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What is property?

From Latin term 'proprius' meaning "own" or "proper".

Property: Rights in relation to a thing (either tangible or intangible).

Property is a bundle of rights.
1. Right to exclude, transfer, use, dispose of, capital, duties/responsibility/liability (?)
2. Irreducible core elements: Right to exclude

Single-variable essentialism (Cohen):
The right to exclude is all that you need.

Multi-variable essentialism:
The right to exclude is one of many essential conditions.
The right of 'free use, enjoyment, and disposal (transfer)'
   - Not necessarily accurate, as transfer is not essential in some property rights

Nominalism:
Property is that which the law decides should bear that label.
Property is a term that is defined by use of social convention. (Bundle of sticks)
Must be a criteria: "definable, identifiable by 3rd parties, capable to be assumed, and some degree of permanence/stability"

Yanner v Eaton
"All fauna save fauna taken or kept otherwise than in contravention of this Act, during an open season with respect to that fauna, is the property of the Crown and under the control of the fauna authority" 

Facts:
Yanner is Australian aboriginal who killed crocodiles protected under Fauna Conservation Act 1974. Claims that he has a pre-existing right under the Native Title Act 1993. Crown argues Yanner has no property claim to the fauna as the government claims entitlement to ALL (absolute) property of fauna.

Issue: What is meant by the term property?

Decision:
Majority was in favor of the nominalist definition of property. Yanner's right survived the narrow definition of property.

Dissent:
Interpretation as the right of property as being single variable essentialism. The 'right to exclude'. The right of the government to exclude access of fauna to others.

Why did the Fauna Act not specifically extinguish Yanner's pre-existing right to hunt?
   - It is likely that the legislature did not think of, or were not aware of the pre-existing aboriginal rights.
   - The government is 'armed with power' to do as they wish under the Fauna Act, however they may not have exercised that right as of yet.
   - Rights can co-exist with each other. Some rights may be subordinate to others.

Private v Common v Public property

Private Property:
1) An allocation of rights to a person
2) Owners have exclusive right to undertake socially acceptable uses to the exclusion of non-owners
3) Non-owners have duty to refrain from preventing socially acceptable uses, but duty to prevent/be compensated for socially unacceptable uses.

**Public Property:**
1) Rights to the land/thing are held by the state
2) State determines rules of access/use. Duty to manage for public welfare. Public members do not necessarily have access, but have duty to observe access and use rules developed by agencies.
3) **Distinguishing difference between public & private property?**
   a) Charter of Rights and Freedoms applies to the regulation of public land. (Limits the rights of the state, but not private individuals)

**Common Property:**
- Each member of ownership group has right to access per collective rules of group
- Members have duty to exclude non-members, but also duty to not exclude members

**Non-Property/open access:** Something that belongs to us all (air in atmosphere, international waters)
- Ex The Public Domain' in copyright law is an example of common property. Things in the public domain are those items of which a copyright has expired, the item cannot be copyrighted. There is no right to exclude others (still property?), or no property at all.

**Communal:** Example, Aboriginal Title - the lands are owned by everyone in the band. Owned by a particular community. Compared to widely-held private property (ex if 3000 individuals have access to a common park).

**The Case for Private Property**

**Three orders of inquiry:** Rationales of private ownership
1. (WHY) Should private property be preferred over other property options (ie communal property, state property, public property)
2. (WHEN) In which occasions should private property be preferred? (ex. Airspace?)
3. (TO WHOM) Who should be allowed ownership of private property? (controversial component)

**Claim #1 (Utilitarian)** - Private property creates maximum utility (Jeremy Bentham - utilitarian theorist). Goal of private property should be improve overall net happiness (hedonic).
Utilitarian theory - average happiness of society greater if resources & production owned by individuals. ie people are most happy when they work towards their own success
- Measurable? What is quantifiable as being 'happy'? Simplistic approach. No real basis to measure a given policy
  - Ability of society to promote: equality, security, subsistence, abundance
- Impossible to account for small amount of poverty. Ie what if we have small number of slaves complete work for the rest of us? Equality & justice become irrelevant.
  - John Stuart Mills measured happiness as net benefit to society as a whole
- Least persuasive of theories, however still identifies values worth caring about

**Claim #2 (Personhood values)** - Property is necessary for optimal human development/flourishing. Private property may or may not make us happier, but it does make us 'better' (more objective measure?).
Hegel - 'Property allows us to become individuals'.
Three psychological motivations – the need for: efficacy, self-identity, sense of place
Connection between property and sense of self. Cultural symbols are examples of items of property that have important meaning to individuals. Aboriginals and value of ancestral land.
- Stress importance that people place on security and privacy
- Property serves as a means of channelling aggressive behaviour

