Property

Kaplinsky

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# Nature of Property

Daily usage: things. ex. car, house. Legal views as a sociolegal relationship between people in respect for things.

Property is a right (against the world), not a thing. Enforceable claim to use or benefit from something. Otherwise all we would need is mere occupancy or momentary physical possession.

Implications of possession as a right:

* Has to be defined and recognized by community (enforceable)
* Can be limited rather than absolute (dynamic)
* Based in some justification (eg. natural, moral, societal, government)

**Bundle of Rights:** Property owner not with asset but with various rights attached to asset. Can unbundle (ex. rent the apartment).

1. To exclude
2. Possession (use of non-use), management & control
3. Income
4. Transfer (alive or dead)
5. Protection under law
6. Liability to seizure (liability to execution) and prohibitions on harmful use?

**Essentialism** is the search for the critical element that make up core of property.

**Single-variable:** Right to exclude necessary and sufficient.

**Multi-variable:** Right to exclude plus a larger set of attributes. Eg. use, transfer. The right to exclude is necessary but not sufficient.

**Nominalism:** Property is purely conventional concept with no fixed meaning. Right to exclude is neither necessary or sufficient.

## Forms of Property

**1.** **State / Public Property:** State has a right to determine rule of access/use and duty to manage for public welfare. Public don’t necessarily have right to access but have duty to follow rules of access. Owned by the crown but held in trust for the community.

**2. Private Property:** Owners have exclusive right to socially acceptable uses and duty to refrain from unacceptable uses. Non-owners have a duty to refrain from preventing acceptable uses and right to prevent unacceptable uses.

**3. Common Property:** Members, two or more individuals who own/control resource, have right to access resources and a duty not to break agreed upon rules. Non-members have a duty not to access. Externally open access, internally private property.

**4. Non-Property/Open Access:** Nobody has right to prevent from accessing, nobody has a duty to refrain. No exclusive rights.

## Theories of Property

**Theory of Occupancy:** Based on the right of discovery: take control and can dispose of it. This does not account for acquisition or inheritance.

### Natural & Right-Based Theories

**Rights-Based Approach:** Individual interest considered in itself is sufficiently important from a moral point of view to justify holding people to be under a duty to promote it (WALDRON). What interests are served by the existence of PP?

WALDRON: **General-Rights Based Argument**

* + - 1. Offers security & independence
      2. Freedom from coercion and autonomy
      3. Freedom & moral duty
      4. Stability, discipline, & responsibility in exercise of free will.

LOCKE & NOZIAK: Interest only because of what they have done or acquired from somebody else: special right (transaction between individuals, or relationship, and corresponding obligation is limited to the other party). **Locke’s Labour Theory:** By mixing one’s labour with material world, one can claim that portion from the commons as private property. Everyone is entitled to the product of their labour. Does not account for joint ventures, inheritance or transfer.

HEGEL: **Personhood Theory:** Basic human interest which everyone has: general right (moral right which avails against everyone in the sense that it is protected against interference by others). Property is necessary for self-actualization: object on which you project your free will though possession (grasping, forming, marking).

RADIN: Possess objects feel are part of oneself – bound with personhood because they are part of way we constitute ourselves as continuing personal entities in the world. Distinguishes between fungible property (money) and personal property (value inherent). Eg. random ring vs wedding ring.

### Consequentialist Theories

Property is born with the law; legal protection of property is essential to protecting our happiness.

**Economic Theory:** Maximum productivity is achieved through PP. Many flaws, eg. land is not increased in availability by making PP. POSNER.

**Utilitarian Theory:** Total/average happiness in a society will be greater if resources are privately owned. Assumes human desires are universal and quantifiable. BENTHAM.

# Law & Economics

Private Property encourages labour, investment & useful trade. Capitalist argument: PP rights coupled with good contract laws allow scarce resources to end in the hands of people that value them most – economic efficiency.

**H. DE SOTO.** “Without an integrated formal property system, a modern market economy is inconceivable. The inefficiency of non-Western markets has a lot to do with the fragmentation of their property arrangements and the unavailability of standard representations” Strong property law = stronger society.

**ADAM SMITH**: Argued for a capitalist system based on private property and trade. Everything of value should be made private property. Legal system that puts resources into efficient use needs two things: private property and rule of contract.

**POSNER**: Everything should be private property: can sell babies if parents can’t support and somebody else wants one. 3 touchstones below...

## Incentives & Necessary Conditions

Measure gains and losses by ones’ willingness to pay (to get or to avoid). If I want a product, I value it more than my money so we exchange. Seller values money more than product so exchange and claim the world is better off. However, not all contracts make world better (eg. contract to kill somebody).

Principles governing property will create efficiency and wealth maximization IF:

1. Protection of **exclusivity** – allows for incentives and expectations

2. **Transferability**- facilitate trade and reduce transaction costs so property will gravitate to those who value it most.

3. Property should be **universal**: broad range of items and players.

## Tragedy of the Commons

Is private law consistent with conservation? **HARDIN:** How rational self-interest can lead the collective to its doom and how that result can be avoided. Privatization encourages rationality and alignment of benefits and costs.

Externality problem: misalignment of costs and benefits.

* The benefit from each ‘livestock’ unit added to the common pasture affects the owner alone, while the resulting harm to the pasture is shouldered by everybody.
* Best strategy for each owner is to keep more grazing livestock which the best strategy for the group is to restrict grazing (game theory).
* How to solve externality?
  + Contract. Cost of negotiation and enforcement. Possible if a small common.
  + Business to manage. Overhead, salaries for management, policies & regulation and meetings
  + Nationalization
  + Privatization
* DEMSETZ says property emerges in response to change (if gains exceed costs).
  + Beaver vs Bison example: When demand increased (settlers) populations of beaver and bison decreased. Indigenous people divided hunting territory for beavers – each group was responsible to costs and benefits in their zone. Indigenous people in the plains however, did not do so with bison. Largely due to their nomadic roaming (costs exceeded gains). Bison all gone, beavers fine.

## Tragedy of the Anti-Commons

Economic development can be inhibited by too much private property. Fracturing PP can paralyze resource use – too many people have right of exclusion with no person holding effective control. Transactional gridlock making efficient use thwarted and goods under-utilized.

## Harm & Causation in Neighbour Disputes

The musician and the scholar: classical legal approach would find who is at fault. However, both neighbours just want free use of their property (apartment). No laws are broken.

### Sturges v Bridgeman 1879

Baker and doctor are occupying neighbouring apartments. The doctor can’t work due to baker’s noise, and baker can’t work without!

Court says, this is **double causation**: both parties are harming each other. Thus, the solution is not judgement but **negotiation**. This can be expanded to other boundary related issues such as rancher vs farmer, railroad vs famers.

### Polluting Factory & Neighbourhood

Five household and a smoke-belching factory (coats houses in soot particles). Possible outcomes:

1. Households move away &400,000 \* 5 = 2 million

2. The households spend to live with the smoke (air clearing devices, added medical bills, better windows, cleaning): $200,000 \* 5 = 1 million

3. Factory moves: $25 million

4. Factory installs a pollution abatement device: $3 million

The parties will argue toward the most efficient outcome (#2) and the judge only decided who pays. Not a question of outcome but of who pays.

Real problem: transaction costs. Negotiation costs time, money and effort. This is especially problematic when factoring strategic behaviour. **Free-riding** occurs when one pretends not to value an asset, so others pay. **Holdouts** occur when one pretends to value an asset higher than reality, so others pay more for it.

## Liability Rule (compensation) Vs Property Rules (Punative)

Calabresi & Melamed: Efficient when transaction costs are low, property rule. If transaction costs are high, liability rule. If negotiation costs are not too high, the object of lawsuit will to highest valuing party anyway. Liability rules provide shortcuts around high negotiation costs.

|  |  |  |
| --- | --- | --- |
| **Initial Entitlement** | **Injunction / Property Rule** | **Damages / Liability Rule** |
| *Resident* | Rule 1: Court issues an injunction against Polluter | Rule 2: Court finds a nuisance but permits pollution to continue if the Polluter chooses to pay damages |
| *Polluter* | Rule 3: Court finds the pollution not to be a nuisance and permits the Polluter to continue without paying damages | Rule 4: Court permits Polluter to continue unless Resident chooses to pay Polluter damages in order to enjoin further pollution |

Example of Rule 4: [*Spur Industries, Inc. v. Del E. Webb Development Co.*](https://en.wikipedia.org/wiki/Spur_Industries,_Inc._v._Del_E._Webb_Development_Co.)

Essentially torts vs contracts. Both transactions but contacts are voluntary while torts are involuntary. Contracts have negotiated prices, while torts have prices set by a judge. Property rule: it is the contract that sets price.

What is we abandoned traditional view of justice “give to each what is due to them” and put main value of law to efficiency, “give to each the maximum possible without taking from others”.

## Utilitarianism

Morality is confusing & contradictory. Need a simple rule “whatever feels good is good”, then make the rational calculation to the best course of action.

Economist measure through money and time. If you are willing to spend lots of money, you must value it highly and receive pleasure.

## Crime & Punishment

Crime, and the prevention and punishment of, costs money. Criminal fines are more resource-efficient than incarceration. There is an efficient level of fines: harm caused divided by the probability of enforcement.

Eg. If prohibited parking causes $15 in lost time and extra expenses and illegal parking gets punished 10% of the time, then the fine should be $150.

# Novel Claims

* Property is not a static concept, disputes over new forms of property emerge with new developments of society.
* Approaches when regarding a novel claim:
  + Attributes Approach: Does this property right resemble another item recognized as property?
  + Functional Approach: Focused on policy factors and social ends that institution of property is meant to advance.

## *Ins v Ap – US 1918*

**Facts**: INS was AP’s competitor. AP filed saying INS

1. Bribed employees of AP
2. Induced them to violate its bylaws and get news before publication
3. Copied news from bulletin boards and early edition boards and published as their own.

**Judicial History**: Injunction by lower court for first two, COA sustained injunction, SCOTUS affirms.

**Issue**: Can INS be lawfully restrained from appropriating news taken from bulletins issues by AP for the purpose of selling to INS clients?

(a) is there any property in news?

(b) if so, does it survive pasts instant of publication?

(c) is this unfair competition?

**Held**: **Pitney, J –** Injunction upheld.

**Reasons**: AP put time, effort and expenditure to get news. Property due to commercial realities of its’ production. Not common property in this case, because D intends to sell and profit – benefitting for free thus unfair competition, “trying to reap where it has not sown”. Locke’s Labour Theory. Economic Theory: Publication would be profitless if common property – no incentive.

**Ratio**: News is common property except as between competitors (quasi-property) to the extent necessary to prevent unfair competition.

**Dissent**: **Holmes, J –** Property is a creation of law, does not arise from value. Claim here is one of IMPLIED MISTSTATEMENT – give them credit.

**Brandeis, J – “fact** that a product of the mind has cost its producer money & labour and has value which others are willing to pay is not sufficient to ensure legal attribute of property.” Creating a new form of property, court is ill equipped. Deference to Parliament.

## *Victoria Park Racing and Recreation Grounds Ltd v Taylor: HCA 1937*

**Facts**: D, a neighbour of the racing track, built a tower on his property, commentated on the races and broadcasted on the radio. Reduced the attendance of the track, P filed for injunction.

**Judicial** **History**: Lower courts dismissed claim.

**Issue**: Can there be property rights in a spectacle?

**Held**: Appeal dismissed.

**Reasons**: **Lathman CJ –** Unable to see any right of P that has been violated or any wrong done to him. Anybody can look into neighbour’s property and describe what they see. P needs to put a higher fence. No precedent therefore no injunction. Mere fact that damages incur cannot be relied upon as a cause of action. A spectacle cannot be owned in the ordinary sense of the word.

**Ratio**: No property rights are infringed when neighbour looks over your fence.

**Dissent**: **Rich, J (dissent) –** it is nuisance. Their profitable enterprise relies on having exclusivity- each persons’ rights may be limited to the rights of others.

**Dixon, J (concurring)–** Nuisance (loss exclusivity and profits) not actionable. Occupier is at a liberty to block view (not a wrongful act), but also not a wrongful act of D to avail upon prospects and look over fence. Differentiates between enjoyment of land (nuisance requirement) and profit. There is not a legally protected interest – intangible value is only recognized when falls into recognized category. No precedent. Quotes Brandeis dissent above.

## *Moore v Regents of the University of California* Cal Sup Ct 1990

**Facts:** Moore was being treated for hairy cell leukemia at UCLA Medical Center. Spleen removed to slow down progression of disease. Doctors used his cells in research without informed consent. He came back many times for blood, bone marrow, sperm ect samples Researchers patented a cell line.

**Judicial History:** Lower courts sustained D demurs. COA reversed decision.

**Issue:** Was there a breach of fiduciary duty and informed consent? Is conversion applicable – did Moore retain ownership interest in excised cells?

**Held: Panelli, J**: Upheld COA decision on breach of fiduciary duty and lack of informed consent. However, no conversion.

**Reasons:** 1. To establish conversion P must show interference with his ownership right to possession. Clearly did not intend to keep his spleen. Doubt over continued interest in possession because:

a) No precedent to support: extension of conversion liability.

b) California law drastically limits continued interest in excised cells: Statute (Health & Safety Code 7054.4) Doesn’t directly relate but shows clear intention to reduce possession after removal from body.

c) Subject matter of the patent cannot be his property: factually and legally distinct from his cells. A patent requires inventive effort.

2. Don’t want to extent conversion liability

a) Fair balancing of relevant policy considerations: patients protected though fiduciary duty and informed consent. Research is a socially useful activity, negative impact on society to reduce economic incentive. Too far, everyone in contact with cells liable.

b) Better suited to legislative resolution.

c) Conversion is not necessary to protect patients’ rights.

**Ratio:** Property rights for cells are better protected through established disclose obligations rather than an unprecedented extension of conversion liability.

**Dissent: Mosk, J:** Property is a bundle of rights. Even if some are not present it is seen in law as protectable property interest.

1.a) no precedent supporting? No precedent rejecting.

b) Misuse legislation. Also, conversion is a product of common law. It’s ok to expand alongside new science.

c) Without Moore, there would be no Mo cells. Treat his as a contributor.

2. Destroying economic incentive is hyperbole. Keep records of consent and there won’t be unlimited liability. Human slavery? Abuse of the body by its economic exploitation for the sole benefit of another person.

### Contrast INS v AP with Moore

Both concerned with loss of economic incentive.

INS Pitney concerned with consequences of not recognizing enough property (tragedy of the commons). Panelli was concerned with consequences of recognizing too much property (tragedy of the any commons).

## *Numerus Clausus* Principle

Recognition of a limited number and carefully regulated kinds of interests.

* Reduce information costs.
* Prevent anti-common problems.
* Inhibits ability of courts to delist previously recognized rights.

# Sources of Canadian Property Law

## Indigenous Property

Aboriginal peoples: First Nations, Inuit & Metis

* Special status derives from prior existence as self-governing communities in territory that became Canada.

Early setters recognized Indigenous groups as self-governing but this evolved and degraded as the power dynamics shifted.

* War, Diplomacy & Military Alliances (17th-18th centuries)
* Policies of Assimilation (19th and 20th centuries)
* Recognition of Self-Determination (present)

**Doctrine of Discovery:** Principle saying a European government could claim sovereignty over territory by discovering prior to other Europeans. As traditionally understood gave power to govern but not necessarily right to possession (*Johnson v M’Intosh 1823).* Aboriginal property interest based on prior occupation know as “Indian title”

Treaties recognized interest in land since 17th century – inequality of bargaining though.

Royal Proclamation 1763: Passed not by legislation but the King. Territories ceded to Britain, formally recognized Aboriginal property interests, only be transferred to crown via treaty, part of Constitution.

Aboriginal law is the law of the Canadian state in relation to Indigenous peoples. Whereas Indigenous law is the law of particular Indigenous groups.

Gitxsan

* Property arises only out of reciprocal interaction. This possession is created in the space between two legal entities.
* Delineated boundaries, which are enforced. Property system operates largely on social norms. Have rights but no centralized authority.

## English Property

Property Law didn’t change much from England, as there is a fear of incidental things having large negative consequences. Only tenure brought to Canada was Socage, free of all feudal services or incidents of tenure. There is tax.

William 1st established a new feudal order, in which everyone’s status was defined by their relation to land. Crown owed all the land, subjects held land through from of tenure. Tenure (from French ‘to hold’) was a personal bond based on promise of protection & security in exchange for service & support. Periodic obligations of tenant, originally separate deals but became standardized. People were both with specific status, die with status: no moving between.

King **enfeoffed** land to people as **tenants in capite.** In exchange, tenants in capite pledged military support to the crown. They fulfilled this obligation by further **subinfeudation** and creating tenants of their own.

### Tenurial Forms

Knight service (Scutage): Provide Martial support, as became standardized, paid amount instead – tax.

Religious Service (Frankalmoign): Provide Spiritual support.

Agricultural Service (Socage): Provide Economic support. Began as product but changed to money.

Personal Service (Serjeanty): banner, hairdresser.

Unfree Tenure: Serfs.

### Incidents of Tenure

Classes of obligations attaching to tenure.

(a) Homage & Fealty: kneels, places hands between hands and swears to be loyal.

(b) Forfeiture: if commit treason land returns to feudal superior.

(c) Escheat: if die, without somebody to pass land along to, land escheats to superior.

(d) Aids: Special taxes levied on special occasions to ransom feudal superior, costs to knights.

(e) Relief: Mutual interest to ensure succession. Custom tax to allow heir to ascend based on one year’s income.

(f) Wardship & Marriage: Choose marriage partner for tenants’ children, this ensure correct alliances. Wardship is the right to take custody of tenanment in hands of a minor – income passes to feudal lord.

Over time services are commuted to monetary amounts. There is steep inflation but continue because the incidents of tenure are lucrative. However, tenant sidestep paying by using subinfeudation as a type of tax evasion. Statute *Quia Emptores Terrum 1290* prohibited new subinfeudation but allowed free substitution. Now land is freely bought and sold on the market. This is a move from status to contract. *Tenures Abolition Act 1660* converted knight service and serjeanty to socage.

Remnants in Modern Law: Crown absolute owner – we are tenants in free and common Socage. It is fee simple, no fixed term, can hold forever. Socage – pay taxes.

### Rececption of English Property Law

* Settlers brought the law with them as long as applicable: Most English law was received, most departure concerns water and Newfoundland
* Quebec under rules of conquest – keep same
* Aboriginals – sui generis – hold rights until taken away by legitimate state action (no free and common socage –they hold title).

Reception is convenient, creates continuity, predictability.

### Classification of Property

Common categories movable/immovable, real property/personal property, legal/equitable interests, tangible/intangible. Choses in possession/choses in action.

**Real Property**

Corporal: Possessory (fee simple).

Incorporeal: non-possessory interest (ex. an easement)

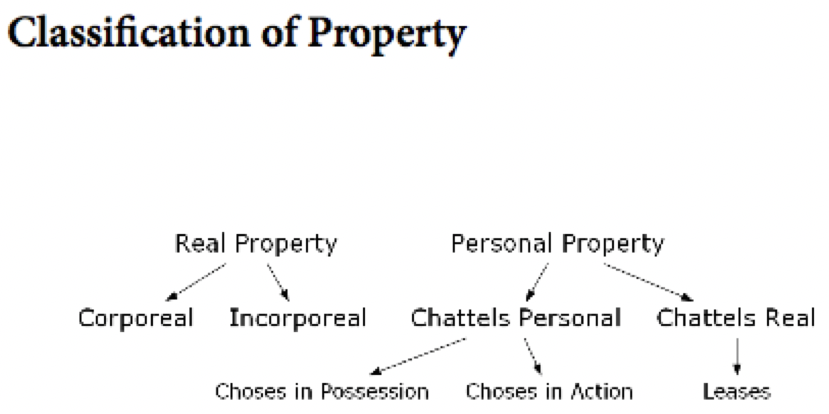
**Personal Property**

Chattels Personal

a) Choses in Action [example: shares in corporation, somebody owes you in contract]

b) Choses in Possession [example: car, land])

Chattels Real (Leases)



Right in Rem: Right against the world.

Rights in Personam: Right against a specific person.

Legal and Equitable Classification of Property

Equity arose when king gave lord or chancellor power to make equitable decisions

Court of Equity - This court recognized your right even if not seized of an estate.

Situation where someone has legal right and someone else has equitable right to same piece of land

Influence of Writs (Maitland)

Enable you to recover possession were known are real writs (where term “real property” comes from). Not anyone can use this writ. Only a tenant-in-chief (someone who holds directly from King).

# Protection of Property Rights

## Constutution & Other Legislative protection

Divided according to the BNAA 1867

|  |  |
| --- | --- |
| **Federal** | **Provincial** |
| POGG | Property & Civil Rights in the Province 92(13) |
| Trade & Commerce 91(2) | Provincial public lands & Timber 92(5) |
| Banking, interest, ect. 91(14) -(16), (18) -(20) | Local Works & Undertakings 92(10) |
| Patents, trademarks & copyrights 91(22) -(23) | Matters of merely local/private nature in Province 92(16) |
| Land reserved for Indians 91(24) | Municipal institutions in the province 92(8) |

No Constitutional protection against the physical taking or expropriation – so stopping legislation unless overlapping interests (search & seizure).

The **Canadian Bill of Rights**: .... enjoyment of property, and the right not to be deprived thereof except by due process of law.

Rights CAN be violated without compensation if there is a due process of law. Not a constitutional document. Clear language in a legislation can override the Bill of Rights. This applies only at the Federal level (procedural right) **Alberta Bill of Rights**, identical to the Canadian one.

**Alberta's Personal Property Bill of Rights:** If there is a taking, it requires compensation. If there is no compensation, then there cannot be a taking**.** This bill can be overwritten by a legislation. Imposes a political limitation, not a substantive one

## Expropriation

Should governments have the power to expropriate private property?

**Yes**. Public Interest: due to the level of efficiency and transparency we require from governments, necessary to overcome lack on consent. Similar projects under private developers would use non-disclosure agreements to protect against hold outs.

Should owners have a right to compensation?

**Yes**, who would invest in property if it could be taken immediately without compensation **(economic efficiency**)? Forces **checks on government power** as only acquire if they value it more: when trade is mutual economic interests and they both gain more than loose. We can’t be sure it’s for public good unless there is consideration. Also, for **equities** sake: it is fairer to share the costs of the project (not only on one person) as the benefits will likely be spread as well (public good projects).

Are there limits to State power over property?

**Hardly any**. A right to property is not expressed in the charter. Canada Bill of Rights “enjoyment of property and right not to be deprived thereof except by due process of the law” however this isn’t substantive protection, only process. Alberta Personal Property Bill of Rights “any provisions that takes your property will have no force or effect unless process in place for determination and payment of compensation”. Both of these are ordinary legislation (not in constitution) thus can be overridden by express legislative action.

### Enacted Acts: Examples

**Expropriation Act:** government takes your land → compensable.

s. 3: When an authorizing Act permits or authorizes an expropriation of land, the expropriating authority may, unless the authorizing Act expressly otherwise provides, acquire any estate required by the expropriating authority in the land and may acquire any lesser interest by way of profit, easement, right, privilege or benefit in, over or derived from the land.

**Surface Rights Act:** Oilco. granted right-of-way over your land → compensable taking

**Hydro and Electric Energy Act:** Electric co. intrudes into your airspace → non-compensable taking (Didow).

**Mines and Mineral Act:** Government takes your pore space → not a taking; non-compensable

## Canadian Expopriation Cases

Canadian courts mainly on sidelines, defer balancing of private rights and public interest to legislators. For de facto expropriation to be shown need to show more than mere impingement (often ad hoc analysis). (Penn Central Transportation Co. v. New York City)

### *R V Sisters of Charity of Rockingham 1922*

Government took some land, sisters are looking for compensation for remaining land as the construction & train has devalued it. There is no right to compensation at common law, must be found in statute.

### *Manitoba Fisheries v R, 1979 SCC*

Facts: Statute passed all business carried exclusively by crown cooperation (drive up fish exports). Manitoba fisheries had invested in facilities & good will for business.

Issue: Does the restriction of rights (continue with business) equate a compensable taking of property?

Ratio: At some point, excessive regulation must be seen as equivalent to confiscation (regulatory taking/ de facto) and deserves compensation.

Held: Yes

Reasons: Good will of a company is intangible property – protected interest. Excessive regulation can be seen as expropriation: no set formula. This is justified in fairness, cost of project distributed to whole, incentive for governments to behave prudently. Insurance of investment for owners.

### *Marnier Real Estate Ltd v Nova Scotia (AG), 1999 NSCA*

Protection of ocean beaches environmental protection. Denied authority to build houses and claimed eliminated the economic value of his property.

CA held: Reversed trial judge decision, no compensation because no de facto expropriation.

Reasons: **Cromwell J –** no clearly articulated precedent. Follow two governing principles (1) valid legislation may significantly restrict an owners’ enjoyment of property (2) courts may order compensation only if legislation authorizes. We looking not to fairness but to the application of the law. Simply decreasing the value of property does not signal expropriation. Need “virtually all aggregated incidents of ownership gone”.

Kaplinsky: First, acquisition test is not supported by precedent. Second, thinks Cromwell gets it in reverse, not because compensation isn’t payable because in this country regulation is norm but because government owes no duty to compensate since regulation has become so restrictive. If government knew it would have to compensate, it would think twice about regulation. Kap says yes there’s restrictive regulation but that’s because there’s no regulation.

### *BC v Tener*

BC makes a park, can’t prospect for minerals in the park without a permit. Strengthen program, now can’t mine at all. Apply for compensation due to the loss of mineral rights. BC says no, government didn’t take mineral property rights just obstructing the access.

SCC: **Wilson, J –** lost interest, which is similar to profit. Who owns coal – own right to prospect? **Estee, J –** doesn’t define what taking it, outcome Tener gets compensation.

Held: Government pay Tener, but doesn’t reconcile with Manitoba Fisheries. SCREWS UP LAW: begins with presumption that it requires to be a taking.

### *Canadian Pacific Railway Co V Vancouver (City), 2006 SCC*

CPR land, discontinued use, proposals to develop and indicated willingness to sell. City passed bylaw that land be used for transport and greenways only. In effect, freeze redevelopment potential and confine CPR to uneconomic uses of land.

Issue: Does the limitation of use constitute an effective taking?

Held: No, for de facto at common law (NO CL) there are two requirements. (1) acquisition of beneficial interest – argue they get a park, but no just need to use land in accordance with city’s vision and (2) removal of all reasonable uses of property - must take all, not just best ones.

**Vancouver Charter, s. 569**

(1) Where a zoning by-law is or has been passed any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of such zoning and no compensation shall be payable by the city or any inspector or official thereof City Charter says: property effected by a bylaw “not a taking”

Expropriation Act applies only to “takings” – so no help

## International Expropriation Cases

Different from Canadian cases as have constitutional protection of property rights. Cases demonstrate constitutional limitations on legislative power in relation to private property (*Marnier)*. **Constitutionalization of property enshrines the courts, rather than legislative bodies, as primary arbiters of private property / public interest conflict.**

Why not in Canada? (a) inappropriate burden on government to justify, (b) property owners are not minority that need C protection from the systematic majoritian bias.

### *A.g. v De Keysers’ Royal Hotel, 1920 UKHL*

Army stayed in hotel, not in good shape so hotel claims damages. **Atkinson J –** “Neither public safety of defense requires Crown be relived from legal liability to pay.” Current recognized rule: unless the statute clearly demands, not construed to take property without compensation. Presumption in favour of compensation (fairness).

### *Pennslyvania coal CO v Mahon, 1922 USSC*

Legislation prevents company from mining in a way that remove supports and cause damage to surface & house.

