case – West Sea Construction, where this may be possible)

### McKeen Estate

Residue of estate should be divided “equally between sisters, if both are alive at time of death of the survivor of me and my said wife. If only one alive at time of death of me and wife, residue of estate to surviving sister, absolutely.” Both sisters survived testator, but died before wife.

Issue: Are sisters’ interest contingent on surviving the wife? If so, then their interest wouldn’t be vested, and their heirs wouldn’t get the estate.

* Most important question is intention of the testator
* 3 important presumptions:
	1. presumption against intestacy
	2. construction in favour of vesting
	3. Rule in Browne v Moody
* Gift prima facie vested if postponement is to allow for a prior life estate
* Don’t want it to be contingent on person dying
* Result : residue vested in sisters at death of willmaker – interest of deceased sister could be divested if other sister survived life tenant

## Limits on Conditional Transfers

* Conditions on grants/devises presumptively valid
* Can be invalidated by: uncertainty, public policy, restraints on alienation
* For CS – struck out if invalid
* Determinable limitation invalid – entire grant/devise fails
* For CP – condition voided – generally grant/devise will fail

**Uncertainty**

* Conditions attaching to property transfers that are too imprecise may be found to be void (conceptual uncertainty, not evidentiary– condition unclear)
* Policy reason – need for certainty in property dealings
* Objective test – in position of testator at time will made

2 Tests:

1. Condition subsequent/determinable limitations
* Donee must be able to see distinctly and precisely what action will lead to loss of their interest (*Hayes)* - higher threshold
1. Condition precedent
* Need to show that condition is capable of being given some meaning
* Lower threshold – just vague and meaningless

\* Result – Condition subsequent/determinable limitation more subject to invalidity than condition precedent

### Sifton

Facts – required her to stay in Canada, found to be too uncertain b/c not obvious what could invalidate it.

### Hayes

Facts:

* Condition to reside and cultivate the land – treated as condition subsequent
* Void for uncertainty – question of what is “residency” and time restraints
* Condition subsequence clause is invalid, so gift given

**Public Policy**

* Conditions should be declared invalid on public policy ground only in clear cases where harm to public is “substantially incontestable” (*Millar*)

### Re Millar (Stork Derby)

Facts: In will, left remainder of shares in jockey club to who could have the most women in 10 yrs after death.

Issue: Does this offend public policy? Harm to women/children

* SCC – substantially incontestable – high bar
* Not invalidated

*Restraint on Marriage*

* Total restraint on marriage contravened PP (partial may be allowed)
* Ex. “No Scotsman” – allowed, but not “If ever get married”

*Breach of statute/civil wrong*

* Invalid if required to breach statute/commit civil wrong/encouraged to violate criminal law (ex. To A if she shoplifts)

### Kent v McKay

Facts: Split up property to the family – on condition that if anyone institutes litigation for provisions of will – then benefits are revoked.

* Found clause would prevent statute (*Wills Variation Act*) from ensuring adequate support for specific individuals – so was invalid

*Race and Religion*

* Charter can apply indirectly – to private transaction

### Leonard Foundation

Facts: scholarship fund for…

* Public or quasi-public trust based on notions of religious superiority contravenes public policy – against equality values of Charter
* Doctrine of cyprès applies – courts can amend trust as close as possible to testator’s original intention
* Court says – validity should be assessed w/ same standard of human rights law – equality analysis like Human Rights Commission
	+ Limited to public trusts – balancing process

### Ramsden

Facts –NS scholarship

* Okay because 3rd party rep gave out scholarships
* Not public, so fine

**Restraints on Alienation**

* Doctrine of repugnancy: restraints are invalid if they are inconsistent with an inherent attribute of ownership (ie. right to transfer property freely)
* Ex. To A on condition that property never sold, leased or mortgaged – invalid
* 4 ways to take away power of alienation – see *Blackburn* – see test

### Rosher

If son sold, would have to offer to mother at 1/5 of price – held to be restraint

* Want to allow property to move around freely – no friction
* Market provides best mechanism for allocating resources
* Tends to result in concentration of wealth (within families)
* May prevent improvements on property

### Trinity College School v Lyons

Facts: 2 aspects of agmt in question – right of first refusal granted by T & MB, and post-mortem option

* Right of first refusal – not restraint on alienation – seen as aspect of proprietary freedom (given by the Bennetts through land they owned)
* Post-mortem option is restraint (executrix of will acquired property less than f/s – not her will, but decision of TCS

### Blackburn v McCallum

Facts: Can’t sell/encumber land for 25 years post-testator’s death

* Test: does the condition take away whole power of alienation substantially?
* Look at : Mode of alienation (ie. mortgage, no selling), class of recipients, time period, price
* Here – can’t mortgage or sell, nobody can buy, time is 25 yrs – found void

### Thibodeau v Thibodeau

Facts: From parents to son. Can’t transfer property to anyone except James’ son Luc. Luc can only sell to continue education.