**Concerns:**
- Weak correlation between objective measures of wealth and subjective happiness
- Greed/Envy – comparison of own property with others.
- Class distinctions based on using property to advertise personhood.
- Property may cause detrimental psychological effects

**Juristic traction:**
- Personhood influences specific allocation of rights (3rd order event)
Claim #3 (Right to act as free person) - Property promotes freedom/autonomy. I.e. 'Things I would do if I won the lottery...'. Freedom to do things (power), or freedom from ... state interference. If I own 'black acre' (arbitrary lot of land), I can prevent you from walking across it. The distribution of wealth creates a power differential. Economic and social difference are reinforced by the overt and covert use of power.

- Property only promotes freedom if widely dispersed. Right to dispel others means that someone (poor) is being dispelled.
- Right to control one’s destiny only valid
- However democratic values may diminish if property is not distributed evenly
  - The right to control things entails the right to control/govern people (limits freedom?)
    - Ex. Conditional gifts/property transfers
    - Harnessing public/private property rights to motivate others
- Private ownership of resources required by the public?

Claim #4 (Economic Efficiency Theory). Property enhances material well-being. Private property creates the most economically efficient system.

- Claims maximum productivity ('the person who makes the greatest profit is the person who has the greatest power to foresee demand!)
  a. Success of the economically fittest, results in waste (loss of those less fit)
  b. Industry may sacrifice the interests of society to commercially profit
- Universality must take back seat to other moral values. i.e. allocation of adopted babies

Claim #5 (Labor Theory - Locke): Private property is just or at least legitimate. We inherently own our labour, and when we infuse this with the material of the earth, we must at least own some of that property (what we mix our labor with).

Three requirements for labour theory:
- In nature property is held in common
- God’s will that property was originally communal then evolved into private property
- Recahing consensus about #2 not possible

There are issues with unilateral appropriation.

a. What about the needs of others? Two qualifications by Locke:
   a. Taking can only be permitted if the is enough left for others
   b. One should not take so much as it would spoil (Note: currency does not spoil)
b. Few things are produced by the labor of one person
   c. Does not account for inheritance & transfer (as well as theory of first occupancy)
   d. Lockean Theory = Early bird gets the worm (for tangible resources)

The obtainment of private property must be at least through a legitimate (recognized by a legitimate body) action, as opposed to just labor (per se).

1. First occupancy: Right of discovery of property to take control of it and dispose of it. Few items of property (Great wealth etc) were actually 'found' but rather accrued through the labours of many (by conquest...). Under labor theory, people should be entitled to retain such property.
   a. Under first order – makes little sense. As if a first occupier retains property, then little justification for private property where it leaves everyone else destitute
   b. However can serve to resolve 3rd order issues – allocation of PP.
   c. Winner takes all. Loser incurs all costs. Fair to provide squatters with property rights simply for showing up first. Verses heavy handed approach to remove them.
   d. Ex. Internet Domain names – Cybersquatters.

2. Desert and Consent – wish to grant ownership to deserving laborer. Labour contributes to well-being. Fairness and justice demands that there is compensation.
   a. Second Order Question: Should we allocate private property to those who labour for it (based on merit)?
   b. Balance between selfishness verses improvement of property and productive use of resources
   c. Meritorious labour verses need. Allocating property to some invariably limits allocation to others

4. Where one is not financially rewarded for labour (ex. Housewife), property law attempts to impose equity → sharing of property on family breakdown

5. **Doctrine of Unjust Enrichment** – Applicable where:
   a. One person enjoys enrichment in circumstance b) another has been deprived and c) no legal reason to deny relief.

**Pluralist Account – Combining all theories:**

*Munzer’s Blend* = Temperate system of PP close to Canadian mixed economy.

Property justification based on combination of theories:
1) Utility & efficiency
2) Justice & Equality
3) Labour & Desert
   - Material inequality only valid if everyone possess minimum amount of property (no poverty)
   - Scale of inequality cannot prevent full human development

**Dominance of Economic Efficiency in 21st Century**

*Posner’s Touchstones:* According to economists, will function successfully if the following principles are in place:

i. **Exclusivity of ownership:**
   i. Allocate rights to individuals and provide means to enforce those rights.
   ii. Law protects individual entitlements and inhibit derivatives to others

ii. **Entitlements/assets should be transferable:**
   i. People who value certain property the most have access to them

iii. **Property should be as universal as possible:**
   i. The more players and more assets the better.