**Holmes J-** Statute destroy previously existing rights of property & contract. Not every regulation requires compensation, the extent of diminution is important. To make coal mining commercially impractical has nearly same effect as appropriating/destroying it.

**Brandeis, J (dissent)** Property still in owners’ hands. No compensation.

### *Penn Central Transportation Co v New York City, 1978 USSC*

Government prevented Penn station from building, claim this is a taking.

(1) Economic impact: extent of diminution

(2) Interference with reasonable investment backed expectations

(3) Character of government action

### *Loretto & The Cable Box*

Ordinance everyone needed cable box – she claimed physical invasion. SCC agrees. Required to give up the right to exclude, it is automatically a taking no matter how minimal.

### *lucas v South Carolina Coastal, 1992 USSC*

Bought real estate for development purposes, environmental regulation prevents development. Removed all economic value thus a regulatory taking and compensation valid, bundle of rights argument.

No need to engage ad hoc analysis.

### *Waters v Welsh Development Agency 2004 UKHL*

**Scott LJ -** “Compulsory expropriation of land is a creature of statute. There is no common law right or extant crown prerogative that allows such a thing. So, it might reasonably be thought that the basis on which compensation would be paid for land compulsorily acquired would be provided for by statute. And so, it is.”.

## Nafta

NAFTA, Article 1110: Expropriation and Compensation read like the Constitution of the States, where it says no property shall be taken without compensation. These have quasi-constitutional status – cannot be bypassed through unilateral Canadian action

An indirect expropriation is protected like a direct expropriation. Ad hoc analysis. (a) the **economic impact** of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the extent to which the measure or series of measures interfere with distinct, reasonable **investment- backed expectations**; and (c) the **character o**f the measure or series of measures.

Canada is giving more protection to foreign investors then Canadians.

# Property, Poverty & the Right to Exclude

Right to exclude allows owner to set agenda for uses of land.

### *Dwyer v Staunton,* 1947

Road closed due to snowstorm, owner refused access through land. Went anyways, sue for trespass.

Ratio: Limited easement: “a traveller who is lawfully using a public road has a right to go upon private lands at places where public land is unpassable”. Must take care not to cause unnecessary damage. No trespass.

### *Fontainebleau Hotel co v 4525 Inc,* 1959 FloRIDA CA

Hotel put up wall to cast a shadow on neighbour’s pool, injurious to the interest.

Held: Do what you want on own property, which is lawful, as long as it isn’t injurious to protected interests of neighbour. Right to light is not a protected interest. Conduct may be vindictive, but is not unlawful.

### *Harrison v Carswell,* 1975 SCC

Protesting shopping center, asked to leave, refused charged trespass. Held no right to protest – private property and owner had the right to exclude. \*Pre-Charter

## HomeLessness

Public spaces are common property, generally characterized as right of individuals not to be excluded. Conflict when that exercise has effect of discouraging others from using. **Waldron –** Libertarian view of all property being private would be a catastrophe for homeless. **Ellison –** “broken window syndrome” signals a lack of social control and more people misbehave.

### *Victoria (City) v Adams,* 2008 BCCA

City is a corporation with statutory powers delegated from province. Prohibition against erecting temporary shelter, still allowed to sleep in public places. Claim infringes s7 of Charter.

Held: Prohibition is arbitrary, overbroad and not justified. Public property is held for the benefit of public, which includes homeless. Not a property right because they are not asking to exclude, other people can use. If cannot house everyone is shelters - Inoperative. \*charter only applies to state action (government entitites).

This is not a property right, but a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter, a prohibition found to impose significant and potentially severe health risks on one of the City's most vulnerable and marginalized populations.

Ratio: City (owner of public property) has right to regulate and exclude, however must yield to protected charter right.

# Land & Water Boundaries

Legal description in (a) deed – by meters & bounds (b) certificate of title: Land Titles Act.

Meridian: Range: Township: Section

Dominion Land Survey (1870): grid followed lines of longitude and latitude. Prime meridian – arbitrary line by Winnipeg. Account for world spherical – correction system to reduce ranges converging north. Two sections auction for education.

Township System: meridians and ranges, divided into 36 sections (1 x 1 miles), quarter-section = 160 acres (standard homestead). Hudson’s Bay Company Lands: s 17–21. [8 colloquially known at HBC land – the beds & shores are not crown property]. School Lands: s 22–23 Town and Village lots: s 32. Land for churches, cemeteries, etc.: s 33. Homesteading provisions: s 34 [limited time to occupy land – check up on later and give title].

If hold certificate, nobody can claim ownership. Conclusive – world is bound.

Water crown property, as well as beds and shores. Accretion (growth) – at common law, a riparian landowner is entitled to extension of land, and bound to lose if waters rise. Needs to be gradual and imperceptible. Legal effect of accretion in Alberta depends on grant.

*Surveys Act, s 17*: the bed and shore of a body of water shall be the land covered so long by water as to wrest it from vegetation or as to mark a distinct character on the vegetation where it extends into the water or on the soil itself.

Bed: part covered by water, Shores: identified by wet, depends on type of vegetation.

# Airspace Rights

Latin Maxim “cujus est solum ejus usque ad coelom” - "whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell". Was in a Hebrew text in the 4th century.

Logan [*Edwards v Sims*] “must be reformed, because the theory was never true in the past”. Haddad [*Didow v Alberta Power*] “maxim is not discredited has been qualified in application. A landowner is entitled to freedom from permanent structures which impinge upon the actual or potential uses and enjoyment of his land.” Griffith “rights of a surface owner are limited to such a height necessary for ordinary use of land.”

Coarse Theorem: As long as bargaining process are available; any state allocation of entitlements will be adjusted by private parties to produce economically efficient allotment. In practical application endowment effect [likely to ask for more if currently help than one would be willing to pay to acquire] can interfere. Collective action problems: free-riding, holdouts. Strategic bargaining: bilateral monopolies. Non-productive costs: contracting, monitoring and enforcing. These make the assignment of property rights by statute or judicial resolution becomes important.

1. The law should mimic the market: try to accomplish what the market would in a world without transaction costs.
2. Assign the property to the highest value user.
3. Choose a remedy to protect the entitlement: difference in who allocates property and sets price.
   1. Property Rule (injunction) when transactions are likely to be smooth.
   2. Liability Rule (damages) when courts are more effective. Legal costs, time consuming.

## *Didow v Alberta Power Ltd,* 1988 ABCA

Powerline placed oved farm, can’t plant trees, restrict use of spraying/seeding.

Held: Entitled to freedom from permanent infringement upon usage & enjoyment of land. Courts don’t literally take the maxim. Differ between permanent structural projection and transient invasion at height unlikely to interfere. Proper remedy in trespass as opposed to nuisance.

# Mines & Minerals, Surface Rights

Several states recognized new issues of ownership that arise with new geological sequestration and have declared that title to pore space is vest in the owner of the surface. This effectively codifies *Edwards v Sims.*

Oil rich Alberta – opposite. All pore space is property of Crown [Mines & Minerals Act]. Not expropriation therefore no compensation.

## *Edwards v Sims,* 1929 KYCA

Edwards discovered cave and created attraction. Only entrance is on his land. Combining caves and making park – so compensation for owners. Neighbour Lee files action for trespass, as some of the cave is under his land. Held: Entitled to compensation.

Dissent – Logan. “But not that which is no benefit to him, and which may be of benefit to others” Only entrance to the cave is under Edwards land, Lee has no means of access. This is the exception to the maxim. Lockean – labour theory - “Edwards owns the cave through right of discovery, exploration, development, advertising, exhibition and conquest”.

## *Star energyWeald Basin ltd v Bocardo,* 2010 UKSC

Found trespass for property 1300, 800 & 950 feet below ground.

## Grants & Legislation

All mineral estates originate from grants from Crown. Include all mines and mineral except gold, silver and any material reserved for Crown.

Common law changed in Alberta.

*Public Lands Act*, s. 35(1): “All mines and minerals and the right to work them are, by implication and without the necessity for any express words of exception, excepted from every disposition and notification made under this Act.” **Need grant to be express in order to get any mines & minerals.**

*Mines and Minerals Act,* s. 10: “It is hereby declared that no grant from the Crown, whether relating to land, minerals in land or otherwise, has operated or will operate as a conveyance of gold and silver unless gold and silver are expressly named and conveyed in the grant.” **Operates retroactively in regards to gold and silver.**

*Law of Property Act*, s 7(1): “... every instrument transferring land operates as an absolute transfer of all right and title that the transferor has in the land at the time of its execution, unless a contrary intention is expressed in the transfer or conveyance.” **Grant mineral leases for royalties.**

Mineral Title Disputes: courts decide based on common understanding, eg. Petroleum does not equate natural gas. Vernacular Test, Purposes and Intentions Test, Exceptional Occurrences Test. Soon after, *Mines & Minerals Act* defines materials.

Right of Entry (Heartland): (1) At common law (2) *Surface Rights Act* s12 (3) Right of entry by order of the Board.

# Fixtures

When chattel becomes a fixture, it ceases to become personal property, and title becomes subsumed into that of realty. Suggested analysis: Was the chattel transformed into a fixture? What happens to existing property rights?

Fixture Test: Transformation a matter of intention, intention ascertained from objective factors - presumed from degree of annexation, rebutted or confirmed by object/purpose of annexation.

## *La Salle Recreations ltd v Canadian Camdex Investments,* 1969 CA

Hotel purchased wall-to-wall carpeting under a conditional sales agreement (vendor retain title until paid). Building was subject to mortgage. Property turn on whether a fixture, or not. Fixtures do not have to be permanent, just remain as long as serves its purpose. Carpet was subject to vendor’s security interest.

Principles:

1. **Degree of annexation**

If physically connected presumption fixture, burden to claim personalty and vise-versa. How difficult + how much damage would occur if it was removed? Slight.

1. **Object of annexation**

Objective evidence of purpose. Ancillary: Was it better for the use of the goods as goods, or better use of the building as a hotel?

i) suitability to character: unfinished plywood unsuitable in hotel.

ii) level of attachment: undermatting and carpentry (if left resting) would be unacceptable due to appearance and utility.

iii) intention: annexation reasonably required for completion of floors. (repeat of 1)

iv) permanence: comparable hotels replace carpeting every 3-5 years.

v) market for resell: ready market for used carpet after removal. K doesn’t like.

## *Re Davis,* 1954

Are bowling alley chattels or fixtures? Remove-able with comparative ease. Regularly sold on conditional sale contracts. Affixed for the bettering of bowling, not of the building.

## *Diamond neon v TD Realty CO,* 1976 BCCA



Lease from UM and WCP was assigned to Dueck. UM out. New rental agreement with DN and Dueck. Dueck leaves, no longer part of the proceedings. WCP sells land to TDR. Who sells sign to NH. Action of conversion for pole and signpost. Who owns the sign?

Held: Attached to land, thus fixtures. Signs attached to ground in concrete fixture, not on own weight. They made premises more useful as a business.

Buy realty as it is, fixtures and all. Only affected by registered interest, anything legally a fixture is subsumed by realty. As a tenant reserves a right to convert fixtures back to chattel at the end of the lease, or reasonable time frame. When Dueck’s lease expired, P could no longer remove sign under law of tenant’s fixtures (impossible to exercise contractual right). Contractual right against party that rented signs to make them convert back to chattels.

In this case, a tenant’s right to convert chattels only gave Dueck the right to convert the fixture back into chattel not DM, because Dueck was the tenant. DM could have told Dueck to convert the fixture back into a chattel, because DM and Dueck had a contract – if Dueck refused, DM could have obtained a court order. Because DM failed to ask they lost their enforceable right to recover the sign.

Dissent: Sign has power to speak for itself.

**Tenant Fixtures:** The possibility that a tenant might lose property through the application of the law of fixtures would, logically, inhibit improvement by leaseholders. Accordingly, it is well established that tenant’s fixtures are subject to special rules for detachment. Generally, a tenant may reclaim fixtures, that is, restore the, to their chattel status.

(1) Must be attached for purposes if (i) trade, (ii) ornamentation, or (iii) domestic convenience. (2) Removal may be precluded if it will cause serious damage to the property. (3) Implied right of detachment may be abridged by contract. (4) There must be timely removal.

## Mistake Imporovements

Statutory solution to a specific type of problem in a specific circumstance.

*Law of Property Act* s69: lasting improvements from mistaken belief its one’s own land, doesn’t have to be a reasonable belief. Two options, open consideration for the court.

1. Lien: ability to hold up a subsequent transfer of property, until paid. Get lien to extent of improvement.
2. Allows person to retain the land, but pay compensation the court directs.

# Transformation of Chattels

**Confusion:** Mixing of personalty.

**Alteration:** Take material and change into another.

**Accession:** Take one’s personalty, and adds something to it.

*Jones v De Marchant:* Took wife’s 18 beaver pelts buys 4 more, makes fur coat and gives to mistress. Who has property in the coat? Severability (if easily separate don’t have transformation), Conduct (Why did it happen? Contract, mistake, negligence, wrongfully?), Dominance?

## Glencore International AG v Metro Trading, 2001

Oil mixed together. Declared bankruptcy, how to deal with leftover oil?

When you have a transformation pursuant to contract, decide accordingly. If innocent confusion become owners in common and get proportionate share (50% if unknown). If wrongful, old rule was punitive – wrongful mixer loses everything.

New rule (*Indian Oil v Greenstone*) shows owners in common, proportionate share. Plus, damages given. Proportionate share must reflect quality and quantity (*Glencore*).

## *McKeown v Cavalier Yachts*, 1988

P owned laminated hull, commissioned work to turn it into a boat. Agreed to terms – only payment due is sales tax. Business sold, finish boat and ask for money. Hull $1,777, Bill $4,400 Boat $24,000.

(1) Has accession occurred?

* Injurious removal, can’t undo work without causing damage. Removal of chattel would destroy object. If otherwise, simply split. Amount of annexation – conveniently detached.
* Separate existence. Complete incorporation.
* Destruction of utility

(2) What is the principle chattel?

* Hull? How sound when worth so much less? Some view economic values attached to personalty.
* Break into series of steps to avoid question. Everything was gradually subsumed. Hull principle.
  + K not convinced – order shouldn’t matter.

(3) What is the property remedy?

* P has property rights in the yacht because owned principle chattel.
  + In personalty – don’t automatically return, only land. Court held sufficient individuality to fall into class of special/unique chattel – return *in specie*.
* Damages – liability rule.
  + Allow the Plaintiff to keep the yacht but pay damages.

(4) Is the improver entitled to payment?

* Unjust enrichment. Benefit to P, corresponding deprivation to D, no just or proper reason.

## *Gidney v Shank,* 1995

P purchased canoe ($100), labour and money to repair, improved value ($1900). Unaware canoe was stolen from D. Condition when stolen never proven in court. D got canoe back, does P get compensation for UE?

Court ignored property questions: no accession mentions, essence – all subsumed into the canoe. Had no knowledge that he was improve, didn’t consent to the investment.

# Possession

## *Pierson v Post*, 1805 NY COA

Does pursuit create right to cause of action of conversion? [Conversion – title or possession, what amounts to possession of wild animals?]. Ancient texts – animal in hand for possession but...

Held: Mortally wounded cannot be fairly intercepted by another hunter when original in pursuit.

Reasons: “Some cases recognize possession even before absolute dominion and control is achieved. Those cases require the actor to be actively and ably engaged in efforts to establish complete control.”. Certainty & knowing important – shouldn’t recognize possession at earlier stage.

\*Possession must have clear act. Clash between principle of useful labour (Locke) and notice to the world through a clear and unequivocal act that allows the community an opportunity to contest the claim.

Dissent: Ruthless animal, can’t discourage hunting. Property possible if within reach or reasonable prospect of taking.

## *Papov v Hayashi*, 2002 Cal Sup Crt

Who owns the baseball? Both have rights. Split the money, dum dums.

Reasons: Popov failed to establish possession, did not deprive of natural liberty and bring it under control. However, recognized pre-possessory interest (has not been applied since). Occurs when claimant takes significant but incomplete steps to achieve possessions, and efforts are interrupted by unlawful act of others. This gives rise to qualified right to possession.

\*Judges only modify full possession if impractical – wild animals, salvage cases.

Clift v Kane: Salvaging case. Did everything they could reasonably do to mark possession of the seals.

## Finders

Possession two parts. Factum – physical control. Animus – intention to control.

### *Amory v Delamarie*

Chimney sweep found ring. Jeweler took jewel and refused to give it back. Court recognized the finder had possessory rights against everyone but true owner, or prior possessory interest.

### *Keron v Cashman*

Boys find stocking full of money. Hitting each other with it. Held: First boy had physical control but no the animus to possess its contents. Emerge when burst open. Not one, but all boys had it at same time.

### *Bird v Fort Frances*

Boy trespassing, found money in tin can. Police took money and no true owner came forward. Court upheld finder claim. Police use of exterpe (out of wrong doing) not enough.

### Baird v BC

Police confiscated money, which Baird admitted to having acquired illegally. No charges ever laid, tried to get $16,000 back. Court says no.

Distinguished from Bird due to degree of criminality or culpable morality. Conduct is so tainted cannot return as a matter of public policy.

### *Parker v British Airways*

Found a gold bracelet in the lounge. Does the finder or the airline have possession?

* Was object attached?
* Was object hidden, or merely lost?
* Were the premises public or private?
* How did the finder come to be on land?
* What was the quality of the possession of the land?

Held: Finder has possession as the airline didn’t have adequate intention to control the land. \*Occupier has superior rights if object is attached to land – intention to control is only with unattached items.

### *Trachuk v Olinek,* 1995 Alta QB

Contractor + dudes find $75,000 buried by well.

Quoted BA wrong: BA states that for unattached items, the occupier of the land has to show they have intention to control items. For attached item, the occupier is deemed to be the possessor. Judge did not differentiate between attached and unattached – simply says occupier has to demonstrate into to control found objects. Current law in Alberta uncertain. This case has not been overturned but also seems he intended to follow BA.

Held: Finder’s win. Finder acquired title good against the world, except for those with a continuing antecedent claim.

* Owner doesn’t have claim if land leased – bundle of sticks.
* Amoco occupier of land – given it was embedded under BA rule would win but didn’t advance claim.
* Trachuk argued de facto possession – wasn’t accepted.
* Employer failed as contractor. Easements are non-possessory interest.
* Crown – doctrine of treasure trove, gold and silver found in circumstances suggest owner long dead.

## Adverse Possession

Person with de facto possession has right to continue against the world. Possession must be without secrecy, violence or permission.

To succeed in Alberta must show uninterrupted possession of the correct nature (common law) for the required duration – 10 years (legislation). This is a defence for trespass. After 10 years, immunity upon liability by virtue of the Limitations Act (in Ontario title extinguished, not here. But rightful title holder is precluded from taking legal or self-action). After 10 years the trespasser can file for caveat and sue. Caveat registered immediately means can’t be a good faith buyer. Court takes a long time. Get certificate of title.

Cannot own crown or municipal land.

Tacking: Possessory title subsequently given to next trespasser. As long as the land is continuously occupied the clock continues. \*Transfer from the owner restarts the clock.

### *Keerfer v Arillotta*, 1976

Who owns the driveway? Adopts the test of inconsistent use – not utilized in this province. The trespasser has to use the land in such a way that is inconsistent with what the owner wants. Required to know (1) Belongs to someone else (2) To know who the owner is (3) What their plans for are (4) Act in a way that is inconsistent. This is harder for adverse possession to occur.

Held: No interference for driveway. But, garage given.

### Personalty

#### *Barerbee v Bilo*, Alta QB

Ex took her motorcycle. She didn’t recover in time (2-year period). Sold to Bilo. The wife’s title is not extinguished. Limitation period for commencing action of conversion starts when demand to turn over is made.

#### O’keefe v Snyder, NSSC 1980

Paintings stolen in 40’s, registered in 70’s. Previously the whereabouts had been unknown.

Ratio: Limitation period only commence when cause of action was properly discoverable by P (known or reasonably should have known).

Reasons: Adverse possession must be open and notorious. Not interrupted by transfer of property.

# GIFTS

Land used to be transferred through a ceremony known as delivery of seisin (possession) to give notoriety to transaction. Because land couldn’t be physically transferred, delivery was accomplished symbolically through handing over a twig or clod of earth on or near the land, ideally in presence of witnesses. Transaction would be recorded in a charter of feoffment (document describing the transfer) just as a record of the event.

## Elements of a Gift Inter Vivos

Perfecting gift inter vivos - 3 elements: **Once all the elements are in place, resultant gift of property is irrevocable as if the recipient had obtained title by virtue of contract.**

1. **An intention to donate** - donor must have the mental capacity to appreciate the nature of the transaction. Must ­­be current intent (can’t intend to give a gift in the future, this is just a promise)
2. **An acceptance** – involves understanding of the transaction & a desire to assume title. A person may refuse a gift  – although the law usually presumes that people will accept a gift of something of value
3. **A sufficient act of delivery** – revolves around possession. Delivery is seen as a demonstration that the donor intends to be bound by the act of giving. Intention may also be shown by declaring oneself trustee of a gift for the donee.

a. Delivery element allows donors to change their minds without legal consequence

Delivery can precede the manifestation of intent.

### Nolan v Nolan Estate

PL is a beneficiary of the estate of Cynthia, Sir Henry’s first wife. DF Lady Mary was Sir Henry’s second wife and inherited his estate. Dispute over 3 paintings which PL claims were gifted by Sir Henry to Cynthia inter vivos, but appear to have been in the DF’s continuous possession.

Held: No donative intention (remained in D’s possession). Onus is on P to prove. No delivery therefore no gift.

## Delivery

Delivery important (a) caution the donor, (b) evidence of the gift for 3rd parties, (c) detrimental reliance – as soon as the possession is transferred there is a greater likelihood start relying on the gift.

**Constructive**: if goods are unwieldy, or if donor is unable to deliver the item (say, due to illness), something less than actual delivery has been found to suffice.

**Symbolic**: When a representation of the goods is handed over, rather than the effective means of control (such as photograph of item). Not given the means of controlling the object. Very likely to be insufficient delivery.

### Alternatives to Delivery

**(1) Deeds:** Normally serves the probative and reflective function served by delivery. Anything less formal than a deed will likely not suffice.

(2) **Declarations of Trust:** Ex. “I will give you this car when you are 18” = unenforceable promise. Ex. “I will hold this car in trust for you until you are 18” = sufficient to perfect a gift. **i.** No visible act – relying on proof of declaration of trust

(3) **Others**

#### Re Cole

Husband takes his new wife to his house. He points to the furnishings and says: "it’s all yours”. Husband subsequently becomes bankrupt. Who gets the furnishings?

Held: Not her property. Words are not sufficient to perfect a gift (In ordinary circumstances both words and delivery are required; Here relaxing the visible act would be dangerous, leaving only the oral requirement).

* If someone asks for something, the other person doesn’t say anything, person takes it. Silence is ambiguous, can be construed either way

## DMC (*donationes mortis causae*)

Gift only becomes absolute with death of donor. If peril passes, gift is assumed to be revoked.

Elements: (1) Impending death, (2) Delivery, (3) Gift to take effect only upon death of donor.

Courts are divided over inclusion of (a) land. Traditional rules preclude DMC’s from land. Courts are divided and one case in Canada has upheld. Ziff sees no compelling policy reason to differentiate between personalty and realty. (b) sudden peril (realistic vs apprehension), (c) whether peril but be substantial or if subjective fear suffices, (d) any death vs death by the specific peril feared, (e) rights of done before death. Since its revocable, is it held in trust? Is the revocable possession immediately?

Delivery requirement is still in play. However, diluted to take into account circumstances (impending peril). After death, there is no way to rectify a deficiency to delivery.

### *Bayoff Estate*

Mr. Bayoff is diagnosed with terminal cancer, he prepares his Last Will and Testament. He summons A.S. in the presence of his two solicitors and hands her the key to his CIBC safety box, and says “everything there is yours”. However, Bayoff fails to give her the proper form to allow her access. He then passes away. A.S. who was the Executrix of the Bayoff estate under the Will, then gets access to the box. It contains $70K and change.

Held: Failed DMC – Bayoff intended her to take possession regardless this is an *inter vivos* gift. Also, Bayoff was certain of his death, no “if”.

Was it inter vivos? Although the delivery of the key would be sufficient for a gift mortis causa, it was insufficient for a good gift *inter vivos*.

The ***Strong v Bird*** exception: (a) The donor intends to make an inter *vivos gift*; and (b) That intention continued until death; and (c) The gift is undelivered; and (d) The done takes legal title to the donor’s estate as the named Executor (or administrator on intestacy).

If all elements are satisfied then the donee can perfect the gift (to himself) if she was not executrix she would be denied.

## Gift Examples

(1) **Elyse’s mother agrees to give her a car for $1000. The car’s actual value is $12,000.** Please advise.

Court would likely rule that this is a contract and not a gift.

(2) **Sid’s uncle calls him up and promises to give him $500 next week.**

It is just an unenforceable promise. However, some courts might rule in favour of the donee if they found it unconscionable to renege the gift. Sid’s uncle gives him a cheque for $500. Sid then insults his uncle, and his uncle stops payment on the cheque. In Canada, a cheque is not a perfected gift. Not complete until it clears.

(3) **R gives D a signed paper for her necklace and earrings that says “I make an irrevocable inter vivos gift of my earrings and necklace (which is described) to donee D.”**

For the necklace, there is nothing she could do at this points to deliver the necklace, whereas for the earrings she could have just handed them over but did not

The gift of the earrings would likely fail, unless she also made a declaration of trust that she will wear the earrings for now and then give them.

# Common Law Estates

“As estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time, for he who has a fee-simple in land has a time in the land without end...”.

**Freehold**: highest form of ownership under feudal system. Principle form of ownership. Hold *seisin* (liability for obligation and incidents of tenure) of property.

i) **Fee Simple**: Most closely approximates actual ownership.

ii) **Fee Tail**: Inheritable right of conceptually more limited duration, effectively extinct and abolished in Alberta.

ii) **Life Estate**: An entitlement that lasts as long as a life or lives.

Leasehold Estates: Voluntary arrangement between an landlord and tenant. That lease is not merely a person’s right, it is an estate in land that can be transferred and all the rules of property apply to that estate.

Copyhold Estates: Never introduced in Canada.

Create estates for:

* + - * 1. Economic potential: encourage stewardship and trade.
        2. Autonomy: control future use and ownership. Provide for loved ones/keep land in the dynasty. Restrict use of land from beyond the grave “dead hand control”.
        3. Product of the tension between autonomy and alienability.

### **Why Create EstaTES?**

To realize the economic potential of the land (balance interests of utility and autonomy of the property owner):

**Value of utility/ economic efficiency**:

**Encourage stewardship**: Encourages the owner of the estate to enhance, protect the value of the holding (knowing that on the death of the owner, those values will benefit their heirs or whoever is named in the will)

**Promote trade**: the fee simple estate is divisible - carve it up and sell it to those who value it more

* Reason why landlord takes his fee simple and gives you a lease interest is that his right to possession at the end of the lease, and your interest to the lease itself, is more valuable than the landlord having sole possession until the end of time. Your transaction makes you both better off
* E.g. Right of way/ easement can be carved out of a fee simple estate, leasehold estate, tenancy agreements

**Control future use and ownership (interests of the deceases/ dead hand control):**

* **Provide for loved ones**: “to my wife for life, remainder to my children in fee simple”
* Why not leave it to the widow in fee simple? Because if she remarries it might go to her new husband. Creation of life estate followed by a remainder in fee simple allows owner to provide for the interests of both his widow AND his children

**Keep land in the dynasty:**“To William and his heirs make of his body on his present wife Katherine begotten”

* Here, the owner says the property can pass to you but after that only to your children from this marriage
* To make sure that children don’t consider only their own interests and squander their family’s wealth.
* Until the 16th century, land was the primary source of wealth, and was considered not a personal but a family asset.