* Class – just one individual – substantial restriction so void

### Re: Brown

Facts: Family business given to 4 sons – can sell or mortgage only to each other

* Void because limited class
* \* Note - different in *Re. MacLay* – can only sell to family members – found valid b/c on other restrictions (time, mode, price) and the class can increase

# Equitable Interests

* CL is wary of contingent remainders – want estate to be vested
* Way around LRR rules – creation of trusts
* Equitable interests not subject to rules against legal remainders – trustee always seised of the land

**Statute of Uses**

* Executes the use
* Ie – to A for the use of B (A has legal f/s, B has equitable f/s)
* Now A dropped from grant – B now has both legal and equitable f/s

## Ways around the Statute of Uses:

**1) Leasehold Estate**

* Statute interpreted as applying only to freehold estate, not leasehold
* To A for 999 years to use of B for 999 years (Statute won’t execute)

**2) Conveyance to a corporation**

* Can avoid Statute by making trustee a corporation (to B Ltd in trust for A)

**3) Give trustees active duties to perform**

* Statute limited to bare uses
* Active duties include: manage property, pay rents and profits

**4) Exhaust the Statute**

* Grant from O to A and heirs to the use of B and heirs to the use of C and heirs
	+ A = legal f/s
	+ B = equitable f/s
	+ C = equitable f/s (trust executed)
* To B and heirs for the use of C and heirs
	+ A = out of picture
	+ B = legal f/s
	+ C = equitable f/s

\* Key – must determine how many fee simples you’re dealing with

# Rule Against Perpetuities

**Contingent interest:**  interest that contain a condition precedent

**Vesting:** property is vest where no conditions need to be satisfied before person can claim interest in the property – RAP doesn’t apply

RAP – rule that sets the outer limits of a period within which any contingent interest must vest, if it vests at all

If any chance contingent interest might vest outside perpetuities period, it is void

* Policy reasons: limit power of wealth holders to impose conditions on property
* Balance of prior owner to control property, and power of present owners
* Perpetuities period = length of lives in being, + 21 years

BC Perpetuities Act

* Fewer grants found to be void on RAP
* S. 6 (1) – except as in the Act, CL RAP still have full effect
* Apply CL first – if disposition valid under CL rule, then don’t need to go to Act (except possibilities of reverter – modified by s. 23)

*Relevant Provisions:*

* s. 7(1) – if an interest must vest within 80 yrs of creation of interest, doesn’t violate RAP
* s. 3 – order of application of remedial provisions (after s. 7): s. 14, 9, 11, 12, 13.
* s. 14 – Capacity to have children
	+ 1(a) – presumption for males (able to have a child as of 14 yrs)
	+ 1(b) – presumption for females (able to have child btw 12 and 55)
	+ (2) – allows to show evidence that person not able to have child
	+ (5) – don’t consider fact that can adopt a child beyond period
	+ (4) – court can make order to protect right child would’ve had
* s. 8-10 – Wait and see
	+ s. 8 – no disposition void for violating RAP, just b/c possibly could best beyond perpetuity period – instead wait and see
	+ s. 10 – period of waiting
		- 10(1)(a) – CL period of LIB, + 21 years if there are statutory LIB (2)
		- 10(1)(b) – if no statutory LIB, (2), then 80 years
		- 10(2) – statutory LIB – must alive at time made, and ascertainable
			* (a) person making disposition (not for will)
			* (b)(i) – any alive member of a class
			* (b)(ii) – person who has satisfied some, but not all conditions
			* (c) – parents or grandparents of beneficiaries, or potential parents or GP of beneficiaries/potential beneficiaries
			* (d) – holder of prior interest in property
			* (e) unborn spouses
* s. 11 Age reduction
	+ (1) If there is a requirement to meet a certain age, greater than 21 and (a) void , but (b) wouldn’t be void if was 21 yrs, then can be construed as if the closest age to prevent the interest from being void
	+ (2) one age reduction to embrace all potential beneficiaries must be made
* s. 12 Class splitting
	+ (1) allows ppl to be excluded from class - to save the disposition being void for remoteness - apply wait and see, and then exclude ppl that are void
	+ CL rule (Andrews v Partington) – allows class of potential takers to be closed if 1 member of class is entitled to receive share
* S. 13 Cy-pres – if none of other remedial sections save a gift, s. 13 confers on courts power to rewrite disposition to comply w/ RAP – only so far as w/ general intention or donor or testator
* s. 22 – for easements, profit a prendre
	+ (a) perpetuity period is 80 yrs from creation of interest
	+ (b) validity determined by actual events within 80 yrs period
	+ (c) easement only void for remoteness if fails to acquire characteristics of present exercisable right in servient land within 80 yrs
* s. 23 – possibilities of reverter and conditions subsequent
	+ (1)(a) – the RAP applies to determinable interests

**5 Step Approach (McCrimmon)**

1. Is the limitation vested or contingent?
2. What is the date of the creation of the interest?
3. Who are the lives in being?
	1. Human
	2. living at date of creation of interest
	3. ascertainable – not too numerous
4. Is it theoretically possible to construct circumstances in which vesting would occur outside perpetuity period?
5. Can limitation which is invalid under CL rule be saved through statutory modifications?

# Common/Shared Ownership

* Both own a whole estate – right to possess in entirety
* Share in fee simple

Ex. O conveys estate to both A and B.