**Principle:** Protected exclusivity of ownership is a hallmark of an efficient property regime

Absence of Posners’ touchstones evident in developing countries for example, where goods are exchanged on the black market. Absence of title to a land effectively prevent the use of land as security for loans.

- Single most important method of raising funds in West is mortgaging a house based on title

**Tragedy of the commons (Hardin)** - Benefit to farmer (increase value of cattle) is greater than the cost he must use for grazing an additional animal. Applicable to an open access commons. What about a commons where there is a regime governing the use? Private property requires plenty of rules & enforcement. It is not self-executing, but requires a complex legal regime.

- Hardin’s proposal was to privatize the commons

**Tragedy of the Anti-Commons** - What if there is too much fracturation of private property?
- Property ineffective given multiplicity of ownerships. Difficult to mount cooperative efforts
- Barriers to transferability
- Some public/common holdings seem necessary to keep enterprise on track
- Ex; Air pollution rights – imagine trying to buy out all polluters (holdouts)

**Novel Claims**

**Two types of novel claims:**
1) Items previously thought of as ‘thing’ ownerships, now favoured under ‘bundle of rights’ ownership
2) Advances in science and technology result in new property rights issues

**Two approaches by judiciary:**
1) Attributes based: Whether the asserted right looks like property (family resemblance) to an existing category of property.
2) Functional Approach: Consideration of policy concerns. What is social purpose of right? Often aligned with nominalist perspective (what the law wishes to call property is property)
3) Ex of novel claims: University Degree split at divorce, Cultural Appropriation (aboriginal stories)
Labour and Desert Theory Applied

FACTS: P and D are competitors in news distribution in the US. P is requesting an injunction on D, preventing them from copying and reissuing news that was originally issued by P (either by bulletin or newspaper publication).

ISSUE: Is news considered ‘property’? Is it still considered property after publishing to the public? Is D’s conduct considered unfair competition in trade?

DECISION: Yes, based on notion of desert and consent. P has right to exclude D, but not the public.

REASON (Majority): (Nominalist)
1) Majority views the rights of property as being a right of exclusion between competitors, as opposed to exclusion from the public.
2) Because P has invested time & money in procuring the news, it has a right to that news.
3) Quasi-property – P has a right in a news story. It may exclude those with a commercial interest (competitors) however not the general public.
   a) Difficult concept because we need to have a firm definition of what actual property is
   b) Rem v personam. Rem = right in world, Personam = Right in a particular person
   c) A unique element in the 'bundle of rights' view. This element gives P the right to exclude D, but not the public.
4) The view that news is 'abandoned to the public for all purposes' is untenable, as P is not intending to abandon it following the investments of time and money in procuring it.
5) Policy: Allowing indiscriminate publishing of any news material would been the costs of producing news would be prohibitive and not in favor of good business practice.

Dissent Opinion #1 (Holmes J): - single variable
1) Property depends upon the ability to exclude. A person cannot be excluded the right to use a phrase or words simply because they were not the first to come up with it.
2) Recommends that D cite any materials it is taking from P (or otherwise wait a certain # of hours)

Dissent Opinion #2 (Brandeis J) – single variable:
1) Essential element of property is the right to exclude others from using it
   a) Private property: Exclusionary right is absolute
   b) If there is some public interest, the right of exclusion is qualified
2) The fact that the 'product of mind' has cost the developer money & time to produce, does not mean that it is property.
3) Courts are powerless to prescribe law in this matter, should be left to the legislation.

Victoria Park Racing and Recreation Grounds Ltd v Taylor (1937) - Australian Supreme Court

FACTS:
P owns a racecourse on his land and D is his neighbour.
D constructed a platform that can view into P's racetrack.
D broadcasts commentary that describes the races, reducing the profitability of P's venture.

Two lines of defense:
1. It was a nuisance
2. Rights in a spectacle

ISSUES: Is a spectacle considered property? Does P have the right to exclude D from viewing spectacle?

DECISION:
No, based on the majority decision in this case, P does not have the right to exclude D from viewing the spectacle.

RATIONALE:
1) Argument that P's expenditure on establishing the spectacle did not provide it sole 'observatory' rights of that spectacle.
2) A spectacle cannot be 'owned' in any sense of the word.

Dissenting opinion (Rich J):
1) Reference to ‘relative rights’ between parties. i.e right to exclude some people, but not others
2) "D's rights are related to P's rights. Each owner's rights may be limited by the rights of the others."
3) Claims that the actions of D fall within the realm of nuisance "interference with the right of specific people" (interfering with the property rights of P)
4) References the prospect of television, and how future court decisions might overrule this one.