**Restrict the use of land from beyond the grave**: “to EPSB, for as long as the property is used as a school”

* The person making a gift here stipulates that the land must be used as a school
* “To the first grandchild of mine to graduate from law school”
* Question: to what extent do we respect the wishes of these grantors? The law of estates is the product of the tension between autonomy and alienability.

Estates are created through either (i) operation of law [ex. Dower Act], or (ii) by an instrument [devise or grant].

Estates inapplicable to personalty as chattels can be owned outright.

Qualifications:

* 1. **bailment** – temporary interest in chattel (library book),
  2. **trust** – limited gifts of personalty contained in a trust.
  3. delay legal of personalty in a will – future interest.

## Fee Simple

Can endure forever, fully alienable and can be divided into smaller estates. At common law, if a tenant in fee simple died without an heir, the estate ‘escheated’ to the tenant’s feudal lord. (See Unclaimed Personal Property and Vested Property Act, SA 2007, c U-1.5, s15(e)). An estate of potentially infinite duration – estate passes to any living blood relative or anybody designated by will  upon death. If neither exists, property reverts back to the Crown via escheat – *Ultimate Heirs Act*.

Each new owner steps into old owner’s shoes – *Quia Emptores.*

Low transaction cost, way to induce conservation of natural resources for future generations. Owner is spurred to install cost-justified permanent improvements and to avoid premature exploitation of resources.

### Creation

Historically: “To A and his/her heirs” or “To A, his/her heirs, executors and assigns”.

* “To A” are words of **purchase**: describe the intended recipient of the property.
* “… and his/her heirs” are words of **limitation**: duration of the estate granted; denotes a fee simple estate - does not confer right of estate to heirs; ‘magic words’.
  + They have *spes successionis*, a chance of succession, but no estate.
* “To A in fee simple” or “to A forever” inter vivos passes just a life estate.
* “To A in fee simple” in a will devises a fee simple. Courts attempt to recognize the intent of testator as intent is clear but testator isn’t alive to remedy the situation.
* “To A”: by devise A inheret a life estate.

Today in Alberta, fee simple (transfer of entire estate) is presumed per ***Law of Property Act* s. 7(1)**, unless a contrary intention is found. Same assumption is made for a devise, per ***Wills Act,* s. 26.**

\*In most jurisdictions (except New Brunswick) magic words no longer necessary. Presume free simple in absence of words of limitation.

**Rule of Law**: Even if it is apparent that a fee simple was intended, the language is required. This wording is required for an inter vivos transfer, but not for a will (only requires that the language is sufficiently clear to convey the meaning). Will apply even if it is inconsistent with the intention of the grantor.

**Rule of Construction**: A default, permissive rule. Provides a presumed interpretation that can be rebutted by proof of contrary intention.

### Grant vs Devise

O acquires a state in fee simple:

* Grant in Fee Simple: Creates a life estate as an *inter vivos* transfer, but creates a fee simple in a will.
  + O is alive, and grants to A in a fee simple.
* Devise in Fee Simple: Testamentary will to B.
  + A devises to B in Fee Simple
* Grant of Life Estate: Grants tenancy for life.
  + B grants L a life estate, B now has a fee simple in reversion. When L’s life estate expires, B will regain rights to use and possession of the land.
* Devise with Remainder: Carves a fee simple estate into a life estate and fee simple estate in remainder.
  + B wills (devises) to W for life, with remainder to C. W has life estate, and C will obtain fee simple on expiration. Will have the exact interest that O acquires originally.

## Fee Tail

Governed by the statute *De Donis Conditionalibus (1285)* which directed the judges to recognize the estate of fee tail. Establishes a series of life estates in successive generations of the same family. Lasts as long as there are direct lineal descendants of the holder; designed in 13th century to keep property in a family.

**Process**: If a gift was given in fee tail to A, when A died, the property would devolve to the children (the system preferred the eldest male, by virtue of *primogenitor*). If there were no children, the fee tail would revert to the grantor; Thus, the grantor has a fee simple “reversion”, keeps the “remainder”. Impeded transferability significantly and creates waste issues.

* “To A and the heirs of his body” (fee tail general).
* “To A and his heirs female of his body begotten” (tail female).
* “To A and his heirs male of his body on his present wife Elizabeth begotten” (tail male special).

Barring the Entail: enlarging it to a fee simple estate for the promotion of alienation.

Common Recovery: a way that conveyancers developed to get around the fee tail without statutory intervention. Accomplished by commencing litigation in which the relevant parties collusively participated in alleging and admitting fictitious claims as to title. Fines and base fees.

Abolition: statute scheme in Alberta; led to the demise of fee tail system. *Law of Property Act, s. 9:* any devise or limitation that previously would have created a fee tail creates an estate in fee simple.

* Makes “To A and heirs of heirs of A’s body” and the like invalid.
* Rationale: restricts alienation, contrary to public policy of transferability and efficiency

## Life Estate

Made expressly “to A for life,”, language to a similar effect “to A for as long as she wishes”, “to A to have and use during her lifetime”, by a faulty purported grant of an estate in a fee simple (does not happen today because whatever grantor has grantee gets), by operation of the law (*Dower Act*).

Can exercise all rights that can normally be enjoyed, rent, permission to others, exclusion. Cannot sell the property outright because interest is always for life.

Measured by the life of the holder.

* *pur sa vie* - life estate for life = “To A for life”.
  + Lasts as long as A is alive - A = the measuring life (“*cestui que vie*”).
  + O retains an interest – fee simple in reversion.
  + Interest is fully transferable, but A will stay the measuring life.
* *pur autre vie* - for someone else’s life = “To A for the life of B”.
  + Lasts as long as B is alive - B = *cestui que vie.*
  + B has no interests - just the “clock on the wall”

### *Thomas v Murphy,* 1990

**Ratio: “To X and his heirs” does not denote any interest to the heirs. It is a matter of limitation of title (fee simple) rather than a question of successor of title.**

### RE *Walker*, ONCA 1925: Repugnancy

Gave wife “all real and personal property” but added if any remains at her death it should be disposed as he directed.

Issue: Can one transfer property absolutely to someone else and also give qualifications on how it will be divided upon their death?

There are three possible constructions:

(i) Gift to the first person named is a fee simple, and the gift over is repugnant.

(ii) The first name takes life estate only. (*Martini Estate*)

(iii) The first gift is a life estate with a power to encroach on the remainder. (*Taylor*)

Held: Dominant intention was to benefit the wife therefore (i). Following gift is repugnant and should be ignored.

\*K says valid argument that the court’s interpretation was not respectful of Walkers intention to benefit other people but the wife. Sees no valid argument why they preferred one construction over another. No reason to prefer one over another. A lot of uncertainty.

**Ratio: An absolute transfer of land (fee simple) cannot be accompanied by directions on how to deal with land upon death of receiver. If life estate, gifts are valid**.

### Re *Taylor*, 1982 SASK

“I give all real and personal property to use during her lifetime, any estate left...”

Held: Language of the grant suggests life interest with the power to encroach. The power to encroach on capital does not result in an absolute interest when a lifetime estate was the intention of the donor. This power does NOT change it into a fee simple. She can encroach for proper maintenance (vague). Power to encroach can be implied.

Need to look at subjective intent – phrases alone have no precedential value therefore it doesn’t matter it particular expressions were given meaning in another case.

### *Christensen v Martini Estate*, 1999 ABCA

Gave house to use, when “no longer need it” give to X.

Held: Life estate without encroachment with remainder to X. Testor was a layman must respect intentions (a) benefit wife, (b) benefit X. Use of the words “said property” denote intention for property to be passed on as it is.

## Waste

Essence of waste is an act that causes injury or lasting damage to the land. Waste balances interests of those in present possession against the interest of those who will or may be entitled to possession in the future. Law expects life tenant to pass EXACT same property to the remainder. Gives remainder right out action best exercised during the life of life tenant (damages or injunction). Onus is on P to prove damage.

**Ameliorating** is a change that enhances the value. Improves inheritance unless character completely changes. Unlikely to be actionable at common law.

**Voluntary** cause damage by affirmative action. Positive wrongful action. Diminish value of the land. Cut tree, open mine... clearly actionable. Over-cultivation. \*Traditionally seperate timber trees and non-timber trees.

**Permissive waste** is a failure to act. Default on maintenance and repairs. Not actionable unless the gift specifies a duty to repair or a duty to maintain.

**Equitable** are acts that are wanton, malicious.

*Law of Property Act s71*. Will has to specifically include equitable waste.

“An estate for life without any impeachment of waste does not confer and shall not be deemed to have conferred on the tenant for life a legal right to commit waste of the description known as equitable waste, unless an intention to confer the right expressly appears by the instrument creating the estate.”

### *Powers v Powers Estate*, 1999 NL SCTD

Received an equitable life estate with the power of encroachment. Power to draw on income and capital of my estate. Settlor delivers title to trustees, designates beneficiaries. Guided by will, but discretion. Can appear before court and ask for direction.

* A life estate comes with responsibilities of paying taxes, providing utilities, sometimes mortgage and sometimes insurance from income. Annual expenses that depend on use of property and can change with use of property. Section 18: Trustee Act.
* Heating – no obligation to pay out of capital.
* Repairs: necessary for proper preservation of building can come from capital.
* Insurance: no obligation on life tenant to ensure at common law. If leasehold assume duty to pay rent and insurance if required by lease. Therefore, no obligation for insurance.
  + In US Insurance is a regular payment and comes from income.
* Income = Annual expenses, i.e. heat, regular upkeep, taxes, sometimes insurance.
* Mixed income and capital = sometimes mortgage.
* Capital = repair necessary for proper preservation, sometimes insurance

\*Failure of trustee to insure for loss by fire would probably be seen as negligence.

## Dower Act

Eliminated dower and curtsey rules in western provinces because they were inconsistent with the principles of emerging land title systems. They impaired the freedom to transfer lands and provided interests which were not disclosed on certificates of titles to land. Homestead legislation provides a counter-balance to the free and efficient alienation of lands promoted by modern title systems – promotes security of the home.

Life interests irrespective of intention of landowner. Gender neutral. Must be legally married, end upon divorce.

Applies: Place the couple resides.

Modern Homestead Legislation: Three main elements – control of disposition of home, life estate, protections from creditors.

(i) fetters ability to dispose without consent of non-owner spouse.

(ii) provides non-owner spouse with life estate in homestead upon death of owner spouse.

(iii) wholly or partially exempts homestead from exclusion from unsecured creditors.

Release of Dower Rights: Affidavit: Application for transfer of land forms.

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# Aboriginal Property

Aboriginal law is the law of the Canadian state in relation to Aboriginal peoples.

* It includes common law doctrines like Aboriginal rights and title, treaty rights, s. 35 of the Constitution Act, 1982, and legislation (like the Indian Act)

Indigenous law is the law of particular Indigenous groups.

* It includes Indigenous legal traditions that often can be traced back to before contact with Europeans (but that also continue to evolve).
  + See eg, traditional Gitxsan land tenure principles.
* It also includes formal laws (including legislation) enacted by Indigenous communities exercising recognized self-government powers.
  + Eg a First Nation’s land code enacted under the First Nation Land Management Act.

### Framework for Aboriginal Interests

Aboriginal Title: Common law interest in land that received constitutional protection in 1982.

Tenure under Statutory Regimes: Indian Act, First Nations Land Management Act (written by indigenous groups), Metis Settlements Act (AB)

Tenure under Modern Treaties & Self-Government Agreements: Eg Nisga’a Final Agreement provides for fee simple interests in land under Nisga’a jurisdiction

Customary interests in land within particular Indigenous communities.

## Nature and Sources of Aboriginal Title

* Aboriginal title has been recognized by common law courts for at least two centuries (see Johnson v M’Intosh, 21 US 543 (1823)).
* Indian title – Aboriginal title that is a continuing burden to the Crown.
* However, it was recognized prior to that in the colonial practices of the British in North America, in colonial statutes, and in imperial legislation (eg Royal Proclamation, 1763).
* The practice of entering into land cession treaties (and private land sales) with Indigenous people can be traced to the early days of British settlement of New England in the 17th century.
  + These practices were premised on a recognition of an Indigenous legal interest in lands a group occupied and controlled – though of course there was often inequality of bargaining power

### Doctrine of Discovery

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

### *Terra Nullius*

* *Terra nullius* means land belonging to no one.
* Most British colonies settled in the 17th and 18th centuries were not treated as *terra nullius*. However, some British territories settled in the 19th century were treated as *terra nullius*, including British Columbia and Australia. The Crown asserted a claim to both sovereignty and full beneficial ownership of the land, despite prior Indigenous occupation of the land.
* *Terra nullius* has since been repudiated by courts in both Australia (Mabo v Queensland (1992), 175 CLR 1) and BC (Calder v Attorney-General of British Columbia, [1973] SCR 313)

### Statutory Arrangements

**Royal Proclamation 1763:** The Royal Proclamation set out much of the basic framework for Crown-Indigenous relations in Canada. It formally recognized an Aboriginal legal interest in part of the territory that became Canada.

* The Royal Proclamation also provided that this interest could only be transferred to the Crown via a treaty (ie. no private sales to settlers).
* As an instrument having the force of imperial legislation, the Royal Proclamation is part of the Constitution of Canada (to the extent not subsequently repealed)
* *Catherine Milling v R:* Aboriginal title personal and usufuctary.
* Residential schools went beyond property rights, but by forcing children from their homes, it played a significant role in dismantling Aboriginal communities and dispossessing them from their lands

**Indian Act 1867**: Created interests that were enforceable in Canadian courts – historically only formal land tenure regime for Canadian FN. Widely regarded as an instrument of colonialism.

* Uniform regime applicable to all Indigenous peoples regardless of existing laws, customs and norms.
* Allowed Ottawa to retain significant oversight over “Indian” affairs.
* Reserve land: Crown land set aside for the use and benefit of specific bands.
  + Each band recognized chief and counsel. Granted certain powers, not unlike a municipality. Difference was that chief could grant and take away property rights on the reserve at their discretion.
  + All rights conditional on remaining resident on reserve.
* Amended – recognized more formal property interested which were enforceable based on a certificate of possession. Granted exclusive right to use and enjoyment of property which could not be deprived arbitrarily by band or council.
  + Devised by will, or transferred *inter vivos* between members of the band living on the reserve.
  + Land revert to band otherwise.
* Provincial property legislation does not apply to the reserves.
  + Eg. Matrimonial property, Orders of protection.
* Reforming is difficult – cannot unilaterally impose reforms as that would essentially repeat mistakes of colonialism. Reform only when specific groups opt-in.
  + If have modern treaty or self-government agreement can opt out.

**First Nations Land Management Act**: Authorizes reform – opt in. 90 codes adopted, but none in Alberta.

**Metis Settlement Act**: Things pg. 210

### Treaties

* Land cession treaties were pursued in most of Ontario and the Prairie provinces (eg Treaty 6).
* In St. *Catherine’s Milling v The Queen* (1888), 14 AC 46, the Privy Council described Aboriginal title as a merely “personal and usufructuary right”.
* In Calder (1973), a divided panel at the Supreme Court of Canada left open the possibility that the doctrine of Aboriginal title applied in BC (most of which was not covered by historical treaties), and that title had not been extinguished through legislation. This raised the prospect of Aboriginal title claims in large portions of BC.
  + The land claim in Calder was ultimately resolved through *the Nisga’a Final Agreement*, one of the first “modern” treaties between the Crown and an Indigenous group. However, a multitude of other potential Aboriginal title claims continue to exist.
  + Possible to sell, lease, mortgage all aboriginal title land. Grant fee simple to citizens.
  + Constitutionally protecting governmental authority over own territory.
* In 1982, s. 35 of the Constitution Act, 1982 came into force (“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. …”)

### Economic Issue

First nation socio-economic disparities are a direct consequence of the failure of the market for private investment on First Nation lands; absence of market investment partly due to high transactions costs associated with legal uncertainties surrounding inalienable lands

* De Soto s argument: alienability is required for economic development (limit of alienability is paternalistic and potentially unfair) – therefore indigenous groups have trouble putting up their land for credit when it is inalienable

While privatization can have beneficial results, such as wealth creation and social mobility, the alteration of property rights in other contexts have been shown to have unintended costs for communities.

Divestment: conversion to fee simple will facilitate divestment to non-Nisga’a.

Foreclosure of property, loss through non-payment of taxes, loss through judgement, difficulties when the land is a family asset o Impoverishment: property loss for communicates cause consequences like social dislocation, but there are more than just that.

Absenteeism: individual ownership may undermine the current right of citizens to occupy lands by virtue of their membership in the community; once membership right is converted to property right, a member can potentially lose the right to occupy the property.

Monopolization: privatization may concentrate ownership to a few hands and thereby undermine goals of developing capital wealth for numerous citizens, further marginalize.

Loss of possession: because possession was tied to the financial ability of the Nisga’a group and the federal government to provide, assurance with fee simple is lost

## *Delgamuuk v BC*, SCC

Claim brought by the Gitxsan and Wet’suwet’en peoples to Aboriginal title of a portion of territory in northwestern BC. Dismissed on procedural grounds - (the pleadings at trial had framed the claim as a claim by individual houses and clans, rather than as collective claims brought by the Gitxsan and Wet’suwet’en nations).

**Extensive *obiter dicta* on the nature and content of Aboriginal title, how it may be established, and how it may be infringed by governments.**

1. Aboriginal title is a unique estate in land (“sui generis”). Its content is informed by both common law and Aboriginal perspectives & legal systems.
2. It is based on occupation by an Indigenous group prior to the Crown’s assertion of sovereignty.
   1. The Royal Proclamation recognized this interest but did not create it.
3. Sources:
   1. occupation of land
   2. relationship between the common law and pre-existing principles of Indigenous law.
4. The Crown holds the underlying title, as with traditional estates in land, on the basis of asserted sovereignty.
5. Aboriginal title is inherently collective in nature, held by the Indigenous nation as a whole.
   1. Compare with *Gixon* – is that accurate.
6. Right to exclusive use and occupation, subject to unique features & restrictions:
   1. Inalienable except to the Crown.
   2. Inherent limit on use: uses must not be “irreconcilable with the nature of the occupation of … land and the relationship that the particular group has had with the land”. Such as?
      1. Strip mining a hunting ground.
      2. Building a parking lot on culturally significant land.
   3. However, uses are not restricted to those uses that the group traditionally engaged in. Aboriginal title has a modern, economic component.

**Why is aboriginal title inalienable?**

Lamer CJ:

* Ensures settlers receive their titles from the Crown.
* Ensures Indigenous peoples are not “dispossessed of their entitlements”.
* Reflects the relationship and connection an Indigenous group has with the land (more than just a fungible commodity).

Other reasons?

* Historical reasons relating to Crown military and diplomatic relations with Indigenous groups.
* Outdated paternalism towards Indigenous people?
* Many Indigenous legal systems did not traditionally treat land as an alienable commodity.
* Ensuring the maintenance of a collective land base as a locus of self-government

**CONCERNS**: Lamer CJ justifies restrictions on Aboriginal title based in part on Aboriginal perspectives and Indigenous peoples’ relationship and connection with the land.

* Does the decision assume there is a single, pan Indigenous perspective on or relationship with land?
* Can’t Indigenous cultural commitments change over time?
* Is this approach based on a frozen conception of Indigenous culture?
* Is it the role of the Court to define and police restrictions on Aboriginal title based on its view of an Indigenous group’s own culture?

### ESTABLISHING A CLAIM

Must demonstrate sovereignty over lands in question at time British crown established sovereignty. Control must be sufficient, continuous and exclusive. “Once it is accepted that some form of actual possession is enjoyed a significant physical presence need not be shown for a group to retain rights over the land.”. “When dealing with the requisite quality of possession adopt a standard that recognizes and accommodates facts of case (geology, culture of group, ect)” . In theory, nomadic and semi nomadic peoples can establish.

1. Occupation of land at the time the Crown asserted sovereignty over the land.
   1. Indigenous laws in relation to the land.
   2. Physical occupation (Examples: “construction of dwellings … cultivation and enclosure of fields … regular use of definite tracts of land for hunting, fishing, or otherwise exploiting its resources”)
2. Continuity of occupation (if present occupation is relied on as proof of pre-sovereignty occupation)
3. Occupation must be exclusive. Shared exclusivity is possible – presence of legal conception of trespass? *Justify this requirement as proof of title should be consistent with property interest acquired, prevents competing claims between aboriginal groups.*

### Aboriginal Title & Traditional Common Law EStates

Aboriginal title has both similarities and differences with traditional common law estates in land (eg. fee simple, life estate, etc.). However, Aboriginal law is *su generis* and therefore analogies with other estates are a good starting point but should not dictate conclusions.

**Similarities**

1. The Crown holds the underlying title.
2. The Crown asserts a right to govern and make laws in relation to the land (subject to constitutional restrictions).
3. Enforceable in the courts of the Crown.
4. Perpetual, ongoing interest in the land.
5. Exclusive
6. Presumptive power to use the land.

**Differences**

1. Unlike traditional common law estates, which are presumed to ultimately derive from a Crown grant, Aboriginal title is based on occupation prior to the Crown’s assertion of sovereignty, and so is not based on a Crown grant.
2. The content of Aboriginal title is unique and distinct from any other common law estate (inherently collective, inalienable, restrictions on use).
3. The content of Aboriginal title is based in part on Indigenous legal systems.

## ABORIGINAL RIGHTS

### Recognition

In addition to Aboriginal title, Indigenous groups may claim common law (constitutionally protected) Aboriginal rights to engage in specific practices, customs and traditions. Even if a group fails in a claim to Aboriginal title, it may still have a claim to Aboriginal rights in a given area.

* Site specific: areas of land where practices or uses are central and significant. Get right to continue the practice, central and significant PRIOR to contact, excludes practices that emerged as a result of contact. Freezes aboriginal uses in time.

These are rights to engage in specific practices, rather than rights to exclusive possession of land (eg. hunting, fishing, ceremonial practices, etc.).

In order to make out a claim to an Aboriginal right, a group must establish that a practice was engaged in before contact with Europeans and that it is of central significance to the Indigenous society in question (*R v Van der Peet,* [1996] 2 SCR 507). Not petrified in form, but may assume present day attributes.

### Contemporary Issues

Government decisions relating to “Crown lands” subject to asserted but unproven Aboriginal title claims (see Haida Nation, pp 440-446)

Eg. The regulatory approvals of both the Northern Gateway and Trans Mountain pipelines were quashed on the basis of inadequate consultation with Indigenous groups, including those with claims to Aboriginal title (2016 FCA 187; 2018 FCA 153)

Claims to land owned privately (fee simple). \*Up in the air, never fully materialized.

*Choppewas of Sarnia v Canada (AG)*: People purport to sell (in 1839) to private owners but grant is defective. Sell onward to others who are good faith purchasers. Held: current owners have priority over aboriginal claimants. Not going to wipe out rights of current owners who are good faith purchasers. Aboriginals have COA against Crown due to breach of fiduciary duty. **This is a different method of extinguishing aboriginal title**: defective grant, good faith purchaser.

## *Tsilhqot’in Nation v BC,* SCC

BC was granted forestry rights to certain timber companies, granted on belief that they are Crown lands. T disputed Crown ownership and asserted Aboriginal title – 1900^2 km.

Trial Judge: Test for title satisfied in certain areas, accepted claim that pleadings framed by all or nothing. This argument was rejected at COA. Claimants were semi nomadic....MORE.

SCC clarifies application of *Delgamuukw* principles.

1. Amount of control determined by: Indigenous law and custom, size of group, manner of life, character of land.
2. Court accepts judge’s finding that the area could not sustain a group larger than them. CL perspective that being physically present doesn’t need to be on every single inch. If establish effective control have possession (or constructive possession) of the whole thing.
3. Possession has to be an act that sends clear message or signal.

Landmark decision: First time recognized aboriginal title, logging operations now require permission from FN.

### Infringements

As a matter of international law and common law sovereign can exercise rights to extinguish property interests.

**Unilateral act of Sovereign**: Bound by Honour of the Crown, duty to consult, Royal Proclaimation limits sovereign rights. Ex. Giving of HBC lands did not extinguish title – have to be explicit.

**Surrender**: Aboriginal title can be surrendered. Also, defective grant and good faith purchasers - *Chippewas of Sarnia v Canada (AG)*.

Aboriginal title is constitutionally protected under s35. Unilateral extinguishment is no longer possible. Government actions may infringe in some circumstances, but these infringements must be justified.

* The infringement must be in furtherance of a compelling and substantial objective.
* The infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal people.
* The government must meet its duty to consult and accommodate.

#### Honour of the Crown

* “Not paternalistic but a recognition of strength”
* Good faith obligation, informs interpretation.
* Duties to consult and accommodate.
* Duties are NOT contingent on judicial finding that Aboriginal right exists. Duty of consultation emerges when Crown is or should be aware contemplated state action could adversely affect Aboriginal claim or right.
  + Likelihood of claimed right being recognized and serious of impact of planned action frame the scope of the duties.
* Even when robust infringement, Aboriginal groups do not hold veto – the Crown must make a bona fide effort to reach agreement.

#### Duty to Consult

Arises automatically when a claim was made – have to show licence is not against aboriginal group.

* Duty depends on the strength of the claim.
* Injunction can be sought by Aboriginal groups.
* Once aboriginal title is recognized any infringement by the government has to be justified – s35.
* Usually when court resolves a dispute the ruling operates retroactively – these were the boundaries all along and here is the remedy.
  + EXCEPT with Aboriginal title. No title until it is recognized.

***Haida Nation v BC***

BC issued a “Tree Farm License” on lands that Haida Nation had a pending land claim, not yet resolved. Haida claimed aboriginal right to harvest red cedar in that area. Minister authorized a license to the Weyerhauser Comp without Haida consent

Issue: What do you do when Crown makes decisions based on “Crown lands” subject to asserted, but unproven Aboriginal title claims?  How does one know if there is a duty to consult with aboriginal groups?

Judicial History:

* Trial: Crown was successful – no duty to consult
* CA: Overturned, both Crown and Weyerhauser had a duty to consult the Haida
* SCC: Dismissed Crown appeal (confirmed duty), allowed W appeal

Analysis:

* Duty to consult originates from the Crown’s honour; must occur when the Crown has knowledge of the potential existence of an aboriginal right or title and contemplates activity that may adversely affect it
* No duty to come to an agreement, only a duty to consult – with the requirement that steps are taken to avoid irreparable harm and to minimize the effects of infringement
* Aboriginal groups do not get a veto, the good faith requirement remains
* The duty to consult applies only to the Crown, not third parties, due to the “special relationship” the Crown has with aboriginals, which does not exist with third parties
* The Crown had a legal duty to act, or at least consult, with the Haida before making decisions that could irreparably harm the land

**Ratio:**

* **There is a duty to consult Aboriginal peoples where an Aboriginal right is claimed or is suspected by the Crown, but not yet proven/formally recognized under the law**
* **The extent of the duty depends on the level of intrusion and the strength of the claim – a strong claim requires that the group participate in the decision making process, a weak claim requires only notification**

Notes:  Until aboriginal title has been established or recognized through a treaty, the Crown can make decisions about the land, but the Crown has a duty to consult the indigenous groups

Ex: regulatory approvals of pipelines were quashed on the basis on inadequate consultation with indigenous groups.

# Trusts

Legal and equitable interests are distinguished in Canadian Law. Trusts can be created by will, deed or declaration of trust. Trustees are authorized to buy, sell, lease in the best interests of the beneficiaries. B’s interests are protected by fiduciary interests. \*Pay capital gains on trusts every 21 years in Canada.