* Both have f/s estate
* As co-owners, right to possess whole property
* If one dies, depends on Form of grant and subsequent events, what happens

## Joint Tenancy vs. Tenancy in Common

* Both have equal right to possession and use of land
* Can make inter-vivos dispositions of share in undivided property

Difference:

* Only tenant in common can dispose or share by will
* Joint tenants constrained by right of survivorship
	+ On death of JT, their share goes to surviving co-owner
	+ Like the Simpsons fighting Hellfish – last one has 100%

In grant, CL presumption in favour of joint tenancy (*Bancroft)*

Modified by statute:

* *Property Law Act* – s. 11(2) – now presumption of tenancy in common
	+ Except for trustees/personal reps – presumption of JT
* Presumed to be TIC unless contrary in instrument

### McEwen v Ewers & Ferguson

Facts: T devised lot to daughters B and J under will. Stated become their property “jointly,” and if they sell, divided equally. B predeceased J, by will gave ½ to P.

Issue: Did will create joint tenancy or tenancy in common? Enough to rebut presumption in s. 11(2)?

* Not enough – didn’t stand alone (additional clause after)
* Jointly and equally = TIC
* Words of division/distribution (“to be divided” or “equally”) = TIC
* Any intention to divide the property = TIC

4 Unities

1. Possession (right relate to same piece of property)
* Each co-owner entitled to possession of all property – subject to equal right of possession of other co-owners
* Choosing not to exercise right to pss’n doesn’t destroy unity of pss’n
1. Interest (holdings equal in nature, extent, duration – ex. Both L/E)
* Co-owners must have same estate in land, equal share in estate, and same quality of estate (legal, equitable or both)
1. Time (holdings arise at same time)
* All co-owners receive their estates at same time - vest simultaneously
	+ Exception – to children at JT – when they are born
* S. 18(1) PLA – can convey land to yourself jointly w/ another person
	+ Ex. Conveyance from A to “A and B”
1. Title (holdings arise from same act or instrument)
* Same instrument, whether will or deed

**Joint Tenancy**

* Need express declaration that grant/devise is in joint tenancy
* Need four unities

\* Right of survivorship

**Tenancy in Common**

* S. 11(2) PLA, presumption of tenancy in common
* Need just unity of possession (but can have more)

\* Interest devolves in accordance w/ general principles

* Creating a tenancy in common:
1. Express creation
2. Pursuant to statutory presumption
3. Result of a failed attempt to create a joint tenancy
4. By operation of law

#### Severance of Joint Tenancies

* By one person acting on his own share
* By mutual agreement
* By any course of dealing sufficient to indicate that interests of all were mutually treated as constituting tenancy in common
* Severance through unilateral action – any act that destroys 1 of 4 unities brings JT to an end
	+ Ex. A, B, C are JT. C conveys to D. Now A&B JT, D holds 1/3 TIC
	+ Or A & B JTs. A conveys from A to A. Severs JT.
	+ PLA – s. 18(3) transferring to yourself same as transferring to stranger, so can sever JT
	+ \* can’t sever JT through a will

#### Ending Co-ownership

* can apply for court order partitioning property (parcels) or for its sale w/ a division of proceeds
	+ if agree, then no issue, if one opposes, then there is statute
* *Partition of Property Act* – s. 2(1) parties may be compelled to partition
* s. 2(2) – applies to both legal and equitable interest
* s. 4(1) – who can apply for partition/sale:
	+ JT of f/s or profit/pronder
	+ TIC of f/s or l/e
	+ Co-owner of lease hold estate
* Two remedies: partition or sale (sale more common)
* S. 7 – courts can order sale in place of partition, if more beneficial based on nature of property, number of parties, absence/disability of parties, other…
* S. 10 – allow co-owners and others interested in land to bid at sale

Possibility of reform

* Get rid of severance in secret – public interest reasons (but maybe power imbalance)
* Eliminate 4 unities rule – so only right of survivorship matters
	+ Seen as artificial, ppl want more flexible JT (commercial relationships), and want survivorship to apply in more circumstances

# Aboriginal Title

## History of Nisga’a Title

      State-based European systems versus kinship-based Aboriginal systems

      Introduction of smallpox vastly diminished numbers of Aboriginals (90%)

      Aboriginals part of global flow of capital through sea otter hunt

      Two systems:

o   French who followed traders inland, setting up posts as they travelled  North West Company

o   British who established trading posts along the coast and offered higher prices  Hudson Bay Company

      Eventually merged into Hudson’s Bay Company, whose core was at Fort Vancouver

      Used Indigenous dispute resolution methods, took place on Native space

      Oregon Treaty – 49th parallel

      Movement of trading post from Fort Vancouver to Fort Victoria, land of Vancouver Island given to Hudson’s Bay Company

      James Douglas, governor in 1850 negotiated “Douglas Treaties” for Crown

o   14 different treaties, see map

o   Colonial office in London prepared template

o   Close to what Douglas thought he accomplished

      Replacement of Douglas with Trutch, who had no experience in fur trade

      Granted 10 acres per head of Aboriginal peoples, while standard was 160

      BC joins Confederation

      Calder for recognition that AT does not owe origins to proclamation, 6 judges recognizing existence of title as legal entity