Dissenting opinion #2 (Dixon J):
1) D's use of his land, strips the value of P's property
2) Means of fumes, smells, noises are not the only way of providing a nuisance
3) Reference to a new law that covers the rights of such intangible property

Notes:
- There may be no distinction between *Victoria Park* and INS, however in the *Pittsburgh Athletic Co v KQC Broadcasting* (1938), the judge states that the *Victoria Park* case was decided in an Australian jurisdiction, and the judge advises this is not an authority. "The doctrine of unfair competition is not recognized under English Common Law. Therefore this decision is not an authority"

**Quasi-property:** essentially intangible items not covered by English law.
There are in existence trademarks, trade name, designs, and reputation, but these are specific examples of protected interests. There is no wide generalization term for this sort of quasi-property.

Moore v The Regent of the University of California

**FACTS:**
P attends to D's clinic to treat his cancer
D extracts cells and forms and receives valuable patent for components extracted from P's cells
P is suing D for rights to the patents

**Cause of action:**

**Breach in fiduciary relationship** - The doctor did not properly disclose their intent to Moore.
1. **IN PERSONAM** - Moore only has a claim against his doctor, who breached the fiduciary duty
2. **IN REM** - Liability for conversion is *strict*. If Moore had a claim in his cells, then all researchers downstream would be affected (IN REM)

**ISSUE:** Can one have a property claim (ie right to) in patents formed using their DNA/body parts?

**DECISION:** No, one does not have a right in a patent that is formed from their body parts

**RATIONALE:**
1. Does a conversion claim exist? (Does Moore have a property in his body?) NO
   a. California legislation expressly states that one no longer owns their body parts after removal
   b. The Patent itself is a separate entity from the patient’s property.
   i. Cells change while being developed into a cell line; distinct from Moore's original cells
2. Should conversion liability be extended to include this right?
   a. Policy concern: Providing patient rights to patents would inhibit research. (Tragedy of the anti-commons).
   b. Related TO INS: If AP's rights were not protected, it would render their service profitless and prohibit publication

**DISSENT (Mosk J):** *(PROPERTY = BUNDLE OF RIGHTS)*
1) Property = Broad Concept, best represented by ‘bundle of rights mentality’
   a) California legislation prohibiting patients' rights on some property does mean that these rules apply to all property rights.
   b) One of these rights certainly could be interpreted as right to a patent resolving from removed cells. "At least he had the right to do with his tissue whatever the defendant did with it"
2) Moore seeks to assert an interest in the commercial exploitation of the 'unique property' of his cells that has not changed since they were extracted.
3) Joint Invention Provision of federal statute - All who contribute to an invention should benefit from the reward that invention bring.
4) Conversion law is a creation of common law; judges have the authority to extend it

**Policy concerns of majority addressed:**
1) Biotech companies already place most new cell lines under 'trade secret protection' which already has an anti-commons effect. However the system still functions! Researchers can be made aware of limitations, and operate within them. Researchers are already required to maintain good records for a variety of different reasons.
2) Proper record keeping can avoid buying a ticket to the 'litigation lottery' for third gen researchers
3) Even if there is extensive litigation, this cost will be born by the end-user (the public) in the cost of purchasing products, as opposed to just one patient bearing the full burden.

4) Dignity and sanctity of human body. Professional ethics.

**Patent is a bit of a bargain** that will disclose the secrets of the patentable materials, in exchange for protection of that patent. This means that other companies can become aware of the advancement and work upon the theoretical material.

**Numerus Clausus**

1) While property rights are definitely dynamic (ie patents), courts generally do not recognize new forms of property. Generally property rights are a 'closed set' (numerus clausus)
   a) Keppell v Bailey', it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner'.

2) In civil law, property rights are a true 'numerus clausus' as these rights are created and enumerated by legislation

3) In common law, the propensity for common law judges to identify new property rights is based upon their comfort of 'judicial activism'. Bound up between the separation between courts and legislature.
   a) 'The door is not bolted shut, but rather set slightly ajar'

4) This is in contrast to approach in contract law. Plenary right (freedom to contract) to create all kinds of special arrangements.

5) *Talk v Moxhay* expanded property law by establishing that covenants could run with freehold land in equity
   a) Distinction: *Talk v Moxhay*, it is possible that the justice misinterpreted the reasons within *Keppell v Bailey* when distinguishing the case.
      i) Hall & Weeks Report:
         (1) Chancellor's comments indicate that he did not have the chance to review *Talk*; if the outcome was what the Chancellor thought it to be, then he disagreed with it.
         (2) This chancellor's decision gave birth to the restrictive covenant!