**Example: S: to Dewey, Cheatham and Howe and their heirs → to the use of B and his heirs**

* S: *feoffer to uses.*
* D, C & H: *feoffees to uses.*
* B: *cestui que uses.*

### History

**Act 1** in which many estates are transferred by deeds ‘to uses’ which circumvent the common law but the Chancery enforces.

* The break-up of personal bond between lord and vassal.
* The growing importance of incidents of tenure.
* The transformation of the economy.

‘Use’ at common law – since B is not ‘seised’ of the estate, real actions are not available. The court regards her as having “no more to do with the land than the greatest stranger in the world”.

* Courts of equity was designed as a means of perfecting the common law. Designed to improve and suppliament but not supplant.
  + Generally evolved and lost elasticity and became more pliable. Remedies of injunction and specific performance.
* Uses of uses: Avoiding relief, forefeiture and other feudal incidents. Designating heirs (prior to *Statute of Wills*), shielding property from creditors or dower rights, making charitable gifts to religious institutions.

Under equity: B has an equitable interest in the land that effects all who come to the land except a bonda fide purchaser for value.

**Act 2** in which the King convinces Parliament to pass the Statute of Uses to fuse equitable and legal titles.

**Act 3** in which lawyers find creative loopholes in the Statute of Uses.

Nowadays it is possible through careful drafting to separate legal and equitable title (i.e., create a ‘trust’) by avoiding the Statute of Uses, or, depending on one’s objectives, to raise a use that deliberately attracts that Statute.

## Statute of Uses, 1535

The Use separated legal title from the beneficial ownership of property. In response, the SOU reunited legal and equitable title by removing the legal title from the feoffee and placing it in the hands of the *cestui que use*.

s. 1: Where person A is *seised* to the use of (person or corporation) B, then B’s equitable interest is enlarged by a corresponding legal interest; and A’s interest is extinguished (‘executed’).

Example: X: to P and his heirs → to the use of Q and her heirs.

* Before the Statute of Uses? P holds the legal title in fee simple; and Q holds the equitable interest.
* After the Statute of Uses? Q holds legal and equitable fee simple; P has nothing.

Example: X: to A and her heirs to the use of B for life, remainder to the use of C and her heirs (“use after use”).

* Before the Statute of Uses? A holds the legal title; B has an equitable life estate; C has an equitable remainder in fee simple.
* After the Statute of Uses? A is ‘executed’ out; B has a legal and equitable life estate; C has a legal and equitable remainder in fee simple.

#### Unintended Features

The SOU forced the courts of the common law to recognize legal interests which they previously abhorred. No more ceremony of feoffment by livery of seisin.

1. Bargain and Sale. While in London, X agrees to transfer to Y an estate in Whiteacre, Yorkshire. Does the common law allow it? No because no *seisen* ceremony. But after 1536, X can convey “To the use of Y”. The Statute of Uses executes the use and places legal title in Y.
2. Springing Interest. Interest granted upon occurance of a certain circumstance. O conveys Blackacre: “to Lady Mary when she marries Matthew”. What says the common law? But after 1536, O can covenant: “To stand seised for the benefit of Lady Mary and her heirs when she marries Matthew” (more on this in chapter 7)

### Avoidance

One method of creating a trust after the Statute is to construct a limitation that does not fit within the four corners of the legislation.

1. The Statute does not apply when the feofee/trustee holds a leasehold estate, since a leaseholder cannot be seised to the use of another. (Seisin is the possession enjoyed by the freeholder). **Example**: To B for 99 years to hold for the use of C.
2. The Statute does not apply when a corporation holds property to the use of someone else. **Example**: B ltd holds to the use of C.
3. The Statute only executes a use when one is seised to the use of another. **Example**: To A to the use of A. However, same result as A has both legal and equitable title.
4. The Statute is not invoked if the feoffee/trustee was given active duties to perform, duties that would require that legal title be retained (To A to hold, manage, pay the rent and profits to the use of B in fee simple).
5. The Statute does not apply to personalty.

### Exhaustion

**The SOU is only capable of executing one fee simple of uses.** Use upon use results in the creation of an enforceable equitable title. Execute one full fee simple

**Examples:**

* to A, to the use of B to the use of C. Creates a trust with B as the trustee and C as the beneficiary.
* To A to the use of B in trust of C.
* To B to the use of B in trust for C.
* Unto and to the use of B in trust for C.
* To the use of B in trust for C.

### Examples

Following gifts contained in *inter vivos* transfer create a trust:

1. To B for 99 years, in trust for C (for 99 years)
2. To B Ltd in trust for C
3. To B, to collect rent and profits and invest these to the use of C.
4. To B, the sum of $10,000, to hold in trust for the benefit of C
5. To A to the use of B to the use of C.
6. To B to the use of B to the use of C.
7. Unto and to the use of B to the use of C.
8. Unto and to the use of B in trust for C.
9. To the use of B in trust for C.

Assuming the Statute of Uses applies, the following *inter vivos* transfers of land will not produce a separation of legal and equitable title. Faulty trust.

1. To B to the use of C.
2. To B to the use of C Ltd.
3. To B in trust for C.
4. To B in trust for C for life, then in trust for D in fee simple.
   1. A trust with a life estate does not exhaust the statute.

### Modern Equity & Trust

Nowadays, the term ‘trust’ describes a conveyance that creates an equitable interest (as opposed to a conveyance designed to be executed by the Statute of Uses). But in a transfer, the language “to the use of” = “in trust for”.

SOU was abolished in England in 1925, but is still law in Canada. Some aspects of the Statute may be affected by modern registration rules. While the statute may regard a grantee as entitled to a legal estate, in some provinces such as Alberta, legal title to a freehold estate cannot pass without the registration of the transfer. (Land titles Act ss 53-54). **In Alberta, the Statute of Uses applies, but affected estates remain equitable until registered in accordance with the Land Titles Act.**

* A right in equity is dependent on the availability of equitable remedies, the granting or withholding of which is still a matter of judicial discretions.
* Additionally, equity will not impose an obligation against a *bona fide* purchaser for value of a legal interest who had no notice of an antecedent equitable claim. Such a person acquires the legal title free from the obligation of equity.

## Resulting Trusts

A resulting trust can arise in several ways. It may occur when the beneficial entitlement under a trust has not been fully or properly disposed of by the settlor. [Presumed where there is a gap in equitable title]. Or when property is gratuitously conferred by A to B, a resulting trust may be found in favor of A. Equity will NOT perfect a gift.

May arise by implication.

(1) Incomplete disposal of equitable entitlement. If, in a grant of property on trust, some element of the beneficial interest is not transferred it will result back to the settlor. Example:

* **A – To the Baker Trust Co. in fee simple, in trust to C for life**. Baker holds the legal title on trust for C, the beneficiary, for life. The remainder of the beneficial fee simple estate after the grant of the equitable life estate to C is unaccounted for in the settlement. It results back to the settlor A.
* **A – To X for my first child to turn 21 years of age.** Until the age condition is met, the equitable title cannot pass to the intended beneficiary. Revers back to settlor for the meantime.

(2) A resulting trust can also arise if a deed of trust is somehow ineffective, such that it fails totally or partially. Can occur if it contravenes public policy, or created through fraud or duress. Equitable title results back to the settlor.

(3) Gratuitous transfers can result in a resulting trust. As a general rule, when A buys a property (or transfers one that he presently owns) and places title to B, a resulting trust is presumed to arise in favour of A. The legal title is still in B, but equity will treat that interest as subordinate to the resulting trust held by A. B is regarded as bare trustee.

* If a resulting trust occurs here then B, by definition, holding in trust for A the Statute of Uses should be invoked by such a gift. If so, A winds up with not just the equitable title but the legal title as well.
* Maxim – equity presumes bargains and not gifts.
* The presumption can be rebutted by showing that a gift was truly intended (*Fediuk v Gluck*). If that is proven L&E titles are held in B and no trust arises.

(4) Gratuitous transfers do not have the presumption of resulting trust in every situation. Some circumstances the position is reversed and a **presumption of advancement** is obtained. This depends on the nature of the relationship of the parties.

* Gift is presumed in a transfer from parent to adult child (*Pecore v Pecore*). (or stand in for parent).
* An adult child, even one still dependent on parental support, will not have the presumption of advancement is not invoked. A resulting trust arises unless an intention to give a gift can be proven on a balance of probabilities.
* Traditionally, advancement presumed when husband purchased property in name of wife, but not vise versa – *Mitchel v Baker* 1984
  + Advancement has been applied to engaged couples.
  + Conventional view advancement does not apply to cohabiting couples.
* Transfers between spouses have been reformed by statute – general approach is to make gender neutral and limit or end the presumption of advancement.
  + Alberta *Matrimonial Property Act* for division of property the presumption of resulting trust generally applies to transfers made by one spouse to the other.
    - Exception for assets purchased as joint owners – presumption is that both hold share of equitable title and gift is presumed.
* *Rathwell v Rathwell:* held that the presumption of advancement has ceased to embody any credible inference of intention.
  + Presumption has no place when spouses have separated.
  + Ziff prefers a gender neutral rule that presumes an advancement (most likely intention).

### *Pecore v Pecore*

Hughes, Paula’s ageing father, planned for Paula’s financial security by designating her as the beneficiary of his RRSP, and life insurance policies. Following this, he gratuitously placed the bulk of his assets (approximately $950,000) in joint accounts with her. Hughes retained control of the accounts, and declared and paid all taxes on the income made from the assets in the accounts. Hughes subsequently rewrote his will naming Paula as sole executrix, Paula and Michael (Paula’s husband at the time) as residuary beneficiaries, and removing his other two daughters as beneficiaries. There was no mention of the accounts in the will. Hughes also clearly expressed to his lawyer that upon his death, his investments would devolve to Paula. Upon Hughes’ death, Paula redeemed the balance in the joint accounts on the basis of the right of survivorship. Paula later divorced Michael and a dispute over the accounts arose during their matrimonial property proceedings. Michael argued that Paula held the balance in the joint accounts in trust for the benefit of her father’s estate, and as a consequence, the assets formed part of the residue of the estate and should be distributed according to the will.

Held: The trial judge erred in applying the presumption of advancement because Paula was not a minor child. However, the error did not affect the decision. The trial judge found ample evidence in support of Hughes’ intention to have the balance in the joint accounts go to Paula upon his death through survivorship. Had the trial judge applied the presumption of resulting trust, the result would have been the same as proof that a gift was intended would have been found on the evidence.

**Ratio: The presumption of advancement doesn’t apply between parents and their independent adult children.**

Abella: Presumption should be based on affection not on age – presumption should apply.

Reasons: Parental obligation to support their dependent children (and not parental affection) is the basis upon which to apply the presumption of advancement. While Hughes maintained control of the accounts and used the funds for his benefit during his life, his concern in providing for Paula after his death is consistent with an intention to gift a right of survivorship.

## Constructive Trusts

Constructive trust is imposed by equity.

Institutional Constructive Trust: Imposed when a person has acquired property for his or her own benefit at expense of another to whom the person owns a fiduciary duty.

Remedial Constructive Trust: Provides a remedy when title holder of property would be UE unless equity compelled him to share the property with someone who contributed.

### Conventional Forms

Situationally based: Commonly arises in instances where equity wishes to respond to various modes of unconscionable conduct (not necessary).

(1) Arises when an express trustee wrongfully obtains profits from his position. They will hold the monies under a constructive trust.

(2) May be imposed to prevent a wrongdoer from profiting from a crime – ex. Murder of one joint tenant by another.

(3) Vendor in standard house sale normally assumes position of a constructive trustee prior to closing of the transaction. Must maintain property and not damage. However, until price paid in full vender still has many beneficial rights (possession and profits).

* Purchaser acquires this equitable interests (through constructive trust) if equity would be prepared to order specific performance of the contract of sale.
  + *Semelhago v Paramadevan* – Sopinka in obiter: Specific performance should no longer the default position for real property.
    - Must demonstrate damages are not adequate recompense because property is unique.
    - Taken seriously by courts. Equity as a supplement.
* Leaky ceiling example: As soon as sign the contract and make first payment on a house you are regarded to already be a holder of beneficial interest in the property and the vender, as a constructive trustee of the buyer, cannot jeaprodize the buyers position.
  + Example: Leak in the ceiling have to fix it. Unless already evident.

#### *Bulen v Bulen*

Artist in Australia designs are based in indigenous traditional art. 3rd party infringes on his IP rights. Takes party to court. If he hadn’t what would happen? Would there be any rights to the aboriginal group to sue that infringer?

IP puts one person as holding the property rights? Does *Bulen* hold in trust for the Indigenous group?

Equity will not automatically impose a constructive trust merely upon the identification of a fiduciary obligation.

What am I supposed to get from this?

### Remedial Constructive Trust

The use of RCT is used as a means of responding to UE for compensating those engages in (otherwise unrewarded) household labour. Created in response to the traditional treatment of women by the legal system, domestic roles, opportunistic breach from shitty men. Opportunistic breach: don’t perform obligations at same time. Party that performs earlier is at a disadvantage.

* Wife performs earlier – has kids and takes care. Husband’s role is to make money, slowly – 20 years later she’s done her role and he’s senior partner and makes bank.... she’s at a disadvantage if he breaches.

Response to society – law reform and changing domestic roles.

Equity response: ascribe an equitable interest to the other partner

1. trust resulting from gratuitous transfer or shared intentions,
2. constructive trust as a remedy for unjust enrichment.

#### *Murdoch v Murdoch*, 1975 SCC

Tried to claim interest in the ranch, based partially on the financial contributions made prior to the purchase of the land, and partly on the indirect contributions she had provided through her work.

Failed: Just doing what a rancher’s wife should. Necessary intention required to create a resulting trust “could not be found”. Harsh catalyst for reform.

* Resulting trust requires financial contributions to the financial contributions to the acquisition of the property. Or evidence of a common intention to share.

Dissent: Who cares about intentions – give constructive trust. Husband gets unjust enrichment.

\*Nowadays wouldn’t be a problem because of Matrimonial Property Act. Presumes equal division of assets acquired during the marriage.

#### *RathwEll v Rathwell*, 1978 SCC

Similar claim.

Majority held: Resulting trust based on common intention.

Minority: resulting trust based on common intention but also endorsed general doctrine of UE. One of the ways that UE can be remedied was to treat the legal owner as holding part of the legal title on a constructive trust for the party suffering the deprivation!

#### *Pettkus v Becker*, 1980 SCC

Involved a de facto relationship that lasted almost 20 years. Minority opinion was adopted by the majority. Doctrine of UE and remedy of constructive trust has been firmly entrenched within the Canadian legal system since.

#### *Peter v Beblow*, 1993 SCC

Sustained a claim of UE based on conventional domestic labour. A constructive trust may be imposed on the basis of ‘ordinary’ domestic contributions where:

1. There is unjust enrichment.
2. Monetary damages are inadequate;
3. The claimant’s contribution to the property is “sufficiently substantial and direct”

Considered legitimate expectations of the parties...

* Was the benefit conferred a gift or pursuant to some obligation?
* Does public policy support his enrichment at her expense?

Held: 100% interest in the house.

As a general rule P must initially show that there is no previously recognized juristic reason to deny recovery that applies to present case. Established reasons are **contract, disposition by operation of law, intended gift, or any other valid obligation founded in the CL, equity or statute**. If there is none, P has made out a *prima facie* case under the juristic reason component. D then bears a *de facto* burden to establish that a novel jurisdiction exists.

Two alternatives for restitution – personal resititutionary reward (monetary payment) or restiutionary proprietary reward (constructive trust). Presumptive order is for monetary payment. Where, however, monetary payment is problematic and there is a proven and direct connection between the contributions and the property at issue, constructive trust may be imposed. Can occur if unable to pay or personhood values – special property.

How do determine the quantum of the entitlement? Two approaches.

1. **Value Received or Fee-For-Services**: Court strive to identify the value of the work undertaken on a fee-for-services basis. Based on open market prices.
2. **Value Survived or Accumulated Wealth**: Treat contributions as an investment in the overall wealth of the parties. Aim to determine how much contributions enhanced overall wealth of the parties.

#### *Kerr v Baranow*, 2011 SCC

Common law relationship for 26 years. K less money, disabled after a stroke, B left job early with reduced pension to take care of her. Put her in a home. She served with papers for property division. Each party claim UE against the other.

Salient concern is whether the parties engages in a ‘joint family venture’. If so, normal approach is to apply value survived method of quantification. Existence of JFV is a question of fact. The claimant must show a causal nexus between his/her contributions and the assets accumulated by the JFV.

Four prime factors:

1. **Mutual Effort:** Extent pooling of efforts, length of marriage, decision to have children, use of assets for family purposes. If one party stayed home for domestic labour enabling the other to work as breadwinner.
   1. Do the parties proportionally pay for expenses?
   2. Do they make contributions as best as they can?
   3. Do they divide their domestic labour as a team?
   4. Did the domestic contributions free the other to focus on education/business/work?
2. **Economic Integration:** Extent finances, economic interests and well-being are intertwined.
   1. Joint bank account?
   2. Separate accounts – authority?
   3. Pay each other’s debts?
   4. Choose home together?
   5. File income tax? Together?
      1. Identify as CL partners?
3. **Primacy of the family to the parties’ actions**: How family interests were weighed for important decisions, detrimental reliance (forgoing education or career).
   1. Did make career or other sacrifices?
   2. Dedication to each-other and children?
4. **Subjective Intentions**: Given considerable weight.
   1. Assure of stability and security?
   2. Are listed as health coverage together?
   3. Work together for retirement assets?

## Unjust Enrichment Schema

CAUSE OF ACTION

1. Enrichment
2. Corresponding Deprivation
3. Absence of Juristic Reason
   1. No established JR (onus on claimants)
   2. Presence of an addition JR (onus on respondent)
      1. New JR established
      2. Case specific JR

REMEDY

1. Form of Award
   1. Monetary (presumptive)
   2. Proprietary
2. Valuation
   1. Value received (fee for services)
   2. Value survived (presumptive for join family ventures)
   3. Other financial considerations (such as conferral of mutual benefits)

# Qualifed Dispositions

A transfer of an interest in real or personal property can be absolute or it can be qualified by terms of forfeiture, or acquisition, or both.

A qualified transfer must take the form of an interest subject to a condition precedent, determinable limitation or condition subsequent. A qualified transfer creates a future interest in the transferor (right of re-entry or possibility of reverter), in the transferee, or in a third party (executory interest)



* **Reversion**: Interest where the property returns to grantor, ex. after expiration of life interest.
* **Remainder**: Interest moves to next person to be enjoyed in possession when a prior particular life estate has ended
* While one may describe remainders and reversions as future interests, they are more accurately described as present rights to future enjoyment.
* **Defeasible**: Interest that may be brought to a premature end on the occurrence of a specified event.
  + Ex. To X in fee simple, on the condition that if the property no longer be needed for school purposes, my estate may re-enter.
  + X receives a fee simple subject to a condition subsequent.
  + Decedent’s estate retains right to re-entry which MAY be exercised if the stated even comes to pass.

### Fee Simple Determinable : Determinable Limitation

1. O: To A so long as the land is used as a school.
2. O: To A until he marries.

Modified fee simple estate, escheat for lack of heirs or when event occurs. A acquires a fee simple determinable. O’s interest is known as a possibility of reverter. A acquired a qualified interest in possession. If the eventuality stipulated ever materializes, A’s fee simple will determine (end) **automatically**, and the right to possession will revert to O. Fencepost. If event occurs, estate ended and A on the property with no legal interest.

\*A still has possessory title – in time could assert a claim of adverse possession.

* **Determinable**: Interest ends automatically ends on the happening of the prescribed even and no formal entry or demand for possession is required by the person holding the possibility of reverter.
  + Ex. To X until the land is no longer required for school purposes.
  + X receives a determinable fee simple.
  + Interest retained is the possibility of reverter.
* Whether a condition subsequent or a determinable limitation has been created is a matter of construction, and so depends, in principle, on the intention of the grantor. Now, generally use of stock phrases are used to construe the grant.
  + **Condition Subsequent: On condition that, but if, provided that, if it happens that.**
  + **Determinable: While, during, so long as, until.**

### Fee Simple Subject to a Condition Subsequent

1. O - to B on condition that the property be used as a school.
2. O- To B, but if B enlist in the army, my estate may enter.

B acquires a fee simple subject to a condition subsequent. O, or O’s estate, retains a right of re-entry. B acquires a qualified fee simple in possession. If the stipulated eventuality ever materializes the grantor may **elect** to cut B’s estate short by entering the land. Estate foes not end automatically, O must exercise rights. Thundercloud.

**Condition Subsequent: On condition that, but if, provided that, if it happens that.**

### Fee Simple Subject to Executory Limitation

1. O - To A until she marries, and then to B.
2. O – To son 1 provided he marries by age of 25, otherwise to son 2.
3. O – the mineral rights to X Corp. for 7 years and so long thereafter as oil or gas are produced in paying quantities, and thereafter to B Corp. for 7 years.

B’s interest is an executory interest, and A’s interest is referred to subject to an executory limitation. Executory interests can be created through a will or a ‘use’. Made possible by Statute Of Uses.

Possible right of 3rd parties.

### Conditions precedent and Contingent Remainders

1. O – to C on her marriage.
2. O – to W for life, then to C at age 21

C acquires an interest subject to a condition precedent. C’s interest is contingent and will vest if and when the condition is satisfied. The condition serves as a bridge.

1. O – 1 million to the first graduate of class of 2021 appointed to the COA in Alberta.
2. O – to W for life, then to the children of A

The gift is contingent until we know who crossed the bridge. May never happen.

### Compare DL & CS

O: to A on condition that the property be used as a school. VS O: to A, while used as a school.

Ascertain the granters intentions through:

* Choice of language
  + Durational language is indicative of determinable limitation – so long as, while, until, during.
  + External stipulations are indicative of a condition subsequent – but if, on condition, provided that.
* Instrument as a whole
* Rules of Construction

#### *Brown v Moody (McKeens Estate)*

[I]n trust for my wife during her lifetime. Divide the residue of my estate equally between my sisters Alice and Beatrice if they are both alive at the time of the death of the survivor of me and my said wife. If only one of my said sisters is alive at the time of the death of the survivor of me and my said wife, deliver the residue of my estate to the surviving sister, the same to be hers absolutely.”

Wife survived both sisters. Widow’s interest is an equitable life estate.

Two interpretations for the sisters:

* 1. a remainder in fee simple in Alice, or Beatrice, or both, contingent on surviving the life tenant (interest is subject to a condition precedent);
  2. a remainder in Alice & Beatrice equally, which vested a *morte testatoris*, but is subject to a condition subsequent that Alice be divested if Beatrice were the sole survivor, and vice versa.

Preferred 2 because the settlor’s intent. Interpretation #1 would result in partial intestacy.

The rule in *Browne v Moody* states that a remainder conditional only on surviving the life tenant is to be regarded *prima facie* as vested (i.e., subject to a condition subsequent of being divested if not surviving the life tenant).

The rule is an example of the preference for early vesting. Demonstrated preference of courts to chose present (vested) interest and not future interest. A remainder conditional only on surviving the life tenant is to be regarded as prima facie as vested (subjected to a condition subsequent of being divest if not surviving the life tenant.)

Since Language which is ambiguous allows multiple interpretations and we have to choose. What did the settlor intend in the event that neither sister survived the widow?

* ·       Several presumptions:
* Presumption of intestacy: if a person goes to the trouble of writing a will, he intends it to cover all possible events.
* Presumption of early vesting: if we can treat the sisters’ remainder as either subject to a condition precedent or vested subject to a condition subsequent, then we should favor the latter. We prefer to regard the interest as having vested early (i.e. on the death of the testator).
* ·       The court is helped by the rule in *Browne v Moody*:
* If the only condition attached to a remainder is surviving the life tenant, as opposed to satisfying some personal test/accomplishment, then the courts will presume, in the absence of any evidence to the contrary, that the remainder is vested and not contingent.
* The idea is to treat the condition as only a stipulation that postpones enjoyment of the vested interest for the lifetime of the life tenant.
* If the gift is not only postponed by the life of the life tenant but also qualified with another condition, i.e. marriage or attaining a certain age, then that gift is prima facie contingent, i.e. subject to a condition precedent.
* ·       Idea here is to recognize that the language here is open to 2 interpretations
* Court is assisted by the presumptions to assume this as a vested interest
* Courts will go out of their way to make this a vested interest but if the language is clear it will be regardedas a contingent interest.

#### *Phipps v Ackers (Kotsar v Shottock)*

Testatrix: “My Trustees . . . To pay my residuary estate to Oilme Kotsar if and when she shall attain the age of 21 years . . . In the event of the failure of the trust in favour of Oilme Kotsar, to such charitable institutions as my trustees shall think fit. ”

Issue: Is reaching 21 a condition of acquisition or retention? Is it a condition precedent (allows her to get it) or condition allows her to keep it?

According to the rule of construction in *Phipps v Ackers*, where

1. There is a gift to A ‘if/when/as soon as’ A attains a specified age or fulfils some other condition;
2. With a gift over to B on failure to fulfil that condition; then
3. A’s interest is regarded as vested at the date the gift becomes effective subject to being divested by B if the condition is not satisfied.

**Ratio: Illustrates the preference for early vesting in action**.

As initially cast, the rule provided that in a devise (or grant) to A**, if or when** A attains a given age, with a gift over in the event that he or she were to the before reaching the age, the age threshold is to be regarded as a condition subsequent and not precedent.

* As a result, A would take immediate vested estate subject to being divested if he or she died before reaching the specified age.
* Facile reasoning is that the gift over implies that the first taker

Note that the rule operates here: “to the children of A when they turn 21, but if no child reaches 21, then to B”; but arguably not here: “to the children of A who turn 21, but if no child reaches 21, then to B”.

* + To the children of A when they turn 21, but if no child reaches that age then to B.
    - Attracts rule.
    - Gift to a class on a contingency
  + To all the children of A who shall attain 21, but if no child attains 21 then to B.
    - Does not attract rule.
    - Gift to a contingent class.

## Vested & Contingent Interests

* **Vested**: Interest when no condition or limitation (including the ascertainment of the identity of the recipient) stand in the way of enjoyment.
  + Natural termination is not treated as such a condition.
  + Ex. To A for life, remainder to B
    - A has life estate vested in possession.
    - B has fee simple in remainder. Vested in interest (but not in possession).
* Interests that are vested in possession are fully alienable, as are reversions and vested remainders.
* Vesting means granting a person an immediate right to present or future enjoyment of property.
* **Contingent**: If vesting is delayed pending the occurrence of some condition precedent, the happening of which is not inevitable.
* The contrast between vested and contingent interests can be shown by the fee simple subject to a condition subsequent and the companion concept, the right of re-entry. That type of fee is vested but it may be lost/divested if the condition is breached. The right of re-entry is subject to a condition precedent, violation of the condition, therefore it is contingent.
* In contrast – determinable interest followed by the possibility of reverter. The determinable fee is vested. In Canada, the possibility of reverter is treated as being vested at CL. The determining even is regarded as marking a natural limitation of the estate granted and not as imposing a super-added condition.
* When possible the courts adopt an interpretation that leaves an interest indefeasibly vested.
  + Also, preference in favor of vesting gifts at the earliest time possible.
* Construing an interested as vested insulates the girl from those rules that may vitiate contingent interests, including the rule against perpetuities.
  + Can also allow for the early distribution of a deceased’s estate into the hands of the ultimate beneficiaries.
  + is to enjoy the property first, it is to be given over if the prescribed event does not occur.