How to Approach

1)   Text of treaty

2)   Additional documents

3)   Oral agreement

### Key points

      Interplay between courts and governments with respect to AT

      Collision/relationship between Indigenous and Western legal traditions

      Two row wampum and its connection to AT and Aboriginal/non-Aboriginal relations

      Maps, sense of being in courtroom

Land Rights  bridge between two different land rights systems

Treaty rights: rights that have been recognized in a treaty

Aboriginal rights: now recognized as inherent, not based on any agreement or declaration; flowing from occupation of Canada by Aboriginals at assertion of sovereignty; contains Aboriginal title, and other rights such as hunting, fishing, relationship between common law and pre-existing Aboriginal systems

## Development of Aboriginal Title

#### Royal Proclamation, 1763

And whereas it is just and reasonable and essential to our Interest and the Security of our colonies, that the several nations or tribes of Indians with whom we are connected and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded or purchased by us, are reserved to the, or any of them as their hunting grounds. We do therefore, declare it to be our Royal Will and Pleasure that no governor or commander in chief in any of our colonies of Quebec, East Florida or West Florida, do presume upon any pretense whatever to grant Warrants of Survey, or pass any Patents for Lands beyond the bounds of their respective governments… or pass Patens for any Lands beyond the heads or sources of the rivers which falling into the Atlantic Ocean from the West and North or upon any lands whatever, which not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.

And we do further declare it to be our royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection and dominion for the use of said Indians, all the lands and territories not included within the limits of the 3 new governments or within the limits of the territory granted to us be the Hudson Bay Company, as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north west as aforesaid.

And we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of the lands above reserved, without our especial leave and license for that purpose obtained.

#### British North American Act, 1867

91(24): Indians, and Lands reserved for the Indians

109: All lands, mines, minerals and royalties to provinces.

#### St. Catharine’s Milling

-       Aboriginal title flows from the Royal Proclamation of 1763:*just and reasonable and essential to our interest and the security of the colonies, that the several nations and tribes of Indians with whom we are connected and who live under our protection, should not be molested and disturbed in possession of such parts of Our Dominions and Territories as have not been ceded to or purchased by us and are reserved to them as their hunting grounds*

-       Properties of AT:

o   Is alienable only to the Crown

o   Is “dependent on the goodwill of the sovereign”

o   Exists in conjunction with underlying Crown title – burden

o   Is personal and usufructuary

#### R v White and Bob

-       Question to be resolved with view to how parties must have interpreted the document

-       Natives relied on the assurance of the “word of the white man”, which was an important means of gaining cooperation of native tribes & protecting settlors

#### Calder et al v Attorney-General of BC

F: Nisga’a Nation seeking declaration of AT over 1000 sq miles in NW BC

I: 1) Did the Nisga’a ever have AT to the land in question? What was the source?

2) If AT did exist, had it been extinguished by the Crown?

A: 1) 6/9 Judges: Title was present and inherent in occupation

2) 3/6 said it had been extinguished, 3 said it had not

Summary: “Although I think that it is clear that Indian title in BC cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers has done for centuries… That is what Indian title means and it does not help one in the solution of this problem to call it a ‘personal and usufructuary right’” (Judson)

      AT as inherent, based on historic occupation & use of land

      Exists at same time as Crown title

      Can only be alienated to the Crown

      Can be extinguished by the Crown under limited circumstances

#### Guerin v Canada

-       AT existing in conjunction with underlying Crown title

-       AT as “sui generis” or unique

-       Fiduciary relationship created the fact AT can only be surrendered to Crown

#### R v Sparrow

-       Consideration of s 35(1) on Aboriginal rights for first time

-       S 35(1) “*Existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed*”

o   Rights in existence in April 1982

o   Rejection of “frozen rights” doctrine

-       Process for considering Aboriginal rights claims

1.     Did the claimed Aboriginal rights exist in the past? (onus on claimant)

2.     If the Aboriginal right existed, does it still exist or was it extinguished? (onus on Crown)

  Who can extinguish? Only Federal government

  Can Aboriginal rights be extinguished unilaterally by gov’t

      Pre 1982: yes

      Post 1982: no

3.     Does the regulation prima facie interfere with the Aboriginal right? (onus on claimant)

  Is the limit unreasonable?

  Does it impose undue hardship?

  Aboriginal perspective

4.     If the regulation prima facie interferes with an Aboriginal right, can this be justified? (onus on Crown)

  A) Valid legislative objective?

  B) If yes, does regulation reflect fiduciary relationship?

#### Delgamuukw v BC

1)   Use of oral histories as evidence

-       TJ erred in refusing to give weight to oral histories

-       Aboriginal rights must be adjudicated in a way that reflects Aboriginal perspective & Canadian legal and constitutional structures

-       Goal:  Reconciliation of prior occupation of land by Aboriginals and Crown sovereignty

2)   Nature of Aboriginal title

-       AT as right to land itself, more than license to occupy and use

-       AT is sui generis

-       Ultimate sovereignty and underlying title or fee simple lie with Crown

-       AT is inherent

-       AT is inalienable except to Crown

-       AT is held communally

-       Lands held pursuant to AT cannot be used in a manner irreconcilable with community’s continued relationships with the land

3)   Proof of Aboriginal title

-       Claimants must show that (1) land was occupied prior to Crown sovereignty, (2) occupation was exclusive