### *Stuartburn* (Municipality) *v Kiansky*

K wants to be an elected official, but there is a condition in the *Local Authorities Elections Act* where all officials must be owners of land in the municipality where they are being elected

* “Owner of the land” is defined as the present owner of a freehold estate (includes both life estates and freehold estates)
* K’s grandmother held a life estate for property in the municipality, and K had the remainder in fee simple for this property

Issue: Is K “owner of land” for the purpose of the Act?  Does the remainder in fee simple interest qualify as being a current owner of land?

Analysis:

* Freehold estate can be interpreted to mean a freehold right, title, or interest in land
* K’s remainder in fee simple is a vested interest, i.e. the present entitlement to future enjoyment of the freehold estate
* K’s remainder fee simple interest is vested because of an *interest*, not because of possession
* Whereas K’s grandmother’s interest is vested in possession for the duration of her life, i.e. the present entitlement to present enjoyment of the freehold estate
* Allows D to be classified as a present owner of a freehold estate

**Ratio: A remainder in fee simple interest is a vested interest and thus is a valid freehold estate**

### Precatory

Terms are said to be purely precatory if they fall short of establishing conditions, limitations or any kind of binding obligation whatsoever.

* To “request” that a beneficiary maintain accounts for the gifted property coupled with a stated “understanding” that the property shall pass on that person’s death to others is precatory.
  + Language denoted neither a condition nor a gift over.
* Conditions *in terrorem* are intended to deter the legatee from contesting the will and are generally regarded as idle threats.
  + However, if the testator provided for a gift over and the stipulation is not against public policy the condition may be upheld.

## Invalidity

1. Public Policy
2. Uncertainty
3. Impossibility
4. Restraint on Alienation
5. Perpetuities
6. Condition subsequent (whether of reality or personalty) – invalid condition subsequent is eliminated and the gift is rendered absolute.
   * + - 1. To A provided she never votes in the provincial elections. If the condition is invalid, A takes a fee simple absolute.
7. If the determinable limitation is void the entire gift fails.
   * + - 1. To A until she votes in the provincial elections. IF the condition is invalid, A takes nothing,



A donor who is worried that invalidity might sabotage the whole gift should use a condition subsequent. On the other hand, if the attitude of the donor is that the stipulation is closely ties to the very reasons for giving the gift then the transfer should be drafted as a determinable limitation.

1. When a condition precedent is attached to realty invalidity destroys the gift.
2. The law is less simply stated in the case of a contingent gift of personalty.

Feeney:

* When a condition is originally impossible – the gift is absolute and the condition is simply ignored.
  + Rule presumes that the stipulation is a frivolous gesture – but what about giant FU?
* If it can’t be performed because contrary to law...If performance is sole motive of the bequest, or its impossibility was unknown to testator or was possible in creation but became impossible due to act of God – gift and condition are both void



#### *Unger v Gossen*

Facts:   Woman left her estate to her sister for her life, and on her sister’s death, in equal shares to her 3 nephews so long as they were Canadian residents (her intention was to give money to her nephews and keep the money out of reach from the Soviet Union).  Upon the fall of the Soviet Union, the nephews moved to Germany; not eligible to immigrate to Canada. All potential beneficiaries agreed that the estate should be divided into three equal portions and immediately distributed to the 3 nephews; this petition is brought by the Executor of the estate

Issue: Whether the Court can or should direct a distribution of the estate as desired by all the potential beneficiaries?

Analysis:

* Clear intention of the testator that she did not want any of her funds going to any beneficiary residing in a communist state; before the Soviet Union collapsed, she became mentally unable to alter her will.
* Canadian law makes it impossible for the nephews to immigrate to Canada – the condition has become impossible to fulfill due to the operation of Canadian law.

 The impossibility was not known to the Testator as it arose after making the will:

* Conditions precedent impossible of performance (so known to the testator) are to be disregarded and the gift upheld
* Where the condition is made impossible by the act or default of the testator, the condition is void but the legacy is good
* Regardless of the testator’s knowledge, where the condition cannot be performed because it is contrary to law, then the bequest is absolute – It must be shown that the performance of the condition was not the sole motive for the bequest
* If impossibility was unknown to the testator, or if the condition when created was possible but has since become impossible by an act of God or a law, or some act not attributable to the testator, then both the legacy and the condition are void

**Ratio:** **With an invalid bridge/condition precedent for personal property:**

* **Absolute bequest: when the gift is more important than the condition itself.**
* **Entire bequest fails: when the condition was more important than the gift itself.**

### Public Policy

Ownership rights are always subject to the qualification that a private act will not be treated as valid if it offends a countervailing state policy. Individual autonomy and the power to dispose of property vs society’s interests (specifically promoting equality and abolishing discrimination).

Public policy is vague, subjective, and unsafe foundation on which to rest a judgement. Accordingly, the courts are reluctant to develop new heads of public policy. Can look to the *Charter* as a barometer of public policy even though doesn’t apply to private transactions.

Conditions which have been held to be invalid:

* Encourage a recipient to violate the criminal law,
* Seek to undermine parental rights.
* Prohibition on carrying out public duty.
* Prohibitions against remarriage have been tolerated.
  + Depends on the intentions... providing support for someone living alone or creating financial inducements to remain single.
* Restraints based on religion generally upheld - condition against marrying outside of the Jewish faith.

#### lenonard Fountation Trust Litigation

Rich dude left foundation for white people, explicitly racist. The trustees applied to the court for advice and direction as to the validity of the eligibility criteria.

Trial: Upheld. Accepting the deplorable nature of racism, the Court nevertheless plumped in favor of proprietary freedom as the dominant value.

ONTCA: Ordered the discriminatory elements of the document to be excised, but allowed the rest of the trust to stand. A trust of this type, based on notions of racism and religious superiority, patently contravened contemporary public policy.

Tarnoplsky JA – Suggested discriminatory scholarships could be saved if directed towards acceptable policy ends.

\*This case should not be taken as an authority for the proposition that all restriction amount to invalid constraints.

Difficulty of discerning rule – *Re Ramsden Estate* 1996. A scholarship at University of Prince Edward Island tenable to only Protestants was upheld. Distinguished from *Lenard* on the ground that is “was based on blatent religious supremacy and racism” that was absent from the Ramsden bequest.

#### Royal Trust v Western university, 2016 ONSC

To provide funds, from time to time and in the discretion of my Trustee for awards or bursaries to **Caucasian (white)** male, **single**, **heterosexual** students in scientific studies, including medicine, genetics, biology, chemistry, physics and those going into medical pharmacology research.

No awards to be given to anyone who plays intercollegiate sports. Further, to similarly provide funds for an award to be known as the Ellen O’Donnel Priebe Memorial Award in the discretion of my trustee, under the same terms as the awards above, except this award is to go to a hard-working, **single, Caucasian white**girl **who is not a feminist or lesbian**, with special consideration, if she is an immigrant, but not necessarily a recent one.

Despite the absence of recitals or other proof of motive, the court held: “I have no hesitation in declaring the qualifications relating to race, marital status, and sexual orientation and, in the case of female candidates, philosophical ideology, void as being contrary to public policy.

Although it is not expressly stated by Dr. Priebe that he subscribed to white supremacist, homophobic and misogynistic views, the stated qualifications leave no doubt as to Dr. Priebe’s views and his intention to discriminate on these grounds. **Case-by-case determination.**

#### *McCorkill v McCorkill Estate*

H McCokill gave his entire estate, $250,000, to an American-based neo-Nazi organization to which he belonged during his lifetime. H’s sister challenged the legitimacy of the will, arguing the gift was contrary to public policy

Issue:  Was the testamentary gift to a neo-Nazi organization against public policy and therefore invalid?

Holding:  CA invalidated a large testamentary gift to a neo-Nazi organization

Analysis:

* The mission of the group was hate inspired, white-supremacist racism, and disgusting
* The group’s materials were a clear violation of the criminal law’s prohibition against the wilful promotion of hatred, and engaging in such activity was against Canadian public policy
* Public policy had been used to invalidate offensive stipulations or conditions, but here the gift was absolute; second, to invalidate this gift would be solely based on the recipient

**Ratio:** **Extended the reach of the doctrine of public policy as a means to challenge the legality of property transfers. Added another group to the list of “unworthy heirs” to estates: racist hate-groups added to terrorist organizations, and heirs who culpably kill the donor, with the result that the inheritance is triggered**

 Concerns: private discriminatory activity the judgement does not purport to constrain AND the danger that the holding is so open ended that the law is rendered overbroad and indeterminate. Keeping public policy invalidation to stipulations does not open the litigation floodgates, which is good

#### *Blathwayt v Baron*

**Ratio: Term disinheriting a beneficiary should he/she become a Roman Catholic upheld**

#### *Fox v Fox Estate*

**Ratio:** **Contrary to public policy to permit a testator to disinherit a beneficiary under the will for marrying outside of a religious faith.**

#### *In RE Estate of Fineberg*

**Ratio:** **Testamentary freedom governs, meaning testators may disinherit for the marriage outside of a religion**.

### Gift

If in a gift – not trust or a will can still be held to be invalid. Court of NB says, based on the identity of the recipiants, gifts can be invalidated.

Eg. KKK. Organization racist and promote hate speech. IF to leader?

Cannot send money to terrorist organisation.

### Uncertainty

Conditions attached to property transfers that are too imprecise may be found to be void. Generally, only a practical level of clarity is demanded.

1. Conditions subsequent (and probably determinable limitations) the donee must be able to see distinctly and precisely from the outset those actions that will lead to a loss of the interest.
2. Condition precedent require a lower threshold of certainty. All that need be shown is that the condition is capable of being given some plausible meaning.

#### *Hayes v Meade*, 1987 NBQb

**Facts:** M leaves land to son J on condition that J resides on and cultivates the land. If he desires not to do this, land goes to H, who must also pay J $1000. J leaves the country and returns years later. H now claims they took possession due to failure to meet conditions (or through adverse possession). J claims they are condition subsequent, and void for uncertainty.

**Issue:** is the condition a condition precedent or a condition subsequent? Held: CS void for uncertainty. J takes absolute title to property

**Reasoning:**

* Court *prima facie*treats disputed conditions as CS to allow early vesting
* If viewed as CP, property would vest in neither J or H since J did not live on land, nor did H pay the $1000. Therefore, request of beneficiary would fail in its entirety, and intestacy would result
* Clear from testator’s intention that J receive something (money or land), and more justice is done by reading will as CS – gives effect to intent, presumption of early vesting, and presumption against intestacy

**Test for Condition Subsequent:**

* You must be able to state with certainty what events will give rise to the grantor’s right of re-entry.
* You must be able to state with a determinable limitation what will cause the grantee’s interest to revert to the grantor.

**Test for Condition precedent:** The language must be capable of some reasonable meaning.  Note: full scope of the condition need not be mapped out in advance

Condition is void for uncertainty. Must be clear from the beginning, precisely and distinctly, what even determines the vested interest. Parties cannot be sure what period of time the residency requirement must be met, so no certainty on condition

#### Sifton v Sifton, 1938

Trustees instructed to pay beneficiary sum of money annually “so long as she shall continue to reside in Canada”. Her interest was interpreted as subject to a condition subsequent, and the condition was held to be void for uncertainty. No adequate guidelines as to what sorts of temporary absences would contravene the condition.

Owing to the difference between these two tests, conditions subsequent are more vulnerable to invalidity than conditions precedent.

\*Lawyers avoid uncertainty by using ‘crisp’ language. A further hedge against litigation is to include a mechanism to resolve uncertainties should they arise.

*\*\*Kotsar v Shattock*: Held clearly distinguishable from *Sifton*. Obtain vs continue to reside.

“To pay the remainder of my residuary estate to Oilme Kotsar ... if and when she shall attain the age of 21 years, provided that upon the attainment of such age she shall then be resident in one of the countries of the British Commonwealth of Nations.”

#### Re Tuck Settlement Trusts, 1978

Will called for defeasance if a donee married outside of the Jewish faith. The will also provided that a reference could be made to the Chief Rabbi of England to resolve disputes as to whether a marriage would violate (or had violated) the stipulation.

Has been criticized on the bases that if the language was too uncertain for the parties, then a non-judicial arbiter cannot likely do better, particularly where that person has no special expertise.

### Restraints on Alienation

To what extent should current owner be allowed to restrain alienation to future owner. A total restraint on alienation, by way of condition or limitation, is void. **When the validity of a restraint is at issue, the extent of the restriction must be assessed. Voids anything that substantially deprives the right to alienate. (Grantor the power of veto acceptable?)**

Policy Reasons:

* Allow dead hand control of prior owners, not the ever-changing market place.
* Restraint prevents property from being put to its best or most valuable use.
* Restraint can discourage improvements.
  + If cannot sell land- less likely to improve it.
  + May be difficult to obtain financing, can’t mortgage (no security)
  + Limits profitability of investments.
* Perpetuates social and economic inequality – put in place when only source of money is land.
  + Act to concentrate wealth.
* Repugnant to the freehold estate.
  + Right to alienation is an essential right.
  + K says circular thinking.

Interest may be qualified to regulate the behaviour of grantees, but not in such a way to change the nature of the property itself.

* Fee tail is a classic restraint. Can only pass land to descendants. Abolished.
* Aboriginal reserves are inalienable, can only sell to the Crown.
* Subdivision control: Need permission from planning authority.

Valid Restraints:

**Promissory Restraint**: Purely contractual.

* O gives to A. A promises and assigns not to transfer the land.
  + If A breaches, O can sue for remedies on breach of contract.
  + Might be able to get an injunction, if sell can get damages.

**Disabling Restraint**: Simply removes a power of disposal normally found in bundle of right.

* O gives to A, but any transfer after that is null and void.
* A gets a fee-simple without the right to alienation.
  + Violation of a disabling restraint does not divest the holder of the property. Merely deprives the owner of some aspect of the power of transfer normally held in the bundle of rights.
  + Purported transfer is treated as a nullity.
    - *Nemo dat quod non habet:* One cannot give what one does not have.

**Forefeiture Restraint**: Restraint is attached as a condition. Right of re-entry or possibility of reverter may be invoked in the event of a breach. Restraint is attached as a condition, grantee forfeits land if it is transferred.

* O gives to X, but if X tries to sell O may re-enter.

Powers of disposal may be abridged in three ways:

1. By restricting the mode of alienation. (Eg. The property may not be sold or mortgaged)
2. By prohibiting alienation to some class of recipients.
3. By precluding dealings for a specified time.
   1. SCC has suggested that total restraint for any period of time isn’t acceptable.

CAN be restraints based on Public Policy:

* Control over transfers of minor’s property.
* Transfer of matrimonial home without consent.
* Sale of prescription drugs by patients.
* Control on foreign ownerships.
* Sale of sacred object.

**When the validity of a restraint is at issue, the extent of the restriction must be assessed. Voids anything that substantially deprives the right to alienate. (Grantor the power of veto acceptable?)** TEST: In ascertaining whether the combined mode, class and time restrictions are unacceptable, “does the condition take away the whole power of alienation substantially?”

* Highly flexible

#### *Re Rosher*, 1884

“I devise my real estate unto my son, and I declare that if my said son, or any person claiming through or him shall desire to sell my estates in the life time of my wife, she shall have the option to purchase the same at the price of £3600 for the whole”.

* At the time, the devise took effect the property was worth 15,000 pounds. A loving son might make such an offer, but the Court must have thought that a rational wealth maximize would not, it was held that the provision was an invalid **restraint on alienation**. Not allowed to do that. Basically, just ensuring he waited until his mother died to sell the land.
* **An indirect restraint within reasonable limit is enforceable because it is not really a restraint. But if a restraint, right to first refusal, is too strenuous it will be void.**

#### *Stephens v Gulf Oil*, 1975

Palen sold part of his property to Stephens on condition that Palen get a right of first refusal at a fixed price. Palen agreed to give a similar right to Stephens.

Held: The condition on the sale to Stephens was an illegal restraint.

**Ratio: If fixed price is too far below market value, it will be an invalid indirect restraint on alienation.**

#### Trinity College School v Lyons, 1995

Bennetts and TCS residential school made agreement that gave option to TCS to purchase Bennetts’ land for fixed price ($9375) upon their death. 1963 sell part of farm to school – part of deal was giving school right of first refusal with fixed price. However, right of first refusal has an option and isn’t a fixed price. 1965 signed a contract creating post mortem contract option for $9375. When Bennetts died, TCS sought to exercise their option (by this time, fair market value = $135k). Bennetts had already transferred the land to their children.

Issue: Is there a term in the 1965 contract that prevents parents from gifting land? Was option to purchase for fixed price void as improper restraint on alienation?

Held: Yes – there is a term. Officious bystander – implied term that the Benents cannot give land to daughters but the land belongs to the daughter. However, option void because difference between fixed price and market price was too divergent.

Alienation should not be restrained for two reasons:

1. Keeps property out of commerce and tend to result in concentration of wealth;
2. Tend to prevent improvements to property b/c landowner would be reluctant to make improvements if they cannot sell the property.

**Ratio: If the condition imposes a restrain on alienation that condition is void. If it is too below market price, it is an indirect restraint on alienation.**

\*\*\*\*\*In most cases it is theoretically possible for parties who are affected by a restraint to reach a mutually advantageous agreement to remove the restraint.

* Restraint as a condition subsequent can be bought off by purchasing the right of re-entry.
* When restraint is disabling, when it removes power of disposal form the bundle of rights of a fee simple owner, it would seem that there is no one with whom to bargain.

## Rule Against Perpetutities

The RAP sets a time limit for resolving contingent interests. Any interest that might vest “too late” is void at the outset. Its modern function is to promote alienability. The rule establishes a period of time during which contingent property rights will be permitted to remain unvested.

RAP tries to strike a balance between rights of a prior owner to control the destiny of her property, and the autonomy of present owners to act without being controlled by the dead hand of the past. IN essence connected to the goal of promoting economic efficiency and attempts to broker the liberty interest of present and future owners.

* Does not care who ‘wins’. “Utterly indifferent as to whether a contingent interest actually does vest”.

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

* Interest may be a legal interest, or an interest created in trust.
  + Possibility of reverter is considered a vested interest in Canada.
  + Right of re-entry arising from the breach of a condition under a lease, an option to renew a lease and a gift over from one charity to another are excepted. Interests are treated as vested so the rule against perpetuities does not apply.
* Only in regards to unvested interest.
  + Subject to a condition precedent.
  + Exact size of interest of the donee unknown.
* Date instrument takes effect:
  + Inter vivos: the completion of the transaction.
  + Will: death of the decedent.
* Perpetuity Period: duration of all lives in being plus 21 years.
  + Life in being: Someone who is alive when the interest is created. This includes a child *en ventre sa mere* (inside the mother).
    - A group of people can serve as lives in being if size of group is ascertainable and fixed.
    - Only helpful lives in being are those who can be used to demonstrate vesting cannot possibly occur outside the period.

### Determining if Valid

Must be known at the outset that a remote vesting of the interest granted is impossible. If it is possible, however unlikely, that the interest may vest outside the perpetuity period the gift is void.

1. **Classify**: Identify the contingent interests.
2. **Time**: Established the perpetuities period.
   1. Begins when the interest is created... is it an *inter vivos* gift or a *morte testatores*?
3. **Prove**: Prove that remote vesting is possible or impossible.
   1. Can you identify someone during whose life, or within 21 years of whose death, the contingency will be determined the contingency is good (validating life).
      1. Human
      2. Living at date of creation
      3. If group, cannot increase in number,
      4. If group, must be ascertainable (anything vague)
   2. Construct a hypothetical circumstance in which remote vesting is possible:
      1. Imagine a child being born after perpetuities period began.
      2. Kill off all lives in being.
      3. If the contingency can be unresolved after 21 years, the contingency violated the RAP.

Example: T devises “to Otis’s first child to land on Mars”.

* Feb. 2019: T dies, at that time Otis has a son AW and a daughter BW.
* Feb 2021: MR is born to Otis.
* Jul 2022: Otis, AW and BW die.
* Mar 2045: MW lands on Mars.

The gift violates RAP so its void at the outset.

#### Unborn Widow Problem

Example: To A for life, remainder to A’s widow for life, remainder in fee simple to their eldest surviving child.

Assuming that A is not marries when devise is drafted – remainder to widow is contingent, since it is obvious that the donor is not referring to a specific person (*Persona designate*) but rather to an individual, presently unascertained, who may someday be the widow of A.

Whether such a person will emerge is unknown BUT since A is a life in being the gift is valid.

Remainder to the eldest child is void for breaching RAP. Interest will vest on death of widow; only then will it be known who, if anyone, is the eldest surviving child. BUT the widow may not be a life-in-being because she may not have been alive at date the limitation took effect.

#### *Caroline Village v Roper*

Original owner allowed town to use land as a community center. Town wanted to put a basement in, persuaded Roper to give a gift over. Gift stated the land would revert back if it was used for any purpose other than a community center.

 Community center burned down in 1982 and the town wanted to sell the land for commercial use. Roper’s estate protested that the gift was not given in fee simple absolute. Town argued that the condition upon the gift was void because it was a condition subsequent (Defeasible fee simple) and the right of reverter in estate violated the perpetuities – (clouds cannot hang around too long).

**The right of re-entry was conditional, and the rule of perpetuities applies, because the title may vest too late in the person holding the right of re-entry.**

### *Alberta Perpetuities Act* 1973

Concern whether the RAP strikes the appropriate balance between autonomy and market objectives.

Avenues for reform:

1. Abolition: The common law rule allows for dead hand control. Land or money held in trust could do good today but is denied from the market.
   1. The Alberta Law Reform Institute recommended it be abolished.
   2. It is currently abolished in SK, MR, NS. Recommended by the Uniform Law Conference of Canada.
   3. AB legislation allows trusts to be varied.
   4. Tax system discourages long-term trust.
2. Wait and See*:* If the interest MAY vest in time but MAY vest too late – just wait and see. Once it hasn’t worked, say the gift failed.
3. A flat statutory perpetuity period – no lives in interest (80 years, 360 years).

The Alberta *Perpetuties Act* governs interest which is taken into effect after July 2, 1973.

* s 2. “Except as provided by this Act, the common law rule against perpetuities continues to have full effect”.
* s 3. The mere possibility of remote vesting is no longer the benchmark for invalidity.
  + Just because an interest can vest too late is no reason to make it void. If remedial provisions fix the problem, wonderful, if not it shall be void.
* s 11. The remedial provisions of the Act shall be applied in the following order: s 9; s 4; s 6; s 7; s 8

#### Remedial Provision

**SECTION 9:** It shall be *presumed* that a male is able to have a child at the age of 14 years or over, but not under that age, and that a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years; but evidence may be given to show that *a living person* will or will not be able to have a child at the time in question.

**SECTION 4**: Every contingency that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish: (wait and see):

* that remote vesting is impossible, in which case the interest is valid; or
* that the interest will not vest in time, in which case the interest is void, unless it can be saved by ss 6, 7, or 8.

**SECTION 5**: The wait and see period is 21 years + any lives in being.

Only persons referred to in s 5(2) may serve as LIBs (e.g., the grantor, the grantee). They must be alive at the outset (but see s 5(2)(e)), and a group of LIBs must not be so large as to make it impractical to identify the last survivor.

* Eliminates the unborn widow – only people (widow) mentioned are lives in being.

**SECTION 6**: When an interest is contingent upon someone attaining some age over 21, and it becomes apparent that age will not be attained by the end the perpetuity period but that the interest would vest if the age requirement were 21, then the age requirement is reduced to the nearest age over 21 that will allow timely vesting.

Example: T devises to any child of Matilda to reach the age of 30. Matilda has no children at the outset.

* Violates the common law RAP.
* Violates with wait-and-see period.
* Assume Matilda died and left a 5 year old child: what result per s 6? Since it became apparent that the interest would not vest in 21 years, but would vest if the age requirement was 21, we read the devise as: to any child of Matilda to reach 26.
* Section 6 would only help when age is the **only** barrier. Requires interest must vest when 21.

**SECTION 7:** If a gift to a class of individuals is void only because at the end of the wait and see period one or more members of the class may vest too remotely, then those members are excluded from the class, and the rest of the class vest.

Example 7. S transfers in trust for M for life, then to such of her children to marry.

* 2019 At the outset, M has two children: C1 who is married and C2 who is unmarried
* 2020 C3 is born to M
* 2022 M passes away
* 2032 C2 marries
* 2043 The trustees ask for advice
* Under common law nobody gets money, because the who group isn’t vested. Under act, C1 & C2 get money, C3 doesn’t because not vested within 21 years of M’s death.

**SECTION 19**: Both the right of entry (ROE) and possibility of reverter (POR) are subject to the rule against perpetuities. The perpetuity period for both is 40 years.

**SECTION 17, 18, 19(5): Commercial and Miscellaneous Contingencies.**

* s 19(5). The 40-year period does not apply to mineral “leases”.
* s. 18: for commercial transactions such as options, the perpetuity period is 80 years. If a contract stipulates a longer period, it’s still only exercisable within 80 years.

### Top Leases

A top lease is designed to take effect on the expiration of some prior lease. If the top lease is subject to a condition precedent it is contingent. However, found to be exempt from the rule (*Scurry Rainbow*),

#### *Scurry Rainbow v Taylor*, SASKCA

Landowner grants A Corp. “mineral lease” for ten years and so long thereafter as oil & gas were produced from the land and a “top lease” to B Corp. to take effect upon and in the event of the termination, cancellation, avoidance or expiration of the A Corp.’s lease, but only if any of those events should occur within a 42-year period from the execution of the top lease.

Held: The arrangement promoted the use of the mineral estate, so that from an economic perspective such arrangements could not be prohibited.

Rule again perpetuities was created to help facilitate commercial transactions. The top lease does this as property. Rare occasional of judicial activism.

#### *Symphony Space*

Own a building that consists of a theatre and a gallery of shops. Can’t find a tenant for the theatre.

Something.

recognition that the rule against perpetuities had been overturned in commercial contexts.... scurry rainbow was about how it made commercial sense to allow the oil top lease to run longer than 21 years

#### Overview

1. The common law RAP is in effect in Alberta. Check to see if any contingencies are affected.
2. The *Perpetuities Act* governs interests created 2 July 1973 or later.
3. Apply the remedial provisions of the statute in order:
   1. Not everyone is capable of having children in the future.
   2. We “wait-and-see” for actual events to establish if remote vesting is possible.
   3. The wait and see period for right of entry (on condition broken) or possibility of reverter (on a determining event) are 40 years. Mineral leases, options to buy, etc, are governed separately.
   4. Otherwise, the wait and see period is determined by reference to statutory lives in being.
   5. Age reduction and class splitting and closing determine whose contingent interests are valid and which are void.
   6. Any other matters?

# LEasehold

Create and govern simultaneous interests in property. Title vested in one person and possession vested in another.

It is important to distinguish between commercial tenancies and residential tenancies. Commercial tenancies are largely governed by the common law. (There are some statutes of influence.) Up until the 1960s this was true for residential tenancies but they were then reformed. The reforms bolstered tenant’s rights. The law of landlord and tenant is a composite of contract and property principles for a lease can be both a contract and the basis for an estate in land.

A lease is an estate in land. A lease is a demise of land under which exclusive occupation is conferred by a landlord on a tenant. Conveyance is exclusive possession for a certain term. While the lease continues in force the landlord retains a reversionary interest: the landlords right to actual possession is suspended during the term of the tenancy. This is not a true reversion of the freehold, for even while the lease is in existence the landlord remains seised of the land.

\*Everyone is a tenant of the Crown.

### Types of Leases

By purpose, or by tem.

1. By Term
   1. Fixed term (1 day, 150 years)
      1. May last for any term, starting date must be certain or at least ascertainable on the occurrence of a specified event. The termination date must also be certain.
   2. Periodic (monthly, yearly)
      1. Once to be enjoyed for some recurring unit of time that, in the normal course, continues until terminated by notice.
      2. Unless otherwise agreed upon or altered by statute (Residential Tenancies Act section 5-9) the notice required is equivalent to the length of the tenancy period, although in the case of a yearly tenancy a six-month notice is the rule at common law.
   3. Lease for Life:
      1. Treated as a freehold interest (life estate) at CL. When property is conferred for life without rent – life estate, whereas if rent is payable the interest is frequently described as a lease for life.
   4. Tenancy at Will
      1. No set period or term and continues only so long as both the landlord and tenant wish. Either may bring the tenancy to an end by notice, even if this right is stated to be at the sole prereogative of the lessor.
         1. The creation may be implied.
         2. Notice to terminate need not be express and the conduct of either party may demonstrate that the tenancy is being treated as if it’s over.
         3. Even if no rent obligation is expressed, a tenant at will may be liable to a claim based on use and occupation.
   5. Perpetual Lease
      1. With no fixed term or stated period, no right of termination, and which can accordingly last forever.
      2. Generally, not treated as tenable at common law.
   6. Tenancy at Suffrage
      1. Arises when a tenant remains on the premises without consent or dissent of the landlord after the termination of one of the other tenancies. A tenant refusing the landlords demand for possession is thereby rendered a trespasser.
      2. Non-consensual. Classification as tenancy is tenable.
2. By Purpose
   1. Commercial (governed by the common law). Not difference in the equality of bargaining power.
   2. Residential (governed by the Residential Tenancies Act)
      1. Standard Rules for Leases: all need to know is the price and duration.
      2. Standard Set of Terms – mandatory in some places.
      3. Mobile Home Sites Tenancies Act.

. \*Alberta law now defines residential premises as “any place occupied by an individual as a residence” and a tenant is a “person who is permitted to occupy residential premises under a residential tenancy agreement.” Explicit exclusion of hotel guests.

Unimpeachable lease should contain a demise of:

1. exclusive possession,
2. identification of the parties,
3. identification of the property,
4. the term (time period),
5. the date of commencement (present or future),
6. and the rent (if any) to be paid,
7. written requirements.

(Another list is identification of the parties, description of the demised premises, a demise of the premises for certain terms, date of commencements (present of future) rent (if any – for a valid contract need some consideration, written requirements).

\*If a tenant enters into possession under a void lease and pays rent (and is accepted by the landlord) a periodic tenancy is presumed by common law. The appropriate period will depend upon the facts, of especial significants is the basis on which rent is paid

## Lease or Liscence

A lease is a grant of exclusive possession: that is the key feature that distinguishes a lease from a licence. If exclusive possession has been conferred the, generally, the interest granted is a tenancy.

|  |  |
| --- | --- |
| LEASE | LICENSE |
| Exclusive Possession | Only a Right to Use (can’t sue in trespass) privilege to occupy with consent. |
| Non-Revocable (statutory protection against eviction) | Revocable at any time |
| Estate in Land | Not an Estate – Purely Contractual.  Not an interest in land. |
| Binding to the world  ie.. Subsequent purchasers of land bound to existing lease, only has reversionary interest. | Landlord can sell without obligation. New owners are not bound to the license. |

* License is a defence to trespass (permission to do what would otherwise amount to wrong). It can be revoked anytime. If pursuant to contract, it might be enforceable in equity. Liscense is not binding on successors – 3rd party takes land free of obligations. Licensee has no right to sue in trespass (owner or 3rd party).
* There are instances where licenses will bind subsequence purchasers. Liscense may turn into an interest in land in *equity* under the principles of estoppel and UE.
  + Estoppel: May be imposed when the owner of land request or allows another to spend money under an expectation, created by the owner of a parcel, that the other party will be able to remain there.
  + UE: Recognizing the existence of an irrevocable license is one way that a court can respond to UE.
* A lease can only be terminated in special circumstances. Special proceedings to evict a tenant. Lease creates an estate that is generally binding on the world. If landlord sells, the person acquires a reversion because that is that they have to give.

Determining whether exclusive possession has been granted looks to the terms of the lease and other circumstances. For example: Term “tenant shall not have exclusive possession” does not necessarily create a license if such a term is a sham and doesn’t reflect the reality of the situation.

### *Metro-Matic v Hulmann,* 1973 ONTCA

Metro-Matic operates a laundry room in a residential building; original landlord sells his interest to a landlord that has own laundry company; tenant could install machines, but residents of building had access to laundry room.

Issue: Is the agreement b/w Metro-Matic and landlord a lease or license? Is the new landlord bound to continue to let Metro-Matic operate?

Held: Lease. Form/language used is lease like but Ziff argues that question is substance and not form (whether exclusive possession has been granted is resolved not only by looking at terms of lease but other attendant circumstances)

* Clear description of premises within a specific term.
* Minor derogations and restrictions in agreement on the tenant’s exclusivity does not destroy the lease in its entirety.
* Despite stipulated term that ensures Metro-Matic’s free access, when it should be landlord that reserves right to access premises, Metro-Matic is being prudent as a commercial entity.
* Occupancy demonstrating possession → Having machines there.
* Stipulated term that machines and equipment shall not become fixtures of the Landlord, but shall remain the personal property of the Tenant.
* Language used suggests a lease (“rent”; “demise”); clearly indicated duration of the term.
* Labelled lease – persuasive but not determinative.

HELD: New landlord was bound by the agreement of the Lease

Notes: In favour of a license, 6(b) and (e) give the landlord control over access to the room. But the landlords ability to limit access during reasonable times could be argued to just be a restriction to access the common areas that are required to pass through to get to the laundry room. The laundry room itself is still subject to the exclusive possession of Metro-Matic.

### *Fatac LTD v Commissioner of Inland Revenue*, 2001 NZCA

Our conclusion is that in this country, as elsewhere, the **fundamental distinction** between a tenant and a licensee is that the former alone has the **right to exclusive possession**. For exclusive possession to be meaningful there must be a minimum finite term, whether fixed or periodic. Rent is an important indicator of an intention to be legally bound but its absence does not *per se* negate a tenancy.   
  
The terminology employed by the parties in describing their relationship will be immaterial unless it helps in deciding whether there is a right to exclusive possession. Restrictions upon the use to which the occupier may put the land are not inconsistent with exclusive possession. On the other hand, there will be no tenancy where there is no **intention** to enter into a legally binding relationship or where a tenancy is precluded by statute.   
  
There will similarly be no tenancy where the occupier’s right to possession may be terminated for reasons extraneous to the occupation of the land. Examples are occupation pursuant to an employment relationship, a purchaser in occupation, a mortgagee in possession, occupation pursuant to the holding of an office, and exclusive occupation of an area that is small in proportion to the total area affected by the agreement. In cases of this kind questions of degree will be unavoidable but the answer is not to be found in the perceived intention of the parties as to the legal classification or dominant purpose of their transaction.

## Transfer of Leases

Under the common law a tenant’s interest is freely alienable and may be assigned or sublet as long as there is not term in the lease to the contrary.

* An assignment occurs when the tenant’s full interest in the lease is conveyed.
  + Terms of lease between landlord and T2 are not binding in contract law because of the access of privity of contract. However, property law says, of T2 took the exact same legal estate that T1 had, there is privity of estate between LL and T2.
  + As a result, the convenant or terms of the lease that “touch and concern” the land, and only those are binding against the assignee for the tenant. It’s as if those contractual terms were glued to the lease. Same rule applies to LL. If LL 1 sole to LL2 there is privity of estate with tenant.
  + New LL may want to sign new contract with assignee, resulting in new LL and T relationship creating privity of contract and estate.
* A transfer of a shorter period, even if only one day less that the full term, creates a sublease.
  + LL to T1 (head lease), T1 to T2 (sublet). No relationship between LL and T2 (under privity of contract or estate), T1 remains a leasehold interest.
  + LL can terminate the head lease, therefore the sublet falls through?

*Spencer’s Case*: Only the real covenants in the original lease will run with the transfer of that lease into the hands of the assignee.

**Real Covenants**: Covenants that touch and concern the land and that affect the landlord as a landlord or the tenant as a tenant. Underlying notion is that the covenants of a personal nature entered into between the original landlord and tenant do not apply to the new relationship. Real covenants related to the subject-matter of the lease, they are terms that affect the nature, quality, or value of the land or the use to which it may be put.

Test: Relate to the subject matter of the lease, duty to repair., obligation to pay rent, restriction on right to alienate.

* Does covenant affect the landlord as a landlord, t as a t
* Nature, quality or value of land, use to which it may be put
* Would covenant lose value if severed from property.

### *Sundance v Richfield,* 1983 ONTCA

The lease of one of two major tenants in a small shopping center provided that the lessor's consent to sublet could not be arbitrarily or unreasonably withheld. **The landlord can withhold consent unreasonable IF the lease says so**.

* Withholding consent was deemed not to be unreasonable if the other major tenant objected to the nature of the business of the proposed subtenant.
* The tenant's proposed subletting to a major family restaurant was objected to by the other tenant because severe parking congestion would result.
* The Alberta Court of Appeal held that the lessor was entitled to withhold consent

The Alberta Court of Appeal stated that a landlord's consent to sublet is not unreasonably withheld, if the landlord's own financial interest will be adversely affected, such as by the damaging of another tenant's business, where rent is a percentage of income.

The Alberta Court of Appeal held that the burden is on a tenant who proposes to sublet to show that the landlord has unreasonably withheld his consent and is not on the landlord to prove that he was justified in withholding consent.

In deciding whether the burden has been discharged, the questions in not whether the court would have reached the same conclusion as the landlord or even whether a reasonable person might have given consent; **It is whether a reasonable person could have withheld consent.**

### *Merger v DME food*, 1990 MANCA

Merger operates a restaurant in the leased premises of a shopping plaza. It is the assignee of a lease from Brousseau. Bonanza operates a restaurant on the neighboring property. The common landlord is Lakeview. Lakeview does construction and that takes away parking from Bonanza, so a side deal is reached to allow Bonaza to park in non-designated stalls closer to Merger. Merger claims under its lease it has the exclusive right to parking in lot 2, the space at issue.

At issue in this action is the plaintiff's (Merger) parking entitlement under the terms of its lease. Can Merger enorce against Lakeview terms that were signed between prior landlord and tenant?

Held: Yes, Merger can enforce parking. **LL could not unilaterally derogate from the lease and assign parking to another tenant.**

The Manitoba Court of Appeal stated that for a covenant in a lease to run with the land, it must "touch or concern" the subject matter of the lease.

Manitoba COA affirmed decision that a covenant in a restaurant lease respecting the use of common areas (including a parking lot) ran with the land, because it directly affected the use of the premises. Accordingly, the covenant was binding on successive landlords.. Bottom line for court in Merger is that parking facilities are so essential to success of restaurant that they clearly touch and concern the value of the land. Therefore, they cannot designate the parking for other customers.

TEST:

1. Does the covenant affect the lessor as a lessor, the LL as a LL, and the T as a T?
2. Does the term of the covenant affect the nature, quality, or value of the land?
3. Or the use to which it may be put?
4. Would the covenant lose its value if it were severed from the property?

### Flamingo Bingo

Does the term run with the lease?

Are they in breach of the lease? No. As long as 130 spots the landlord is not in breach.

### *Anderson v BC*, 1995

Construction and the business at the restaurant suffered. Shut down allegedly due to construction project. Only way to claim compensation is to claim they had parking rights in part of parking lot that was bought.

Both cases dealt with express clauses. Here, the lease said nothing about parking rights. Argued implied term – efficious bystander, so fundamental to the success of a business.

Held: Yes, right to some parking, however no specific rights to the 1/3 of the parking. Lose.

### Limits on the Right to Alienate

May take the form of an

1. absolute prohibition,
2. the right to transfer conditional on the consent of the landlord,
3. a right of transfer conditional on the consent of the landlord that is qualified in some matter.

\*Right to alienation is regarded as an important stick in the bundle of property rights and how optimizing transferability is treated as pivotal to the operation of an economically efficient property regime.

1. A landlord is permitted to object to a transfer on reasonable grounds. It has been accepted that consent may be withheld when there is a valid concern about the personality of the proposed new tenant or the use to which the premises will be put if transferred.
2. A refusal must relate to the relationship of the L and T and to the subject matter of the lease.
3. A reasonable concern about the financial position of the new tenant, or the likelihood of default will normally suffice to support a refusal.
4. It has been held in Canada that the landlord may take into account the position of the other tenants (at least when this may work to the detriment of the landlord) and may have regard to so-called commercial realities.
5. Absent a term to the contrary a transfer by a tenant undertaken without consent will be upheld if it can be shown, after the fact, that the landlord had no reasonable basis to refuse.

## Obligations

Starting point – lease. Terms may be inserted by implication under the CL, in equity, or by statute.

Leases typically include covenants: there are some called the usual covenants, which do not need to be listed. Terms that affect the nature, quality, or value of the land, or the use to which it may be put.

Usual covenants typically include: a covenant by the landlord for quiet enjoyment, covenants by the tenant to pay rent (with a provision for forfeiture on default), keep and deliver the premises in repair, pay taxes not required by law to be paid the landlord, and allow the landlord to enter and view the state of repair of the property. (Implied term will yield to an express).

**T -** Covenant to pay rent, to repair common areas/normal wear and tear, to insure the premises, not to assign without landlord's consent

* Repair: Take proper care of place, clean chimney and windows, do little jobs to fix things. Not damage the house willfully or negligently, that his guests do not damage it. And if they do he must repair it. But if house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by the T then the T is not liable to fix them.

**LL -** Covenant to quiet enjoyment (peaceful occupation of premises), to provide heat and water, etc.

* Enjoyment: direct physical interference by LL or others, indirect also (LL allowing carbon monoxide fumes to seep into an apartment making it unlivable). Peace, comfort, or privacy interfered with due to liquids, gases, vapors, solids, odors, vibration, noise, abusive language, threats, fire, the total or partial withholding of heat, electricity, water, gas, or other essential services, or removal of windows, doors, walls, or other parts of premises.
* Does not protect against wrongful acts of other tenants and does not cover defects present at beginning of term.
* Tenants have better control over instances of fire over the landlord - responsibility is transferred to the tenant (if it burns down you still have obligations owed to the landlord b/c you should have insured it).

Failure by one party to perform does not give the other party a right to terminate the estate – unless landlord interferes with right to exclusion, you cannot terminate b/c covenants are considered independent of the estate.

* Unless a covenant is framed as a condition of the lease –you can give a leasehold interest subject to a condition subsequent (covenant to pay rent is a common condition.
* On a breach of condition by the T, the LL may: re-enter the premises or maintain the lease and sue for damages, or sue for distraint (remedy where the LL can go in and take all the possessions within the property and sell them to reduce damages)
* Breach of covenant allows one to repudiate the lease by SURRENDER (expressly or by conduct) but never unilaterally – it must be accepted by the other side, there is no power that allows unilateral surrender/termination of the lease.

## Termination

Lease can come to an end by re-entry (breach), by merger (if T purchases reversion – now fee simple), expiration of term, surrender back to the landlord (cannot be unilateral, surrender and landlord must accept).

At CL a lease for a fixed term expires naturally on the expiration of the stated term. A right of forfeiture applies when the tenant has breached an obligation that has been framed in the lease as a condition and not a covenant. (forfeiture terms will be strictly construed). A landlord may not exercise this right but may sue on the breach for compensation.

* If there is a breach, landlord may waive those breaches that have triggered the right of forfeiture. A waiver need not be express, and may be found if the landlord implicitly affirms the continued existence of the lease.
  + Classic demonstration is the acceptance of rent, accruing due after, and with knowledge of the breach.
* Covenants in leases have traditionally been viewed as independent of each other. Therefore, the breach of one term foes not normally enable the innocent party to withhold the performance of obligations in response.
  + At common law, nothing short of an eviction would suspend the obligation to pay rent.

### Surrender

A lease may be terminated through an express surrender of the term. A surrender may also arise by operation of law, such as when acts of repudiation committed by the tenant are accepted by the landlord as proof of an intention to forgo the remainder of the lease.

* Surrendering action is often the abandonment of the property.
* The corresponding acceptance occurs when the landlord resumes possession.

### *Goldhar v Universal*,

Rent was 833. T had new office built, couldn’t assign or sublet. On numerous occasions flooding of the land. Inadequacy of sunk punt. Closed the entrance without consideration. T claimed allege breach, regarding lease as null and void. LL says no – will give approval to sublet 0 consider the lease in full force and effect, any attempt to abandon will be seen as a breach of a convenant. T refuses to pay, returns keys and moves out. LL signs lease with new T. Rent 500 not 833.

Issue: What can LL sue for? Is the lease over?

* Ambiguous acts by LL: Going into the premises and taking possession.
* Unequivical act by LL: Signing a new lease with T. For the new lease to be valid old tease must be terminated. As soon as the new lease is signed, old lease is destroyed and all the coveants from previous elase are destroyed with it.

Held: Can sue for arrears, or shortfalls of the lease before new signing, but after can’t sue for 333/month.

When abandonment occurs the landlord may pursue one of four options. (1-3: *Goldhar v Universal*)

1. **Enforce the Lease**. Refuse to bring about the surrender.Patiently stand by, suing for the rent as it falls due, plus whatever ancillary damages occur.
   * Can’t sue for anything in the future, does not acknowledge anticipatory breach.
   * Problem: Have to wait month to month before you can sue and risk the empty premises in a shopping mall.
   * Risk they might not be available to pay, leave country, or become bankrupt.
2. **Accept the surrender**. Terminate the tenants interest in the property, all the while retaining the right to sue for past breaches (can ONLY sue for arrears).
   * Try and find new T (if found, then lease surrendered and can’t sue)
   * If new T rent is less, cannot sue for the difference.
   * Anything that happens is LL responsibility and T is off the hook.
3. **Re-let:** Advise tenant that the premises are going to be re-let, with the landlord acting as agent for the tenant, while still retaining the right to sue for the losses occasioned by the tenant’s breaches.
   * Original lease still in force, LL can sue for loss in rent.
   * Sue for arrears and any shortfall/differences when due.

### *Highway Properties v Kelly*

Supermarket leased a large space in a shopping mall on condition that the business be operated continuously (covenant).  The business was not successful and within 2 years, tenant abandoned and did not sublet property, repudiates (rejects) the lease.  The defendant was the majority property in the shopping mall so its closure undermined profitability and viability of the entire plaza, i.e. tenants moved out, vandalism  Landlord sends notice that going to re-take premises, thus to terminate lease, and to hold tenant liable for all the losses caused to Landlord.

1. **Highway Properties Ltd v Kelly, Douglas & Co (1971),.** SCC held that the landlord may (i) accept the surrender, and (ii) serve notice on the tenant that an action may be brought to recover for prospective losses caused by the tenant’s repudiation of the unexpired portion of the term.
   * Traditional rule in relation to the surrender of leasehold was that acceptance ended T’s estate and with this the obligation to pay rent vanished, as did the right to sue for ancillary future losses. (Premised on the idea that lease was first and foremost an interest in land)
   * Held: No longer sensible to preclude LL from enjoying the range of remedies available on the breaching of a commercial contract.
   * Means LL does not have to act as an agent to sublet to sue for outstanding rent.
   * Basically an anticipatory breach, if mitigated by re-letting take into account, LL has no obligation to mitigate.

**\*Note:** Elements of contract law duty to mitigate damages have been incorporated as part of this branch of L and T act. At least when #4 HPA option is chosen. In order to trigger the right to sue for prospective losses appropriate notice must be given by the landlord. LL HAS NO OBLIGATION TO MITIGAT,

**Efficient Breach**:

* ***Evergreen v IBI*:** No longer in LL’s interest to have office building, wants to go high rise condo business route, gives notice of 12 months to leave, IBI says no they have an estate in the land, Evergreen throws money. BCCA allowed breach.
* The world is a better place where there is more money to be paid out in creating a condo – maximize joint value of the parties b/c IBI is adequately compensated.

TAG Acquisition ONCA: Disagrees. Lease is an estate in land, there can be no efficient breach.

Tenant’s right to terminate on breach: (Metro Matic) “provided that if in the opinion of the T, the LL has been in breach of any of the terms, covenants, agreements contained herein, the T may terminate the lease upon 7 days written notice to the LL”.

## Residential Tenancies

Standard leases reduce the cost of contracting, regulate the terms of the lease to protect tenants, protect vulnerable tenants.

Five features said to support the special place of one’s home within the affective domain: centrality, continuity, privacy, self-expression and social relations.

### ALBERTA’S RESIDENTIAL TENANCIES ACT

Inserts basic terms into all residential tenancy agreements.

**Under the Act, every such agreement contains the following landlord covenants.**

1. That the premise will be available for occupation by the tenant at the beginning of the tenancy.
2. That neither the landlord nor a person having claim to the premises under the LL will in any significant manner disturb the T’s possession or peaceful enjoyment of the premises.
3. That the premises will meet at least the minimum standards prescribed for housing premises under the *Public Health Act* and regulations.

A tenant implied covenants that:

1. Rent will be paid when due,
2. T will not in any significant manner interfere with the rights of either the landlord or other tenants in the premises, the common areas or the property of which they form a part.
3. T will not perform illegal acts or carry on an illegal trade, business or occupation in the premises, the common areas or the property of which they form a part,
4. T will not endanger person or property in the premises, CA or P.
5. T will not do or permit significant damage to the P, CA, or P.
6. T will remain the P and any property rented with it in a reasonably clean condition.
7. T will vacate the premises at the expiration or termination of the tenancy.

Breach by the L gives T the right to (i) seek damages, (ii) an abatement of rent (iii) compensation for the performance of the landlords obligation (iv) termination of the tenancy – if the breach is significant.

**Rights conferred for the benefit of T in Alberta cannot be waived or surrenders under the lease.** May protect T, but not in the long run. Rent control – discourage repairs – and lead to poorer standards.

* Cut down on cost of negotiation – T not negotiating experts.

Act prevails 3(1) Any waiver or release by a tenant of the rights, benefits or protections under this Act is void.

(2) If a residential tenancy agreement is in writing, the agreement must contain the following statement in print larger than the other print in the agreement:

The tenancy created by this agreement is governed by the Residential Tenancies Act and if there is a conflict between this agreement and the Act, the Act prevails.

**Areas Of Reform**:

* greater security of tenure for residential tenants,
* increased notice periods for termination,
* fixing of standard obligations of both LL and Ts in a way that is rational and fair,
* increase in T’s remedies,
* curtailment of LL’s self- help remedies,
* establishment of prohibitions on the bargaining away of statutory rights,
* elimination of dispute resolution procedures that are deigned to be informal effective expeditious and inexpensive,
* establishment of dispute resolution procedures designed to be informal effective expeditious and inexpensive,
* creation of LL and T advisory boards,
* rent control mechanisms

**APPLICATION:** What is and isn’t covered by the ACT.

2(1) Subject to subsection (2), this Act applies only to tenancies of residential premises.

(2) This Act does not apply to

* 1. a mobile home site as defined in the Mobile Home Sites Tenancies Act,
  2. premises occupied for business purposes with living accommodation attached and rented under a single agreement,
  3. rooms in the living quarters of the landlord, if the landlord actually resides in those quarters,
  4. a hotel, motel, motor hotel, resort, lodge or tourist camp, a cottage or cabin located in a campground, or a trailer park, tourist home, bed and breakfast establishment or farm vacation home, if a person resides there for less than 6 consecutive months,
  5. **a tenancy agreement between an educational institution as landlord and a student of that institution as tenant if the tenant does not have exclusive possession of a self-contained dwelling unit,**
  6. a nursing home as defined in the Nursing Homes Act ,
  7. lodge accommodation as defined in the Alberta Housing Act that is operated
     1. by a management body under a ministerial order under section 5 of that Act, or
     2. under an agreement with the Minister responsible for that Act,
  8. (h.1) a supportive living accommodation licensed under the Supportive Living Accommodation Licensing Act ,
     1. a correctional institution, or
     2. (j) any other prescribed premises.

**Section 5 &6:**  At the end of fixed term, your tenancy is converted to a periodic month to month.

**Section 7-9: Notice Periods** Depends who is giving the notice.

**Section 10: Form of notice:** Notice is no effect unless for one of the reasons given in the statute or a prescribed reason (in regulations to see what prescribed reason is)

* Due to termination of tenant’s employment by LL.
* Building being converted to condo.
* LL intends to make major renovations.
* LL or LL’s relative intends to move in.
* Other than that, cannot terminate unilaterally.
* But can increase rent but in AB, rent can only be increased 1 a year with 3 months notice **(s 14)**

**Section 14: Rent Increases**. Does not regulate the amount but defines the notice period before rent can increase.

**Section 16: LL’s Covenants:**

* Read by force into every lease agreement
* Cannot be waived
* Premises ready for move in
* Quiet enjoyment
* Minimum standards under *Public Health Act*

**Section 17:** LL has to give you copy of the lease, if they don’t you don’t have to pay rent till you get a copy.

**Section 21: Tenant’s covenants**

* Rent on time
* Don’t interfere with LL or other tenant’s rights
* Keep it clean (both senses)
* SCAN: If you think neighbors have meth lab or brothel, you can make an anonymous complaint and they will be investigated and government will terminate lease if it’s true.
* Tenant’s obligations to vacate on time.

**Section 22: Right to Assign**

* Does it or doesn’t it modify common law?
* RTA: Cannot assign or sublet without written consent of the LL. But LL cannot withhold consent if it isn’t for  reasonable grounds.
* Common law: You have unlimited, unfettered, right to assign
* Law for commercial leases and residential are different

**Section 26, 27, 29, 30: LL Remedies for Breach by Tenant**

* Once again common law is modified
* If tenant is behind on rent, proceedings to recover rent.
* If tenant doesn’t give you possession back in time at end of lease, you can bring the Sheriff in, they’ll force entry,  toss tenants stuff out, change locks. And you get to sue tenant for over holding use and enjoyment.
* If there is a substantial breach by tenant, LL may terminate tenancy. You will know what that is by looking into substantial breach in definitions section of RTA. Also a series of breaches is applicable to having the lease terminated by applying to court. There is a procedure; run to court and ask right away or send note to tenant saying lease is terminated and they’re ask to leave (in fairy tales they leave right away, or in 10 days you go to court saying they haven’t left). And you get damages.

**Section 27: Repudiation by tenant.** LL can sue for deficiency of rent. Under the RTA, if T abandons premises or reasonable grounds to believe repudiated LL can accept or insist on maintaining the lease. LL remedies to protect rent owned over the term of the lease, but in both cases the LL has a duty to mitigate (which doesn’t exist in HWP).

* LL would accepts the repudiation as termination of T may recover
  + Damages resulting from a breach of the residential tenancy agreement prior to the repudiation, and
  + Damages for the loss of benefit of the residential tenancy agreement
    - In the case of a fixed term tenancy, until it would have expired had the LL not accepted the repudiation, or
    - In the case of a periodic tenancy, until the termeation date.
* Notwithstanding 3(b) a landlord shall make reasonable efforts to mitigate the damages fo the loss of the benefit of RTA.
* If refuses to accept the repudiation must also make reasonable efforts to mitigate T’s liability for rent.

Section 28: LL’s Interference

**Section 37: Other breaches**. You can apply to court and get damages, abatement of rent, compensation for performing LL’s obligations, termination of tenancy (if breach is significant).

SCAN: Safer Communities and Neighbourhoods Act.

* Allows anonymous complaints about neighbours. Government has right to enter and inspect. They can terminate the tenancy.

## Licenses

License is a permission to do that which would otherwise constitute a trespass.