-       For occupation, look to Aboriginal and common law perspectives, taking into account size, lifestyle, resources and technological abilities of claimant FN and character of land being claimed

-       “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources”\*

4)   Extinguishment of Aboriginal title

-       Can only be done by the federal gov’t since confederation

-       Pre 1982  bilaterally or unilaterally if intention sufficiently clear and plain

-       Post 1982: bilaterally

5)   Justification of infringement of Aboriginal title

-       Both federal and provincial governments can regulate Aboriginal rights

-       If prima facie infringement shown, regulation valid only if gov’t shows:

o   Compelling and substantial legislative objective (quite broad)

o   Restriction meets fiduciary obligations of Crown  may require balancing with other interests, will depend on circumstances

#### R v Marshall; R v Bernard

F: Charged under *Crown Lands Act* (Marshall) and *Crown Lands and Forests Act*(Bernard) with cutting timber on Crown land without a permit. Mi’kmaq argued they were entitled to log there due to AT

I: How to consider Aboriginal and common law perspectives in proving occupation?

A: McLachlin: Look to pre-sovereignty aboriginal practices and land use, and translate them into modern right.

LeBel: More weight to Aboriginal perspectives, including systems of law existing pre-sovereignty

C: Claim dismissed for lack of evidence to identify AT areas: where & how extensive?

#### Williams v BC

F: Deals with Aboriginal rights (including title) of Xeni Gwet’in and Tsilqot’in FN in west central interior of BC. Provoked by planning for extensive clearcut logging, they are caretakers of the area and have a sacred duty to protect it.

Trial

Found AT and rights vest in Tsilhqot’in Nation, not band, Aboriginal rights to hunt and trap through claim areas including right to capture and use wild horses and right to trade skins and pelts to seek “moderate livelihood”. BC must develop new model of sustainability in claim area.

Occupation at sovereignty included “village sites”(winter settlements), “cultivated fields” used to gather root plants, medicines and berries, and a well defined network of waterways and trails, and definite tracts of land used on regular basis for hunting, trapping, fishing and gathering.

Plaintiff pleaded AT to Brittany Triangle and Trapline Terrority but TJ held pleadings barred declaration of AT to smaller areas within claim area.

Appeal

BC appealed, saying that AT and rights vest in bands, not Tsilhqot’in Nation, as does not have centralized political structure or governing body. BCCA said TN as proper rights holder, and affirmed Aboriginal systems of governance. Upheld all Tshilhqot’in Aboriginal rights throughout entire claim area.

BC argued that infringement should not be found at strategic management level, instead focusing on specific, on-the-ground interference. CA disagreed, finding that forestry planning and licenses were problem & forestry could not proceed.

Plaintiff wanted AT to claim area. BCCA said flexibility important: could have declared AT to lesser, included areas. Aboriginal title must be proven on a site-specific basis, despite rejection of TJ of this approach as “postage stamp”. Sites on which hunting, fishing or resource extraction took place on regular and intensive basis.

Canada wanted to bar TN from claiming AT in claim area on res judicata; BCCA disagreed and said they could bring new actions for AT to specific sites.

Appeal to SCC on AT issue.

**Issues:**

•       BCCA ruling not considering Delgamuukw\* and Bernard/Marshall findings about regular use and control over tracts of land for hunting, fishing, etc

•       Disregards Aboriginal ways of life in use and occupation of land

•       Disregards historical foundation of title: hunting grounds in possession in same ways as fields to whites (Mitchel v US).

•       Fails to acknowledge legitimacy of Aboriginal land use systems calls back doctrine of discovery, organized society test

o   S 35: equal recognition and respect required

# Land Title Registration

Previously had deed registration system

* Registry office simply depository - voluntary -
* Purchaser responsible to search and evaluate all title – every time property sold
* 3 types of deed registration systems:
1. Race system:
* Priority based on order of registration
1. Notice system:
* Priority ranked on basis of whether subsequent transaction was undertaken w/ notice of prior transaction
1. Race-notice system:
* First person to register has priority, provided they didn’t have notice of any previous interests

Shortcomings: no guarantee that registered land is correct, and always subject to person who is wrongfully deprived. Registration doesn’t cure the title

## Torrens-type Land Title Systems

* To simplify land transactions and reduce transaction costs
* Reduce risk of loss to individuals
* Make sure full economic potential of land resource is unlocked
* Need for balance – risk of loss for ppl who have property – fraudulently given away

Mirror : system itself reflects all relevant property interests at present moment

Curtain : Purchaser doesn’t need to search title, worry about transactions not on record

Assurance/Net: If a property owner suffers b/c of error on record, compensation is provided by the gov’t

Title Registration in BC – adopted in 1860 by 2-tier approach.

Mirror principle : Made title **indefeasible** – can’t be annulled by prior act that might undermine validity of current rights

* Once registered, they are considered owner – not possible to dislodge
* Unless person on title takes part in fraud
* 2 types of indefeasibility:

**Immediate Indefeasibility:**

* Purchaser for value who obtains a certificate of title w/o knowledge that certificate of title obtained by fraud – receives protection of land titles legislation
* Act in good faith on basis of forged instrument

**Deferred Indefeasibility:**

* Purchaser who obtains title w/o knowledge that certificate of title obtained by fraud – **does not** receive protection of land titles legislation
* Loses title to original owner – unless another person acquires from registered owner
* Requires one more step – removed from rogue and forged instrument

\* Balances between efficiency and protecting rights of current property owners - deferred has transaction costs and opportunity costs

* Immediate ID – homeowner has no action, open to eviction – has no chance to avoid fraud
* DI encourages purchasers to be diligent – chance to avoid

### Lawrence v Wright

Facts: L’s home sold by someone posing as L to an imposter, W. W mortgages to MT, which registers the mortgage. L applied to have transfer to W & mtg set aside. TJ voided transfer to W, but upheld mtg. Should it be overruled – only true owner can grant charge on land?

* No – nemo dat principle defeats entire purpose of act – CL principle
* Immediate indefeasibility rejected –
* SO…deferred indefeasibility in Ontario
* 3 classes of parties: original owner, intermediate owner (who dealt w/ party responsible for fraud), and deferred owner (BFPFVWN)
	+ only deferred owner defeats original owner’s title
* MT’s mtg set aside
* MT had title that was voidable – recognizes interest – so can apply to assurance fund
* Want to place burden on person who dealt with the fraud

**Nemo Dat**

* Can’t give better title than you have
* Protects property rights of original property owner

**Exceptions to Nemo Dat - LTA**

* Privilege efficiency of commercial transactions over protection of property
* Must be bona fide purchase for value without notice (BFPFVWN) & fit within one of recognized exceptions – with respect to fee simple (not charges)

Compulsory title registration

* + *Land Title Act* – ss 20(1) / 175(1),
	+ Must be registered in compliance w/ act / requires registrar to store titles

Assurance Fund (net)

* + *LTA* – Part 20 - for ppl deprived of interest - s. 296 (1)(2)

Registration gives indefeasible title (mirror)

* S. 23(2) – indefeasible title is conclusive evidence that person named in title is indefeasibly entitled to estate in F/S
* S. 23(2)(i) – Fraud exception –
* S. 25.1(1) – mirror provision – protects against void instruments

SO….LTA provides certainty in proof of title by reference to a certificate issued by the registrar and made conclusive at law (ss.23)

Also…abolition of the doctrine of notice (curtain) (s. 29(2)) – see below

BC Has System of Immediate Indefeasibility

* Indefeasibility only applies to F/S interests – *LTA* – s. 23(2), 25(1)
	+ 23(2) states “as registered *owner*”, and exceptions to void instruments only applies to f/s interests
* Charges are defeasible if based on a void instrument – *LTA –* s. 26(1)
* Definition of charge – s. 1 – estate less than f/s includes encumbrances (l/e, lease, mortgage)

### Credit Foncier

Facts: B registered as owners of f/s estate. Fraudulent mtg from B to TIL (forged by Allen). Mtg assigned from TIL to Stuart, Stuart assigns mtg to CF. CF brings action against B for personal judgment and foreclosure. Mortgage created w/ void instrument valid?

* Concept of indefeasibility doesn’t apply to charges
* “deemed to be entitled” in s. 26(1) signals rebuttable presumption CF had rights
* b/c of forgery, mortgage was nullity – registration had no effect, so mtg discharged

\*Authority for where rogue creates mortgage and transfers to someone else

### Canadian Commercial Banks v Island Realty

Facts: PM owns fee simple in Kelowna. ILA holds first mortgage. PM grants 2nd mtg to IR and registers it. Then C/Rogue contracts A looking for loan to be secured by 2nd mtg on Kelowna lands. C/Rogue registers forged discharge of of IR mortgage. A advances money to C/Rogue, who abandons law practice. PM files for bankruptcy. Kelowna property sold, pays out 1st mortgage. Can’t pay A’s mortgage – not enough $.

* Is forged discharge is a nullity, this goes against purpose and effect of LTA
* Should be able to rely on registry
* Distinguishes Credit Foncier b/c not void instrument – acquired land from registered owner – mortgage was valid, it was just discharge that was fraudulent
* As long as reg’d holder of charge dealt w/ reg’d holder of f/s interest, court would uphold presumption in favour of charge’s validity

### Gill v Bucholtz

Facts: G owned Lot 4. Rogue forged G’s sign on transfer to Ms. G, who granted mtg to B. She then neg. 2nd mtg to 4337 Investments. G filed caveat, reg of 2nd notice refused – but 4337 Ivst had already advanced $55G – relying on title. No mtgees had knowledge of fraud. Asked for proof of ID that she was on document b4 advancing funds. R is unknown.