Three types

1. Bare: Unsupported by contract, fully revocable.
2. Contractual: *Blue Jays/Davidson Case*. Contractual right to stay to end of performance as long as you behave yourself. Can be revocable or irrevocable dependent upon the circumstances.
3. Irrevocable:

* Conventional position that irrevocable licence would not bind a purchaser of the land over which the licence is exercised.
* There are instances where licenses will bind subsequence purchasers. License may turn into an interest in land in *equity* under the principles of estoppel and UE.
  + Estoppel: May be imposed when the owner of land request or allows another to spend money under an expectation, created by the owner of a parcel, that the other party will be able to remain there.
  + UE: Recognizing the existence of an irrevocable license is one way that a court can respond to UE.
    - If a sale agreement stipulates that the property acquired is taken ‘subject to prior rights’ a court will not ineluctably impose a constructive trust on the purchaser.
    - Remedy of constructive trust is ONLY appropriate if it would be unconscionable to allow the purchaser to take the land sans license.

### *Stiles v Tod Mountain Development Ltd*, 1992 BCSC

Tod Mountain owns recreation property near Kamloops. Under an old owner, Stiles paid $1000 for an unregistered lot in trust for future purchase. Each owner was granted a perpetual and transferable right to improve and occupy the selected lot. Stiles obtained a building permit and built a cabin. The government then denied the subdivision plan for the old owners of the property, so Development purchased it. Stiles was allowed to remain on the land with an informal agreement with the head of the company, but there is a new head who wants him to move his house off the property.

The personal right was obtained through the doctrine of estopppel. When the parties of a transaction proceed on the basis of an underlying assumption on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow them to do so. The Courts have expressed that proprietary estoppel can make revocable license irrevocable.

* If the owner of land request another, or indeed allows another to expend money on land under an expectation created or encouraged by the landlord that the other party will be able to remain there that raises an equity in the licensee such as to entitle him to stay. He has a license coupled with equity.
* In *Inwards*, the equity in the form of an irrevocable license to occupy was found to be binding on the successors of the original owner of the land who took with notice.
* The underlying rationale being that it would be unconscionable in the circumstances for a legal owner to exercise his legal rights.
* Estoppel arose from the acts of detrimental reliance by A.

*Cowper-Smith v Morgan*, 2017 SCC on proprietary estoppel. An equity arises when:

1. a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property;
2. the claimant relies on that expectation by doing or refraining from doing something and his reliance is reasonable in in all of the circumstances; and
3. the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word and insist on her strict legal rights.

## Bailment

A bailment is a temporary transfer of personalty under which the goods of a bailor are handed over to the bailee.

* May be contractual or gratuitous.
* Finder sometimes described as ˆ*quasi*- bailee’
* A bailment may exist eve if the subject goods are drastically transformed.
* When arrangement gives the transferee the option to return the very goods bailed or to substitute others, this transaction should probably be characterized as a sale or barter not a bailment. This seems to be true also when fungables are delivered and intermixed with those belonging to other people. Here the return of *pro rata* (proportionate) share of goods is not a return of the specific goods. The bailor cannot realistically expect to get the very same items back from the commingled mass.
* Lease-license dichotomy important for bailment.
  + Bailee presumptively assumes obligations *vis a vis* the goods that are more extensive than those applicable to a licensor.
* Central question: was there a transfer of possession?
  + Absence of supervision may mean either that no bailment was intended or that it was being poorly performed.

### *Letourneau v Otto Mobiles Edmonton*, 2002 QB

Letourneau made arrangements with a repairer for the repair of a trailer. The repairer instructed Letourneau to leave the trailer after hours on a lot next to the repairer's premises. The trailer was left as instructed but was apparently stolen. Letourneau sued the repairer for the $27,500. The repairer denied liability on the ground that there was no bailment of the trailer to the repairer.

The Alberta Court of Queen's Bench held the repairer liable for the loss of the trailer. The court held that possession was transferred to the repairer and that the repairer failed to properly secure the trailer as required in the circumstances.

* The court held that possession of the trailer passed to the repairer when the trailer was left on the lot in accordance with the repairer's instructions.
* The Alberta Court of Queen's Bench stated that the proper test for determining the liability of the repairer was what was reasonable in the circumstances. The court stated that there was no need to classify the bailment, such as a bailment for reward or a gratuitous bailment.
  + **Standard of Care**: As a prudent owner would under the circumstance.

\*Note: It is important to prove that bailment occurred due to the onus of proof. Presumption of negligence is available in bailment suits when P (bailor) shows that acts complained of occurred during the course of the bailment, not before or afterwords. Then bailee will have to rebut presumption in order to avoid liability. The rationale of reverse onus is that the bailee is in a position to know what has transpired.

### *Minichiello v Devonshire Hotel*, 1967 BCCA

Jewels disappeared from car. Told attendant valuables in car. Parking ticket included conditions waiver of liability of damages including theft. Reasonable care form employees discharge the responsibility.

Held: P was able to recover the amount on the grounds the P’s statement to attendant was sufficient to enable Court to conclude that one could reasonably anticipate that property of such value might be in the car. Court held there was a constructive bailment.

When bailment exists, there will be a constructive bailment of other items that might reasonably be expected to be in or part of the principle chattel. In this case, P left his car with the parking attendant, paid the parking fee, and informed the attendant that there were valuables in the car (16K in jewels).

* Parking lots may be able to get around this or mitigate the problem by increased security, accepting partial liability or purchasing insurance.

**Ratio: When the courts find there is a bailment rather than a license, it might also find that the bailment was constructive in principle chattel. This items may be held to be constructively bailed as part of the case.**

### *Punch v Savoy*, 1986 ONCA

A valuable ring was given by A to a bailee (B) for repair. The ring was then sub-bailed to C in Toronto for the necessary work to be performed. Following that, the ring was sub-bailed to D who was supposed to return it. The item vanished while in transit. The bailor A sued D (and B and C) but was met with the defence that an exculpatory clause in the sub-bailment to D limited D’s liability.

Issues: 1. What is the legal nature of the relationship between Lenore Punch and Walker? CN Rapidex? 2. What duties do the sub-bailees owe Punch?

There had no been express authorization given from A to B to sub-bail but the Court must have found that there was either an implied power to do so, or that there had been a subsequent ratification by the bailor. It was also held that the exculpatory clause could protect D ONLY if the bailor had expressly or impliedly consented to such a clause. Not the case. Did not apply against A.

RATIO: Sub-bailees of a ring liable to the owner for its loss, notwithstanding that there was no contractual relationship between them and the owner.

* Bailee for reward must exercise due care for the safety of the article entrusted to him by taking such care of the goods as would a prudent man of his own possessions.
* The court stated that a bailee is liable for the loss of goods arising out of his servant's theft or neglect or theft by a stranger.
* The Ontario Court of Appeal held that the carrier could not rely on the limitation of liability clause, because it fundamentally breached its duty to the bailor by losing the ring without explanation.

\*Sidenote: Not getting insurance was an actionable failure. Obtaining adequate insurance was a minimal step that one would expect a prudent owned (and hence a careful bailee) to take for such valuable article.

* Savoy clearly strictly liable to Punch on bailment. Say loss not caused by result of failure to take care as sending ring to walker is standard practice in the industry. Punch consented to sub-bailment.
* Walker said used carrier – court not happy with how they chose. No previous dealings, not trusted and no insurance.
  + Standard practice not to buy insurance because if say worth 10,000 will be stolen. Just rely on general insurance.

**What degree of care is required from the bailee?**

* Surrounding circumstances, including the presence of special perils or risk are relevant factors in defining what one can expect.
* May well demand that a bailee obtain insurance.

### *Pioneer Container HongKong,* 1994 PC

P contracted with freight carriers for the carriage of goods from Taiwan to HK. The freight carriers issues P with bills of lading providing that the FC was entitled to subcontract ‘on any terms’ the handling, storage, and carriage of the goods. The FC subcontracted to D, who issued clause that required any dispute to be determined in Taiwan.

Vessel sank with loss of all the cargo and P commenced proceedings in HK. D applied for stay of proceedings on the ground that P, by the exclusive jurisdiction clause, had agreed that any dispute be determined in Taiwan.

Held: P bound by the clause. P consented to the freight carriers sub-bailing the goods to D on D’s terms, including the exclusive jurisdiction clause.

Ratio: If a bailment arises only if the bailor consents to the transfer of possession to the bailee, then the bailee has to accept the terms of the sub-bailment “warts-and-all”.

If a bailee sub-bails goods with the owner’s authority, the relationship between the owner and sub-bailee is that of the owner and bailee.

# Shared Ownership

CL recognized four types of shared ownership: only first two retain contemporary significance – others are functionally extinct.

1. Joint Tenancy
2. Tenancy in Common
3. Tenancy by Entireties
4. Co-Parcenary.

JT and TIC are both characterized by the unity of possession. JT requires, in addition to unity of possession, the unities of interest, title and time. If the four unities are present, whether the co-owners hold jointly or in common is a matter of the grantor’s intention.

### Joint tenancy

Based on a fiction that views all of the owners as a single owner. To create a JT four unities must exists (Blackstone). These describe the need for virtually perfect equality as between (or among) all of the JTs.

1. The holdings of each JT must be equal in nature, extent and duration **(Unity of Interest)**
2. They must arise from the same act or instrument **(Unity of Title)**
3. The interest of JT must arise at the same time **(Unity of Time)**
   * Modified with several exceptions that apply when the interests are created through a will or deed to sues.
   * JT created in a devise – where children may vest at different times is permitted.
4. Their rights must relate to the same piece of property **(Unity of Possession)**
   * “Each of them have the entire possession, as well as every parcel as of the whole.”

JT create the right of **survivorship –** *jus accrescendi*. Once a JT dies, his interest is extinguished, increasing the holdings of the survivors.

**What if we can’t tell who died first? *Janus v Terschevitz*:** Newlyweds back from honeymoon and both have a headache and take a Tylenol. Within minutes he collapses. Bring someone in to resuscitate him. Then she collapses. They were victims of the criminal who had tampered with the Tylenol bottles (took out a few pills and replaced with cyanide) in Chicago. Making people die from cyanide poisoning. Happens on evening of Sept 29. Both newlyweds die due to the cyanide poisoning. Death certificates are issued, his for Sept 29 and hers for Oct 1. They’re joint owners as husband and wife and have wills. She is the primary beneficiary of a $1 million dollar insurance policy. And if she died later than him then she gets the policy. But if he out survived her, then the policy goes to his mother. Literally who dies first determines who gets $1 million. She was determined to survive him. She got $1 million and it was passed on through her will.

* **Alberta**: *Wills and Succession Act* says if during life two or more individuals hold property with right of survivorship and all joint owners die at the same time or where you don’t know who was the last, then court will deem them to be tenants in common.
* **Nova Scotia:** If they die at the same time in different provinces, they go in order of seniority. Older is deemed to have died first.

Matrimonial Property Act section 36(2)(1): The fact that property is places or taken in the name of both spouses as joint owners is proof, the absence of evidence to the contrary, that a joint ownership of the beneficial interest in the property is intended”.

What if “joint tenants” is omitted?

* If they paid unequal shares, equity would say tenancy in common.
* Act says if you register jointly then joint tenancy.
* Wife purchases property and registers it in the name of "Husband and Wife as joint tenants" – they both have legal title, but she reserves beneficial interest unless it can be shown that it was intended as a gift.
* If she registers it in his name only? Husband has legal interest, but there is a presumption that she intended to retain a beneficial interest.

### Tenancy in Common

Not a single entity – own notional shares in the property. Only the unity of possession need be in place for TIC. May hold a different quantum of title (1/2 vs 2/3) as there is no need for unity of interest.

JT may be converted into a tenancy in common even, in some instances, through the unilateral action of a T.

If a tenant in common dies, his share forms part of the co-tenant’s estate (ie. Will go to the co-tenant’s heirs).

Conventional for partnership assets to be held in common. Common areas of condo properties are usually held of unity owners in common.

## Methods of Creation

Assuming the 4 unities are present, determining whether or not a JT or TIC has been created rests on the intention of the grantor.

**Early CL:** Preference for JT. Rule of construction emerged under which property conveyed ‘to A and B’ created a JT, absent a contrary intention.

* Effect on feudal rights
* Convenience it provided for trustees
* Usefulness of survivorship in simplifying the state of title.

**Equity**: K says reluctantly followed the rule of construction with some exceptions. Survivorship was seen as “odious”, no provision for posterity, applied when owners unaware of the result.

**Three exceptions (assumed to be tenancy in common):**

1. Where money is advanced and secured under a mortgage (tenancy in common)
2. Partnership property (tenancy in common)
3. Where money to purchase property is provided in unequal shares
   * Ex. A and B buy a house, A pays 75% and B pays 25%, title is only in B’s name. Subject to proof of a contrary intention, B would hold the property on a resulting trust for A and B as tenants in common with A having a 75% share and B having a 25% share. Similar result if title is in A and B names

**NOW:** Presumption in favor of JT still but slightest indication that property was meant to be held in common could suffice to rebut it. Accordingly, CL presumption might be negated by the use of language such as below. These are words of severance.

* Equally amoung them
* Equally
* In Equal moieties
* Share and Share alike
* Respectively
* Between
* Amongst
* Each

**Statue:** Established a presumption in favour of Tenancy in Common, reversing the CL rule. (*Law of Property Act* section 8). DOES NOT APPLY TO PERSONAL PROPERTY, OR TO EXECUTORS OR TRUSTEES.

“When land or an interest in land is granted, transferred to 2 or more person, other than as executors or trustees, in fee simple or for any less estate, legal or equitable, those persons take as tenants in common and not as JT unless an intention sufficiently appears that they should take as JT”.

* Need a purposeful act to create a JT and invoke the right of survivorship.
* Given statute reforms, JT generally requires the existence of 4 unities coupled with a sufficiently stated intention.
* Creation of a TI (assuming unity of possession
  + By express creation
  + Pursuant to a statutory presumption
  + As a result of a failed attempt to create a JT (no unity of interest)
  + Operation of the law. (ex. 2 or more adverse possessors)
  + Valid JT transformed to TIC through acts of severance.

Matrimonial Property Act section 36(2)(1): The fact that property is places or taken in the name of both spouses as joint owners is proof, the absence of evidence to the contrary, that a joint ownership of the beneficial interest in the property is intended”.

What if “joint tenants” is omitted?

* If they paid unequal shares, equity would say tenancy in common.
* Act says if you register jointly then joint tenancy.
* Wife purchases property and registers it in the name of "Husband and Wife as joint tenants" – they both have legal title, but she reserves beneficial interest unless it can be shown that it was intended as a gift.
* If she registers it in his name only? Husband has legal interest, but there is a presumption that she intended to retain a beneficial interest.

## Severence of Joint Tenancy

Destruction of the right of survivorship is referred to as severance. *Williams v Hensmane* states that a JT can be severed in three ways:

1. By one person acting on his own share
2. By mutual agreement
3. By “any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.” This did not result in mutual agreement but sufficient to show court that all parties have regarded themselves as no longer bound by survivorship.

### Severence through Unilateral Action

Any act that destroys an essential unity must bring JT to an end.

Ex. A & B hold as JT and A conveys to C, the new co-ownership relationship between B and C must be tenancy in common because the unities of title and time are now absent.

Ex. A, B, C hold jointly, and C conveys to D: A & B continue to hold as JT *inter se*, but D holds one-third interest as a solitary TIC. Interests of A and B will pass on survivorship, and 1/3 portion owned by D will deolve to D’s heirs.

At CL such a transfer is void. BUT in Alberta, legislation permits an owner to sever simply by a direct conveyance to oneself. (*Law of Property Act* c L-7, para 12(1)(d). *Conveyancing and Law of Property Act*  C34 s 41).

* Law of Property Act s12. “An interest in real or personal property may be validly conveyed by a person who holds the property as a joint tenant to that person as a tenant in common”
* Land Titles Act: section 65: The Registrar shall not register a transfer that has the effect of severing a joint tenancy unless
  + The transfer is executed by all the JTs
  + All the JT other than those executing the transfer, give their written consent to the transfer, or
  + The Reistrar is provided with evidence satisfactory to the R that all the JT who have not executed the transfer or given their written consent to the transfer have by: (i) Personal service or (ii) Pursuant to a court order, been given written notice of the intention to register the transfer.
* Mortgages & Leases and JT is on pg. 346 & 347

Ziff Textbook: A partial alienation by one JT, such as granting of a life estate, *should* produce a severance, because this leaves the grantor with only a reversion thus destroying the unity of interest. (*Sorrensen v* Sorrensen). However, an attempted severance by will is ineffective. Right of survivorship trumps the owners will (*just accrescendi praefertur ultimae voluntati*).

**Possible Unilateral Actions That Would Work:**

* Convey to someone else
* Can convey to yourself (*Law of Property Act* s 12(1)(d))
  + Severance because new title resulting from this process is obtained at a different time and under a different document than that of joint owners
  + At common law, void. Allowed in AB.
  + Where transfer documents for conveyance to oneself have been prepared, leaving only the matter of egistration, severance in equity will be found.
* Partial alienation (granting a life estate) should produce a severance because it leaves grantor will only a reversion thus destroying unity of interest.
* Mortgage IF it transfers legal title (not in AB).
* Action for partition or forced sale of land.

**Things That Do Not Work:**

* Wills. Survivorship trumps wills and intestacy.
* Easements or rent charge (does not destroy unity, they merely encumber a tenant’s interests with some additional rights)
* Mortgages: You borrow money from bank and covey legal title. Lender becomes legal owner. But you have a right in equity to have title given back to you once you pay the loan. You have equitable right to redeem property at end of loan. Known as equity of redemption. Origin of equity. No longer law in AB.
  + Mortgage is no longer conveyance of title to lender, it is a charge on your legal title. In some circumstances the act by a joint owner of getting a mortgage doesn’t affect severance because it doesn’t affect title. Unities intact, interest of one just has an encumbrance
* Assignment or sublease of a leasehold joint tenancy (maybe, maybe not). Some say yes. Some say it only pauses right of survivorship until lease expires. Lease would end on death of lessor meaning it can never interfere with survivorship.

### *Sorensen Estate v Sorensen*, 1977 ABCA

Owed land in JT, divorced. Sell some property (money to wife), house leased to the wife for 1 dollar a year – as long as she lives. W has cancer, wants to set up estate for handicapped son and long-term care. She executed a trust deed in which she declared that she held the joint tenancy lands in trust for her son,

* Instructed her solicitor to hold the transfers of the lands and register them upon her death and declared that these acts were done in order to sever the joint tenancies.
* She also executed a deed of the lands to her son and executed a will. The deed was left undelivered in her lawyer's office.
* Commenced an action for partition of the joint tenancies, but died before the matter was heard.

She died, he claimed survivorship.

Issue: Was there severance of the joint tenancy titles?

Held: JT had been severed by the execution of the trust deed in favour of the woman's son, even though the gift to her son of only the equitable title to the land.

1. **Separation Agreement:** The Court of Appeal held that none of the terms of the settlement after the divorce had the effect of severing the joint tenancies. Not suffient – Wife’s subsequent conduct shows she believed further acts were necessary. No evidence husband viewed as severed either.
   * K doesn’t find compelling. *Cf* – metromatic where court stated that clause was added just in case – doesn’t mean they wouldn’t have right.
2. **Charge**: H agreed to pay maintenance which was to be secured by a charge against his interest in property held jointly with his wife. Held that the charge on the husband's interest did not result in severance of the joint tenancy
   * *Alberta Land Titles Act* section 103: Charge/Mortgage does not operate as a transfer of estate.
3. **Wife’s Will**: Execution of will did not sever. Ineffective as right of survivorship trumps the owners will (*just accrescendi praefertur ultimae voluntati*). Cannot dispose of assets that do not form part of estate.
4. **Action for partition**: Only commenced action – did not sever. that the bringing of an action for partition of a joint tenancy did not by itself result in severance of the joint tenancy.
   * *Law of Property Act* section 19 “If an interet in land that is the subject of an order is held in JT, the order on being granted severs the JT.
   * Here no order was granted, as she died too early.
5. **Declaration of Intent to Sever**: he Alberta Court of Appeal held that a unilateral declaration of intention of one joint tenant to sever a joint tenancy, which is unaccepted by the other joint tenant, does not result in severance of the joint tenancy.
6. **Inter-vivos Gift.** Delivery to her own solicitor did not constitute delivery to the son and that the gift of the land was incomplete.
7. **DMC**: Held land may not be given mortis causa.
8. **Lease to the Wife:** Lease does not sever JT.
9. **Declaration of Trust**: Execution of the trust deed severed the joint tenancy, even though the gift to her son was of only the equitable title of the land.

 \*The Alberta Court of Appeal stated that the **burden** of demonstrating that there has been a severance of a joint tenancy lies on those who allege it.

\*Leave to SCC was granted by a notice of discontinuance was later files.

## Resolving Concurrent Ownership Disputes

**Common Law:** We have no position on disputes. You’re adults. You don’t like having property together with someone, you can agree to sell the property to someone, you can agree to divide property into two, if partner is not co-operative then sell your share to someone else.

**Terminating Co-Ownership:**

1. Divide co-owned land and each owns a respective parcel
2. Could sell undivided property to someone else and divide profits
3. Co-owner could sell their interest to the other co-owner
4. Last resort: Order for partition or for sale of land

Co-owner can go to court say other is being a baby so they want a forced sale or a forced partition. Court has no discretion but to order one or the other. Co-owners cannot be compelled to stay in present situation. Court can’t turn down the order.

AB: Exception when matrimonial home is involved. Partition and sales proceedings may be stayed pending an application under the Matrimonial Property Act or while order under the act remains in force. Concern is the order being too disruptive to children or spouse

### Waste

A co-owner may use the property in the same manner as an owner who did not share, subject only to a duty to act reasonable. Was is any conduct which would unreasonably reduce the value of the property. (if one is engaged in malicious acts of distruction)

* Can sue for waste but court is more liberal and tolerant of actions becase all the co-owners have a right to 100% of the property.
* Standard for was for co-owners is more difficult to meet than more life tenant and remainderer. Only extreme actions.

### Outster

If one co-owner denies rights for use and enjoyment of the property. Unlawfully excluded the other( actual expulsion) and probably also includes threatening conduct on the part of one that makes it intolerable for the other to remain.

* Can sue to have them restored.
* Action for occupation rent (by assuming de facto possession).
* Has to be complete ouster
  + Eg playing heavy metal at midnight – no. Domestic violence – yes.
* If there is an agreement for rent (to use an exclusive part of the land) that is ok.

Adverse Possession: Cannot be adverse if you own it – does not met the CL requirements.

Some provinces (NOT ALBERTA) have allowed co-owners possession to be adverse. Based on *Real Property Limitation Act (1833).* Heavy burden on an owner that claims AP – intended to exclude.

### Account

Limited action for account (in equity) - *LPA* s 15

* Court orders partition or sale of land by application.
* Sale of land includes distribution of proceeds between the co-owners, or sale of one co-owners interest to the other co-owner willing to purchase the interest.
  + Based from *Statute of Ann* 1704?

Accounting, contribution, and adjustment - *LPA* s 1

* Court able to take all sorts of things into consideration when making adjustments toward equitable resolution of concurrent ownership.

### MODERN STATUTORY REGIME

**Partition or Sale (*Law of Property Act*, s 15)**

* Court shall make an order directly. They must give you one of the following:
  + A physical division of all or part of the land between the co-owners.
  + The sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, OR
  + The sale of all or part of the interest of one or more of the co-owner’s interests in land to one or more of the other co-owners who are willing to purchase the interest.
* Forced sale will be under direction of court. Court fixes value of land and terms of sale

 \*Court SHALL make an order, not may make an order.

**Accounting (Ontario Law Reform Commission)** General rule that a co-owner does not have an obligation to account to other co-owners for the benefits derived from possession. Some circumstances where a co-owner may be required to account to the other co-owners for the benefits of occupation, for what is often referred to as “occupation rent”.

Agreement: Agreement between co-owners may make one liable to account. Two main types of agreement:

* + - 1. may have agreed to one having sole possession on the terms of making rental or other payments,
      2. one co- owner may have agreed to act as agent or as bailiff of the other co-owner with responsibility to account to the latter for her or his share of profits of the land

*Statute of Anne*: Statute provides accounting in certain circumstances. Must account to other co-owners for benefits which he receives, as a co-owner, from third parties, but not for benefits which he takes from the soil as a result of his own exertions

**Accounting, Contribution, and Adjustment (*Law of Property Act* s 17):** Court may order accounting, contribution, or adjustment.

Example: Family farm left to son A and B. Son A says farm is important so he will stay on farm and work. Son B wants to be a miner. After 15 years, Son B returns and says show me what you’ve done and give me half. Son A says he’s been breaking his back and Son B has been away and now he wants his share? Son B says yes, he has unity of possession, it’s just as much B’s as it is A’s. So,they go to court, forced sale, partition, something.

* Court will adjust the party’s financial responsibilities. Both responsible for mortgage and property taxes.
* If Son A paid all of these, he is entitled to adjustment.
* Son A has been selling canola every year and retaining profits for himself but land belongs to both.
* Law is clear. A co-owner is entitled to proceeds of their own labor working the land. You grew the canola, you keep all the money.
  + But if you get money from third parties on your land (rented land, leased oil and gas rights), that you need to account for to your other co-owner and that will be adjusted.

**Matrimonial Property Act**: Special rule relating to matrimonial property. Fair division of assets.

* Default arrangement that you can opt out of with a pre-nuptual agreement.
* Pool all assets received during the marriage.
  + Exceptions of gifts.
* Only applies to divorce proceedings – no statute for CL.
  + CL only remedy is to prove UE.
    - Give monetary compensation
    - Constructive Trust
    - If want home, have to show direct link through contribution. If want something else, have to show JFV.
  + Costs 30,000 in court – so might not be worth it.

NEW LEGISLATION: Take effect in January 2020. Gets rid of MPA and replaces with Family Property Act. This will apply to common law relationships as well. Will effect divorce as well, as changes the date for division of accumulated property to beginning on CL marriage not legal marriage.

\*K likes having standard arrangements but wants couples to register.

# Servitudes over Property

Servitutes are rights over the use of property that belongs to another. Can be attached to and pass along with a transfer of realty – owing to that quality, they resemble the real covenants that run with the assignment of leasehold interest.

## Easement

An easement is an agreement that confers on an individual, company or municipality the right to use a landowner’s property in some way. While these agreements grant rights, they also have the effect of partially restricting an owner’s use of the affected portions of land.

Easements are incorporeal hereditaments. It is a real property interest but in non-possessory. An easement cannot by definition have a grant of exclusive possession.

### Scope of Easements

Four doctrinal limits circumscribe the scope of an easement: *Re Ellenborough Park*

1. **There must be a dominant tenement (which enjoys the benefit of the easement) and a servient tenanment (which is burdened).** 
   1. At common law easements cannot exist in gross, but must be connected to a dominant easement.
   2. Policy: Since easements inhibit the productive use of land, they are only permitted as long as some reciprocal benefit is conferred somewhere else.
   3. US and New Zealand allow easements in gross: Ontario Law Reform Commission recommended that such an approach be adopted.
   4. In Alberta only the Crown, municipalities and utility companies hold easements in gross. Municipality usually has land (street) but not always.
      1. LTA section 69 (3): utility company can have a right of way over one’s property without owning any land that benefits from easement (no dominant tenement).
2. **The easement must accommodate the dominant land.** 
   1. Test: Whether the right makes the dominant tenement a better property. Benefit must go to the land, not the individual.
   2. *Hill v Tupper* 1863: Exclusive right to place boats on a lake did not accommodate the dominant tenement, because such a monopoly was unconnected with the normal use and enjoyment of the land. Benefited the boat business but not the property.
      1. If regard easements as serving to supply an attribute of ownership normally or frequently associated with land – holding makes more sense. Bundle of rights over land does not include a monopoly.
      2. P had no proprietary right, only a license. P was trying to invent a property right that comes with exclusivity – *numeris clauses* principle.
   3. There must be reasonable proximity between dominant and servient tracts.
3. **The dominant and servient tenements cannot both be in the hands of the same person.** 
   1. Cannot give yourself an easement because it will be subsumed in a fee simple.
   2. Landlord can give one to his tenant (because dominant tenant is a leasehold interest whereas the landlord owns the fee simple).
   3. Some jurisdictions have departed from this #3 CL rule by permitting registration of easements over land owed and occupied by same person.
      1. LTS section 68(1) Owner may grant to himself an easement or restrictive covenant for the benefit of the land that the owner owns and against the land that the owner owns.
      2. Enables land developer to establish easement in a subdivision prior to the sale of individual lots, eliminating the need to grant separate easements on the sale of each parcel.
4. **The easement must be capable of forming the subject matter of a grant.** 
   1. Since an easement is an incorporeal right the transfer of possession is not possible. Must be conveyed by grant to pass ownership.
   2. Reasonably defined: must not be too vague or broad.
   3. Cannot require subservient owner to:
      1. Spend money (aside from fencing easements)
      2. Confer a right to possession or control over lands to an extent that is inconsistent with possessory rights of the servient owner.
      3. Cannot be exclusive or unrestricted use – this would pass ownership.
      4. Must not be purely for amusement or recreation (must benefit the land).