* Ms. Gill didn’t take interest when she registered mtg – b/c of 23(2)(i), 25.1 – fraud, couldn’t gain protection of LTA
* Are mtgs valid?
* Fraud exception applies – void instrument in 25.1(1) includes mtg taken from person who obtained title by fraud
	+ Exception negates indefeasibility even when fraudsters title enforced and uncancelled
	+ If fraudulently on title, mtg will be invalid even if with valid instrument
* Preserves nemo dat rule for charges (even if reliance on the register)
* Mortgagee’s can’t rely on assurance fund, no interest – instruments were void under CL and s. 23(2)(i)

Notice for when the underlying fee simple is fraudulent, and grants mortgage – upholds nemo dat rule

Policy – cost of fraud borne by the lender and the charge holder

**Post-Gill:**

* For F/S, registration confers indefeasibility (except fraud)
* For charges: nemo dat rule governs
	+ Where mortgage is forged (but underlying title fine – Credit Foncier)
	+ Where underlying f/s where mortgage granted is invalid (G v B)
	+ Where discharge done fraudulently? - Island Realty
* Creates incentives for mortgagers to proceed w/ care

**Impact:**

* Destabilizing effect? – can’t rely on registry for mortgage – everyone needs insurance? – increased transaction cost
* Possible reform – extend indefeasible title to mortgages
* Compensate mortgagees through public system
* Maybe mortgage lenders should bear the risk – they have more money
* Immediate indefeasibility promotes confidence in system
* Recommend reversing decision in CF – wrt compensation
* Sympathetic to mortgagees who deals with rogue – who is on title

## Notice

* Ideal under Torrens – public title register relieves buyers of need to see what is behind the register- has it been achieved?
* No – different interpretation of s. 29(2) LTA

**LTA - 29 (2)** Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner

(a) a transfer of land, or

(b) a charge on land, or a transfer or assignment or subcharge of the charge,

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than…

**Types of Notice**

*Actual Notice* – knowledge of a fact – can be express (actual notice in which knowledge of facts is acquired directly), or implied (knowledge that law imputes to person b/c of knowledge of other facts from which it can be inferred)

*Constructive Notice*: knowledge of facts that a person is conclusively presumed to have (willful blindness) – could’ve discovered by diligent inquiries

CL position – buyer beware

Legal fraud – intentional or reckless making of false representation of fact w/ intention that it is acted on – reliance on it to detriment of person

Equitable fraud – CL, plus conduct in breach of obligations of conscience – including trying to defeat a prior, competing interest of which you have notice (Harris) – so broader

Two views:

**A) Registering with actual notice of unregistered interest amounts to fraud**

* *Hudson’s Bay v Kearns and Rowling*
* So it continues to encumber property
* Strong common law position - statutes only displace CL to extent necessary
* Nemo dat principle still there
* Fits with equitable concept of fraud

**B) Fraud requires dishonesty in addition to mere registration w/ actual notice**

* Taking advantage of land title statute to protect one’s interest through registration, if have actual notice of unregistered interest – not enough to find fraud
* Additional element of dishonest conduct or intention is required
* *Assets Co v Mere Roihi*
* Unregistered interest doesn’t encumber property
* Aligns with idea that statute meant to implement pure Torrens system
* Fits w/ legal concept of fraud

**What constitutes dishonest conduct?**

* Purchaser’s acceptance of rent after completion of transfer, and subsequent repudiation of unregistered lease (Me-n-Ed’s Pizza Parlour)
* Contracting for sale of land on basis that existing leases will be honoured, then repudiating them after transfer of title – on basis they weren’t registered at time title was acquired (1198952 Alberta Ltd)
* Collusion btw purchaser and vendor to defeat unregistered interest (McCullogh)

**Position in BC:**

* Uncertainty…some cases adopt line of authority A, others B
* Harris and Au argue:
	+ Courts more likely to find fraud where there is express or actual notice rather than constructive
	+ If registered holder of interest has notice only after it changed its position in reliance on absence of prior registered interest, then notice likely irrelevant
	+ More likely to find that notice of prior unregistered interest amounts to fraud where prior unregistered interest is fee simple interest

### Holt Renfrew v Henry Singer

Facts: T&D own building in Edmonton. Lease to HR. Option to renew. Renewed lease, office in Montreal didn’t know had to register lease in Ed. Lawyer of purchaser knew that unregistered lease, client wouldn’t want w/ lease. Building sells. HF wanted longer lease b/c put $200,000 into it. P told Dixon he had client interested – with lease, said “we don’t believe would be deterrent to client’s interest.” He had duty to client, to not tell, b/c realized if he registered title would get property w/o lease. Buys property, then files caveat.

BC:

* Curtain from 29(2) partially drawn
* Not possible to give conclusive opinion on priority of mortgage if lender aware of unreg. Instruments impacting title
* Preserves conditions that Torrens system designed to overcome
	+ Adds legal expense, cost of financing

**Recommendation for reform:**

* Amend LTA to provide expressly that knowledge of unregistered interest/instrument of person transacting isn’t fraud (like other provinces)
* Accept that LTA about efficiency and uncertainty
* OR – define fraud – found if person taking transfer from registered owner knew that owner of unregistered interest wasn’t acquiescing in subsequent transaction and would be prejudiced by it (may be subjective)
* OR – add new exception to 29(2) – confined to where someone obtains priority through registration – ignoring knowledge of unregistered interest, if knowledge gained a) before entering into binding K w/ reg. owner in case of transactions where value is exchanged for interest in land, or b) before title or interest obtained through gratuitous transfer or assignment from registered owner is registered.

**NET/ ASSURANCE PROVISIONS**

**LTA s. 296(1)-(4)** – to make successful claim against assurance fund, person wrongfully deprived must be able to show they would’ve recovered land under CL conveyance system

* (3) – allows you to join minister as defendant
* if fraudster disappears, then can use assurance fund
* if can sue fraudster, assurance fund doesn’t have to pay

# Servitudes over Property

**Servitudes** – non-possessory rights that burden possessory entitlement of owner of freehold or leasehold estate (property interests that don’t include right to possession)

**Easement –** give owner of land (A) a right himself to do something on or to his neighbour B’s land (rights of way)

* *Positive Easement –* give owner o land right himself to do something on or to neighbour’s land (rights of way)
* *Negative Easement* – give owner of land (A) right to stop neighbour B from doing something on B’s land (right to light) - ex. Stop making noise, excessive fumes
	+ Few recognized – narrow – takes away property rights (freedom to enjoy)
* Can’t impose positive obligations on B
* Easement enforceable by all successors – runs w/ the land
* Can get injunction if neighbour blocks your access/interferes w/ easement

**Gratuitous License** – granted permission to do something

* Revocable by neighbour any time w/o incurring liability
* No interest in land
* If sell property, permission automatically revoked

**Contractual License** – contract with permission to do something

* Revocable by neighbour at any time (but must pay damages)
* Injunctions/ specific performance generally unavailable
* If land sold, privty of contract- can’t sue
* If you sell, person you sell to not privy to K – neighbour doesn’t need to honour

### Re: Ellenborough Park

Facts: Park in England – 2 tenants in common own the Park and surrounding property. 1855, sold plots surrounding park (subdivisions). Vendors granted to purchasers, full enjoyment (in common w/ other) of pleasure ground. Each one would pay part of upkeep. If license, no interest. If easement, entitled to compensation for upkeep.

**4 Characteristics of Easement:**

1. Must be a dominant and serviant tenant (DT + ST)
* But see s. 218 LTA (2) – for crown, don’t need DT – statutory right of way
* DT = land which enjoys benefit of easement
* ST = land burdened by, or subject to easement
1. Different owners for DT and ST
* CL – can’t both be in hands of same person
* Changed by statute – s. 18(7) PLA – common ownership doesn’t extinguish
* (5),(6) – useful for developers, ease of commerce
1. Easement must accommodate DT
* Must benefit DT, right must be connected w/ normal enjoyment of the DT
* Actual benefit – open to criticism
* Different test – whether right makes the DT a better and more convenient property
1. Capable of forming subject matter of grant (certainty)
* Right can’t be too vague, must be sufficiently defined
* Capable grantor and grantee (ie. not a child)
* No positive obligations (can’t require to spend money)
* Grant can’t confer right to possession or control of ST – inconsistent w/ possessory rights of servient owner
	+ Ex. In Ellenborough, didn’t take away from Park’s ownership – not walking all over park
* Does it create substantial interference w/ ST
* Subject of easement must be acceptable to courts – doesn’t recognize new categories of negative easements

Outcome: not too vague, not inconsistent w/ possession of ST – can still enjoy

* Owners did have interest, so entitled to compensation

**Granted by:**

* *Express reservation –* where owner of parcel expressly reserves right to exercise easement over another parcel of land
* *By implication –* through doctrine of estoppel, or by statute
	+ Ss. 218, 219 – LTA (statutory right of way, and restrictive covenant)
* Previously by prescription – no longer possible in BC due to s. 24, LTA
* **S. 24** – all existing method of acquiring right in or over land by prescription are abolished, and w/o limiting that abolition, CL doctrine of prescription and doctrine of lost modern grant are abolished - *can’t acquire by prescription*

**Terminated by:**

* Express release – owner of DT releases (s. 241, LTA)
* Court order – allows courts to modify or cancel charges (s. 35(1) PLA)

Cherry v pick – ability to take stuff off land (Profit and prendre)

\* Note – registration of easements under LTA – s. 182 (1), (2)

# Restrictive Covenants

Does the covenant run with the land? Only in equity

Four requirements:

* Covenant must be negative (restrictive)
* Must have intended that burden was to run with land
* All principles of equity apply (including notice rules)
* Must have been made for, and benefit, land retained by convenantee (touch and concern the land), which land must be easily ascertainable from cov document

Must have DT and ST – question of proximity – must be somewhat close

### Swan Properties v Irving Oil

Facts: Covenant not to have restaurant on burdened land. For benefit of other restaurant – Big Stop Property – 5.2 km away

* Courts found proximate enough – fighting for same customers
* Principle: within the same competitive zone – then proximate

### 880682 v Molson Breweries Properties

Facts: Covenant prohibited use of land in Calgary for Brewery – to benefit of brewery in Edmonton.

* Court said 300 km too much
* Otherwise argument that could apply anywhere in the world

**Notes:**

* RAP doesn’t apply per se – no contingent interest
* They might add up and never go away – private power to control land
* May lead to “food deserts” like in US, w/ no grocery stores
* Amberwood – traditional rule affirmed – positive covenant can’t be enforced (in this case for 2nd property owners to share in costs for condo project)
	+ Court said not for CL – needs to be legislated
	+ Don’t want to find new interest in property (like INS)
* Possible workaround:
	+ Leases
	+ Statute – LTA s. 219
	+ Chain of covenants
	+ Rentcharges + conditional grants
	+ Doctrine of Halsall v Brizell – if take benefit of easement, must take burden