### Creation of easements

All easements lie in grant: as incorporeal hereditaments they cannot, by definition, be conveyed by transfer of possession.

1. **EXPRESS GRANT**

* When no words of limitation are recited the duration of the easement is determined with regard to the surrounding circumstances.
* It is not necessary the dominant tenement be described expressly in the granting document if it can be identified through extrinsic evidence.
* As in interest in land, an easement must comply with any formal requirements that are mandated for the valid transfer of real property.
  + An agreement for an easement may produce an equitable easement under the doctrine of *Walsh v Lonsdale.*
  + Even a verbal agreement can be enforced in equity if sufficient acts of part performance can be proven.

1. **IMPLIED GRANT**

(a) May be implied as a necessary incident of a property transaction (*Nelson – Rabbit Hill* case)

1. The easement must be necessary for the enjoyment of the alleged dominant tenement, not merely one that would make the use of the property more convenient.
2. The owner of the alleged dominant tenement must be able to trace the title to the property back to a grant whereby an owner subdivided the property which had been a single parcel, but failed to include the easement of necessity in the grant.

* Strict necessity – arise in favour of the land that is landlocked at the time of the transfer, provided there is some land retained by the grantor over which that access can be exercised.
* Easement of necessity doesn’t need to be registered.
* Right of access arising from necessity is based on the implied intentions of the parties and therefore is not invoked by operation of law.
  + Implication of an easement of necessity is based on a rule of construction and so yields to contrary intention.

(b) Intended: Arise by implication to give effect to common intention of the parties, having regard to purposes for which the land is granted.

* *Wong v Beaumont*: 1965.
  + Intended easement for proper ventilation of a basement was found because *inter alia* without it the premises, which were rented solely for use as a restaurant, would not have complied with the applicable public health codes, nor the lease itself. It would not have been possible to the T to have uses the property legally and in compliance with the lease without the enjoyment of the easement of ventilation being claimed.
  + Given the purpose and terms of the demise, it would have amounted to a derogation from the grant not to recognize the easement over part of the property that had been retained by the landlord.
* *Wheeldon v Burrows:* 1879
  + Ostensible right of way – quasi-easement. When quasi-dominant land is transferred the quasi easement might blossom into a reals easement in the hands of the new owner of the queasy dominant tenement.
  + Must meet criteria:
    - Quasi-easement must be in use at the date of the transfer.
    - Must be reasonably necessary for the enjoyment of the property.
    - And/Or be continuous and apparent.

1. **RESERVATIONS**

* A reservation refers to an interest retained by a grantor on a transfer of land to some other person.
* ON the sale, or lease of a property, an owner may wish to reserve an easement over the land that has been transferred, for the benefit of an adjacent or nearby tract that has been retained.
* Not often found impliedly – *Wheeldon v Burrows* does not apply.

1. **ESTOPPEL**

* Easements can be created through the application of the doctrine of proprietary estoppel.
  + *Adams v Loughman*: representation made to prospective purchaser that a land was going to be set aside for the use of the land being offered for sale. On the faith of the statement that the purchaser agreed to buy the property.
    - Granter and those claiming through him were estopped from preventing the grantee from using the lane as a right-of-way.

1. **PRESCRIPTION**

* Not in Alberta. LPA 69(3) Abolished the acquisition of rights through prescription.

1. **STATUTE**

* Alberta Condominium Legislation: Easement of subjacent and lateral support is implied in favor of every unit capable of enjoying these rights.
* Also creates easements over common areas, right of way for water, sewage, drainage, gas, electricity, garbage, artificially heated and cooled air, telephone and radio and television services.

#### *Nelson v Rabbit Hill*

PUT IN PICTURE v ADD MORE

Rabbit Hill operates in the NW ¼ under a lease and build a road over the NE ¼ which was agreed to when completed and the road was included in the lease to the resort.

Nelson purchased parcel A in 1985, was not party to the contract for the lease of the road but used it anyways. Dale was aware of this NW ¼ was purchased in 2005 and the new owner attempted to bar Nelson from using the road. The lease between Rabbit hill and NE1/4 ended in 2008 and the owner would not renew it.

Issue: Did Nelson gain an easement either at common law or equity over the road?

* **Was there an implied easement of necessity?** This would be binding on subsequent purchasers even if they did not appear on the title.
  + Land must be absolutely inaccessible for a right of way to be implied. Mere inconvenience is not a sufficient reason.
  + Necessity must have existed at the time of the severance of title of servient and dominant tenments.

### Scope, Location and Termination

Scope of an easement is a matter of intention.

Implied easement, extrinsic evidence is often vital to the determining the scope fo the right.

#### *Laurie v Winch*

Farmland (dominant tenement) was subdivided into residential lots. The easement, which was granted as a perpetual right-of-way over a slender lot near the farm, was split into a large number of easements. One of these being attached to each new lot.

SCC: Valid. Nothing to suggest it was contemplated that the lands would always be used for agricultural purposes or that changes in the use of the dominant lands would affect the continued existence of the easement.

Holding is consistent with the rule of construction that provides that an easement is presumed to attach to every part of the dominant lands.

**Easement: An easement survives a subdivision and even a change of use (from farmland to residential) in the dominant tenement.**

\*Court identified the dominant tenement by implication.

\*\*Conversion of this farm to subdivision doesn’t destroy the easement. It now attaches to every lot because it must have been contemplated and the nature of the burden doesn’t change.

#### *Malden Farms v Nicholson*

Two parcels of land, duck sanctuary, and a beach. West (marsh) cuts across west portion into the eastern land. Owner eastern land throws open gates and incites the public to come and picnic at the beach.

Easement: “A free and uninterrupted right of way. Ingress and egress for persons, animals and vehicles thorough along and over...”

Original scope of easement did not contemplate private owner opening public resort open to the public where they could park their cars on lot. Land in west had purpose to preserve a duck sanctuary.

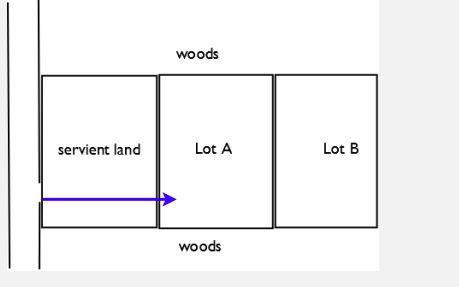
This is something fundamentally different of use of easement, change in scope of activity. Not just number of people but type of activity.

#### *Harris v Flower*

If an easement is granted for the benefit of Lot 1, the easement may not be lawfully used, in substance as a means of crossing over Lot 1 to get to Lot 2.

Colourable use of the right-of-way appurtenant to Lot A to benefit Lot B is prohibited. Is the easement really a servitude for the intended dominant tenement or is it actually enhancing some other property?

But an ancillary use of the easement to benefit Lot B is tolerable.



### Termination

1. Natural termination (eg. a right of way for as long as the land is cultivated.)
2. Express release: can buy an easement back.
3. Implied release/abandomment
   1. (*Costa v Jenika*) Conduct is evidence that they abandoned. Intention to abandon and a sufficient manifestation of relinquishment before the right is considered lose.
      1. Onus is on the party alleging that right has been relinquished.
   2. Intention can be inferred from change in nature of the dominant tenement that renders the easement useless, or by virtue of a similar change in servient lands to which easement holder does not seem to object.
4. Proprietary estoppel
5. For easements of necessity, when easement no longer necessary.

## Other Non-Possessory INterests

Profits entitle the holder to take some of the produce, such as timber, soil for the land belonging to another. Profits are similar to a positive easement.

* Does not have to be annexed to dominant tenement. They may be held in gross, do not need to be a neighbour to be benefitted.
* Right consists in the power to take something from the soil, not the thing itself.
* May be held with others (in common) or exclusively (in severalty)

### *Tener*

Government sterilized mineral claim of P as situtated in provincial park – legislation prohibiting mining unless have a permit which P was told will never receive.

Issue: Are entitled to compensation?

Held: Yes, if and only if, they can show that the government took something from them. He had the right to remove minerals and the government took it back.

* Problem One: P still had the mineral rights – remained in his property.
* Problem Two: Grant seems to give P the minerals themselves, not a profit. You can’t have a profit in your own minerals.

EXAMPLE: Think of a grant of land of what is now AB in the early days of the homestead dominion. You used to get everything including mineral rights. Farmer now wants to dispose of the minerals. Energy company standing by saying they want them.

Both can be permanent or for years.

1. You want them? I convey them to you in fee simple they now have estate in them.
2. Right to work them, you can enter land and remove as much as you like and here’s how much you will pay me for them.
   1. Profit. Colloquially known as mineral lease but it’s not a lease, it’s a profit.
   2. Oil and gas leases were not actually leases (which is an interesting land over time and not the minerals) but profits instead ( or a working interest).

Surface Rights: If you have a profit, you through implication have access.

* Operator does not have access rights even though they have mineral rights in fee simple. They only have access to land in AB if they’ve bargained for it OR they’ve obtained an order dispensing with their consent from the surface right owner.

### *Dynex v BMo*, SCC

Dynex is a company in liquidation that has various assets. Most important are mineral rights (oil and gas leases). More creditors than assets. Creditors have to stand in line, get minimal money of the dollar. BMO however is a secured creditor – registered their interest and its binding.

* Enchant claims overriding royalty interest was registered in Land Titles Office. It’s a profit and you can register it.
* BMO claims profit is not a property interest – courts have states that property interest cannot be derived from non-possessory interest.

Held: Overriding interest can be interest in land in Canada IF the language used in describing the interest is sufficiently precise to show parties intended to royalty to be interest in land. The interest of which the royalty is carved must be in itself an interest in land.

Oil and gas leases were not actually leases (which is an interesting land over time and not the minerals) but profits instead (or a working interest).

* If you promise to pay a share of revenues out of the oil and gas interests found, is it a proprietary interest (can register a caveat) or a contractual obligation (just damages)

Common law – a proprietary interest cannot arise out of incorporeal interests

**HELD : SCC - in Alberta a commercial reality exists, language is sufficiently precise to show that the parties intended a proprietary interest versus contractual obligation, the interest on which the royalty piggybacks is itself an interest in land (a profit is an interest in land and it doesn’t matter that it is non possessory).**

* Numerus clauses principle**:** treats the interest as within the rights and ability of the parties to decide (parties are free to shape any kind of contract they want)
  + but if parties were free to invent new modes of creating interests in land great confusion would ensue (*Kapel v Bailey*)

## Covenants Running With Property

Covenant requires owner to do, or not do something with their own lad. Easement give you the right to so something on someone else’s land.

Covenant is an agreement that includes terms and obligations that don’t satisfy *Ellenborough* test. They are much wider in scope than easements.

* Harder to enforce than easement. Covenant is simply a promise made under seal.

Covenants over land can be used to create rights enforceable by one landowner against another, even in the absence of both privity of contract and estate between those parties.

Resemble public land use controls and can be used to create a planned community aided by a purpose-built legal structure. Cater to a variety of interests:

* Used to regulate commercial practices among tenants in a shopping center (limit the kinds of business operations that can be undertaken).
* Can be used to inhibit competition in commercial settings
* Regulation of the nature or quality of construction in residential developments (keep away the poor, or sex offenders)
* Used between neighbor as freehold covenants

### *Re Drummond Wren*

Dispute over residential lot in Toronto that was subject to a stipulation that the property could never be sold to “Jews or person of objectionable nationality”.

* Held: Covenant was invalid. Void for uncertainty, constituted a restraint on alienation. Also, void as being contrary to public policy.

### *Re Nobel & Wolf*

Validity of land covenant. Prohibition of sale to any person “Jewish, Hebrew, Semitic, Negro or coloured race or blood”. Intention was to limit ownership in the lands to person of white of caucasion race.

COA: Nothing wrong with white people wanting to get together for the holidays. Restrictions of transfer being a danger to public interest is fanciful.

\*Ontario legislation amended law to prevent creation of discriminatory covenants.

SCC: Resolved dispute without public policy argument. 4/7 held invalid for uncertainty, 5/7 thought restrictions of type of occupant could not be binding on subsequent purchaser (doesn’t touch and concern the land)

### Running of Covenants

Covenantor makes covenant to covenantee. X and Y are successors to their respective titles.

* Y is entitled to enforce the covenant if the benefit of the covenant runs with the land.
* The covenant is enforceable against X if the burden of the covenant runs with the land.

1. Benefit can run sometimes (has to meet certain conditions)
2. Burden cannot run in law at all. No remedies against successors to the original covenantor.
3. Burden can run in equity in limited circumstances
4. Means that common law isn’t important in enforcing covenants. You want to turn to equity.  This law develops in 19th century, because England is going through industrialization. Land uses are changing all the time.

* Need to liberate land from traditional agricultural uses and move to more productive uses but want to make sure we’re protecting uses of neighbors
* Another important aspect is urbanization
* Committee in 1832 that recommends to parliament that covenants be made enforceable

Equitable rules are of greatest utility. Not only is the equitable remedy of an injunction frequently the most useful enforcement device, but also it is in the Chancery that the notion of covenants running with land has flourished.

#### *Tulk v Moxhay*

Covenant to maintain a parcel of land in central London as a public park. “The person who retains the garden will maintain it in good shape and allow others to access it with a fee (a covenant for open space essentially).” Purchaser of the property who knew of the covenant was held bound by the terms.

Result did not turn on whether the covenant runs with the land, it added that “if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.”

Decision permits the imposition of land restriction of unlimited durations.

Did not lay down the prerequisites for the running of the burden. Primarily influenced by the fact that the purchaser of the square bought the property knowing of the covenant.

### Principle Requirements For Running Burden in Equity

1. Covenant must be negative in substance. *Haywich and NB permanent building society.* 
   1. Only restrictive covenants.
   2. Compliance possible with inaction.
   3. Can be conditional with an affirmative element. Eg. Covenant not to allow trees to exceed certain heights. You need not plant trees, but if you do you must comply with size limit)
2. It must have been intended that the burden was to run with the servient land, and that the land was sufficiently described in the covenant.
   1. Equity will not impose an obligation on a new owner if the original parties has no desire to do so.
3. Covenant must be taken for the benefit of the dominant lands, and those lands must have been sufficiently identified in the document.
   1. Dominant lands must be easily ascertainable and sufficiently identified. *Galbraith v Madawaska Club*
      1. Extrinsic evidence will not suffice.
      2. If not met – not bound. Rationale that person is entitled to know who may enforce the covenant, servient owner should be able to ascertain who holds the dominant land.
   2. Must be some proximity.
      1. *Swan Properties v Irving Oil*.
      2. Evidence of a competitive overlap is a necessary but not sufficient condition to find a true benefit to the dominant territory.
   3. Promise must be capable of benefitting dominant lands
      1. “Touch and concern” (*Spencer’s Case*)
      2. Affects the mode of occupation of the land, directly (not merely from collateral circumstances) affects the value of the land.
      3. Canada held that covenants that attempt to prohibit alienation to members of particular race or religion to not touch and concern the land.

(4) All general limitations imposed on the availability of equitable remedies apply.

1. Bone fide purchaser for value of a legal interest without notice will not be bound to comply with a restrictive covenant.
2. **Notice**: Cannot take the benefits of the land and not the burdens (unconscionable), think about it as unjust enrichment (selling it free of the covenant for greater value), *Nemo dat* principle: if you bought land without right to build, can’t sell what you don’t have.

#### *Swan Properties v Irving Oil*

Covenant was annexed on a vacant lot in town, prohibiting inter alia the use of the land as a restaurant. A business which included a full-service restaurant in connection with a gas station was located on one of the 12 properties intended to be benefitted by the covenant. Servient tenement was 3.8 or 5.2 km away depending which route you take.

Attack on validity of the restriction based on lack of proximity failed

Held: Limited customer base for restaurants in the town and the restaurant business on the dominant tenement would be adversely affected if competitors entered the market

* Competition radius construed with dominant tenement at the epicenter. Here: assumed that anyone in the town was a potential patron of the restaurant/gas station. A servient parcel within the town would therefore fall within the competition radius.

#### *880682 Alberta Ltd v Molson Breweries Properties LTd*

Validity of the restrictive covenant annexed to land in Calgary was at issue. Covenant prohibited the use of that land for a brewery and was stated to be taken for the benefit of Molson’s Edmonton operation, some 300 km to the north. Molson advanced argument that the owners of the two properties would be competing for the same clients. Molson’s Edmonton plant supplied beer to Calgary and all throughout AB. Covenant pertained to highly competitive industry with breweries trying to reach same clients. Sales by one company are very likely to reduce sales of the other.

Accordingly, brewery facility in Calgary fell within Molson’s competition radius. Two plants could be rivals for same clientele and therefore Molson would benefit from the covenant located in Calgary.

Competition-radius argument rejected. If allowed to stand it would not only stand for dominant tenements in Edmonton but potentially anywhere in the world. Such as Microsoft with headquarters acting as dominant tenement.

### Running of Benefit in Equity

There are three means by which a benefit can be transmitted.

1. Annexation
   1. Touch and concern, and intention to run.
   2. Land must be clearly ascertainable.
      1. Canadian law does not allow for implied annexation. No annexation by implication (*Seketrov v Toronto*)
   3. Land Titles Act Section 48. Enforcement and Termination
      1. Can register a negative covenant.
2. Contractual Assignment
   1. Benefit under contract can be assigned (equitable chose in action).
   2. Express assignment passes the benefit so as to enable an action against an assignee of the convantor.
      1. The covenant touches and concerns the dominant land and was taken for its benefit.
      2. The assignment occurs contemporaneously with the transfer of dominant land.
      3. That land is ascertainable, at least with extrinsic evidence.
   3. Need for express assignment occurs only when express annexation does not occur.
3. Development schemes (or building schemes, or common plans)
   1. Creates a local law under which each property owner is subject to the burdens and is entitled to the benefits of the relevant covenants.
   2. Four requirements: Assuming touch and concern land
      1. Derived from a common vender
      2. Vender laid out the parcels subject to restrictions that can only be consistent with general scheme.
      3. Restrictions intended for the benefit of all parcels within the scheme. Mutuality.
      4. Purchased on the understanding that restrictions would enure to the benefit of all other parcels.

#### *Galbraith*

Club got federal land and made grants of lots to people. Signed covenant that occupation of premises was only by a member of club or by special permission of board of directors. Can’t lease it to someone who’s not a member.

P conveyed land to himself and his wife as joint owners without notice. Argued covenant not binding as didn’t touch or concern the land.

Held: Covenant regarding persons occupying does not have anything to do with use land is put. Imposed not for benefit of land but benefit of club.

### Running of Benefits and Burdens in Law

Law refuses to enforce a burden against a subsequent land owner. Remedies in law ONLY available when new owner of benefitted land seeks to bring suit against original covenator.

* A positive covenant can be enforced only against the original covenantor. Enforcing party may be either the original covenantee or an assignee of the benefit at law or in equity.

**Basic Position** A covenant compelling the covenantor to spend money or perform an active obligation

* Traditional Rule: no doesn’t run (***Keppell v Bailey*, *Austerberry v Oldham Corp***) because burdens do not run at law at all
* Nor can such a burden run in equity. Only negative or restrictive covenants fall within the rules now in place. Positive covenant can only be enforced against the original covenantor, enforcing party may be either the original covenantee or an assignee of the benefit, at law or equity.

**Rationale:** Reluctance of courts to break new ground even though reform might be well warranted. Court declined to abolish rule against running of positive burdens because

* Complex problems at play could not easily be solved through the necessarily incremental processes of case law development.
* The retrospective effect of a common law ruling could adversely affecting existing property rights.
* These concerns illustrate the judicial reluctance to create fancy new interests (numerous clausus policy)

#### *Rhone v Stevens*

* Lords concerned with danger of adopting a rule that would result in the enforcement of a personal obligation against someone who had not covenanted to undertake it.
* Doesn’t apply to restrictive covenants, “to enforce negative covenants is only to treat the land as subject to a restriction”. Restrictive covenants deprive an owner of a right that could otherwise be exercised.
* Equity however cannot compel the performance of a positive covenant agreed to by the prior owner without blatantly contradicting the common law rules concerning privity of contract
* Enforcement of a positive covenant lies in contract, enforcement of a negative covenant lies in property; negative covenant deprives an owner of a right over property.

#### *Szymanski v Excel Resources Society*

Clause 1: “That only one private dwelling house, together with the necessary outbuildings shall be erected on any one of the said lots. A block of flats, apartment, tenement house, or any building constructed to accommodate more than one household shall not be deemed a private dwelling house within the meaning of this clause”

* Only one private dwelling house. Building to accommodate more than one household is not a private dwelling house.
* What is a “household”? Just a family, students sharing together, couples shacking up
* Court: Structure is a private dwelling and group constitutes one household

Clause 7: “That no building erected on any of the said lots shall be used for any purpose other than that of or connected with a private dwelling house”

* Argument would be that we have an understand of what a residential use is, you could say this is medical/supportive use. If you had categories, you wouldn’t put this into the residential category
* Court: Publicly funded body is attempting to provide a living situation for the disabled which is close to being in their own home. This is “borderline” residential.
* Clause 8: “No building shall at any time be erected upon the said lots for manufacture, trade, or business purposes”. Non-profit.

Are those clauses effective in prevented the use of the house for being used for 6 unrelated adults living there with some help services?

* Restrictive covenants have not shown themselves to be very good way of restricting land use
* Very durable
* Don’t provide right amount of control as they’re subject to interpretation and if you get wrong interpretation then hard to change. Which is why they’ve moved to zoning requirements almost everywhere.

### EXCEPTIONs

ATTEMPTS TO SIDE-STEP:

1. **Chain of Covenants:** Get another land owner a term: “Should I ever convey I will include the following stipulation to the next land owner and get them to go the same thing. They promise not to sell without same restrictions.
   1. Sue only for damages
   2. Only as strong as weakest link – if anyone has gone bankrupt chain destroyed.
2. **Principle of Mutual Benefit and Burden:** A person who take the benefit of a covenant must also take the burden of it as well (*Halsall v Brizell*)
3. **Pure Principle of Benefit and Burden.** 
   1. *Ocean Island* Case
   2. Rejected HOLD in *Rhone v Stephens.*
4. **What remains?** *Amberwood v DCC*

#### *Halsall v Brizell*

Predecessor from DF bought property in subdivision where every buyer acquired a right to use the storm water sewer and some common roads and amenities in the subdivision. Also covenanted that they and their successors would pay a proportionate share of the expenses. 100 years later, one of the owners disputed the amount. Issue was raised that they weren’t bound at all.

Held: Successors to original covenantor could not sued on covenant, they would also not be entitled to the benefits of the covenant under the deed. If you don’t want to pay, fine but you don’t get to use the amenities.

Four elements to fit within the benefit/burden principle

1. Adoption of the benefit must be made conditional, expressly or impliedly on the assumption of the burden.
2. The benefit and burden must be related to each other in some material way (merely framing the agreement so that one promise is given in consideration of another is not sufficient.)
3. A subsequent owner will be bound to accept the burden only if one can at least in theory accept or reject the benefit.
4. The benefit must be one that is enjoyed as of right under the agreement.

#### *Ocean Island*

Strip mining company was given rights to strip mine an entire island. Grant of mining rights also contained a separate clause that required company to replant entire island when they were done. Mining company gets the minerals out and transfers rights to someone else. That company at the end of mining says they didn’t sign agreement to replant so they’re just going to leave island as it.

Chancellor holds that although these were independent clauses, one with mineral rights and one imposing duty to reclaim, he’s going to tether them together. That’s a pure principle of benefit and burden.

**Ratio: If you take benefit, you’re bound by the burden.** Courts have resisted this.

#### *Rhone v Stephens*

Above. Makes principled distinction between equitable principle that somebody gave away and compelling someone to perform a contract that somebody else signed.

* When you enforce a restrictive covenant – you enforce property.
* When you enforce positive covenant – it is contract.
* Only if you are taking a benefit will you be bound by a burden. But there has to be a natural tethering of the obligations. If intrinsically connect then you can employ the principle of benefit and burden.

Here: The benefit of lateral support is unrelated to repairing of the roof.

#### *Abmerwood v Dcc*

A developer, WHDC Harbour Development Corporation, owned two parcels of land that they divided for separate condominium complexes to be built upon. Durham bought one of the parcels and built a condominium complex before the other lot had been purchased. Both complexes were to share a common recreational facility and park, and share the costs. WHDC agreed to subsidize Durham for the expenses until someone purchased the other lot. Amberwood eventually purchased the other lot, and agreed to pay the costs. They did so for a while, but then stopped and stated that positive covenants cannot pass with a transfer of land.

Issue: Can positive covenants “run with the land”?

Ratio: Positive covenants on land no not pass with the purchaser upon a sale of the land, even if the purchaser agreed to abide by the covenant, they are not required to do so. (Rejects *Halsall v BrizellI)*

* Long settled law that positive covenants do not run with the land, therefore Amberwood prima facie does not have to pay for the costs of the shared facilities
* They examine two proposed exceptions to the rule – the benefit and burden doctrine and conditional grants of easements – and decide that they do not apply in this case. Although the Law Reform Commission has recommended change in the law of positive covenants, this should be left to the legislatures.

Make benefit of a grant conditional on performance of burden.

* If facts establish that benefit was conditional, then burden
  + “I grant you an easement to my laundry room but only so long as you pay me annually”
  + If you don’t pay me, you don’t have the easement
* Easement lasts only so long as you do the burden

Positive burdens run with leaseholds

* Person who buys land subject to a mortgage has got to realize the failure to pay the payments can produce direresults. The positive obligation is assumed, like it or not. They assume the obligation with eyes open.
* As long as there is policy notice, and covenant does not violate some rule of public policy, owner who takes land subject to a burden can hardly complain.

### Termination

**Generally.** Covenant may be framed to last for a stated or ascertainable period, or indefinitely.

* Generally, unification of ownership and occupation in one person will terminate the covenant.
* Equitable remedies may be refused when a covenant has ceased to fulfill a useful function
* Owners may agree to terminate the covenant

**Public Policy and Other Bases of Invalidity**

* Order for modification or discharge may be obtained if it can be shown that the order would be beneficial to the persons principally interested in its enforcement
* Order for revision/termination may issue if:

(1) the covenant conflicts with zoning laws or other regulatory instruments, AND

(2) the modification or discharge would be in the public interest

* Covenant may be void for uncertainty or because it imposes an unacceptable restraint on alienation or by virtue of it being contrary to public policy or human rights protection