6) Also important that existing property entitlements have well defined meanings.
   a) **Little difference between:**
      i) Establishing a new property right
      ii) Greatly expanding the scope of an existing one

**Function of numerus clausus:**

b) **Economic function**
   i) **Balance:** unmanageable proliferations of property rights *versus* the 'one size fits all' rigidity.
   ii) **Optimization of rights** - as few moving parts as possible that we need to get the job done.
   iii) Compared to the alphabet - We have 26 letters and we make words that we need. Do we need more letters to have all the sounds in the world? Not generally, 26 is good enough.

c) **Avoids the excessive partitioning of property rights** and the resulting dysfunctional fragmentation (otherwise known as anti-commons)

d) Provides a cautionary approach to generation of new property rights, which are not easily reversible once allowed
   i) Precautionary principle: Property rights, unlike contracts, can last for a very long time

**Rights of Property – Environmental Considerations**

- Property rights rationales tend to promote exploitation of resources
- Economic theory driver = efficient resource use → Subordinates other property rights

*Ghen v Rich* – In dispute of right to dead-fin back whale, the party who lanced whale triumphed over first possessors. Ratio: Fruits of labor (lancer) must be awarded.

*Power v Kennedy* – Sealers do not have rights to seals they have killed and left. Other possessors may take if original sealer not there to assert right. Rationale was efficiency driven (promote competition) rather than conservationism.

*Sierra Club v Morton* – Env group pleased general interest of society to prevent development in California wilderness area. US SC held against them, however dissenting opinion stated that natural environment should have legal standing (Similar to corporation).

- Environmental standing has not yet been achieved in Canada in common law, however regulatory regimes have had some impact on promoting 'rights' of environment

**Values of types of ownership:**

1) **Efficiency**
a) Main duties of property law are to promote efficiency through reduction of transaction costs. Transaction cost = Expenses associated with market dealings

2) Certainty (Reduces transaction cost of finding out who is owner)
   a) Clear ownership rules reduce transaction costs = Torrents system of land registration (Titles)
   b) Perfect title is a mirror of all interests affecting that tract

Property In Perspective
Sources of Private Property

Crown has both sovereignty and title - imperium, dominium

Doctrine of Tenure (To hold for the Crown): Embodies the rules for allocating land rights and corresponding obligations

1) Services of Tenure
   a) Tenants in capite (chief/head tenants)
      (1) Subinfeudation
         (a) 1290 - Abolished by Quiao Emptoris (RSO 1897, c 330)
            (i) Cannot retain a right of subinfeudation if converting a part of an estate.
            (ii) Only Substitution acceptable - Same concept as land conversion today
            (iii) This abolition dealt with an 'anti commons' issue. Land was becoming too fractured.
            There was a complex ownership network
            (iv) Only the Crown can devolve down ownership
      b) Military service (knights), eventually became a money payment (scuttage)
      c) 1660 Statue of Tenures - Services were reduced to free and common socage
         i) Abolishment of military tenures (not in capite, or knights service)
         ii) Free and Common Socage was inherited to Canada

2) Incidents of Tenure
   a) Best understood as incidental aspects of grants, essentially taxes or death duties
      i) Dependant on the 'kind of tenure' that was granted.
      ii) Aids was a form of request by the king, essentially could be asked at any time
      iii) Magna Carta - No scuttage or aid shall be imposed in our kingdom, except for certain conditions.
     iv) Escheat – An incidental element of tenure that remains today. When tenurial term expires (if landowner dies with no next of kin), then land will escheat to the Crown.

Doctrine of Estates: Defines the time span of an interest in land and associated rights

- Fee Simple: Represents largest possible tenural holding. Most land in Canada is held in fee simple, with Crown possessing the ultimate/radical title.
- Three kinds of estates possible:
  i) Life Estate – held for life
  ii) Fee Tail - An estate that could be passed down through families
  iii) Fee Simple - equivalent roughly to absent ownership
         (1) In modern times, when we sell our 'property' we are transferring the fee simple estate to their ownership (a substitution occurs)
         (2) If a Fee Simple owner dies without heirs, their land escheats to the Crown

Reception of English Law to Canada

- English law was brought to Canada insofar as it was applicable to the colonies
- Fixed reception date (Alberta: July 15, 1870)
  o North West Territories Act 1886
  o 1870 – the date the territories was purchased by the federal government from HBC
- Ontario past legislature RSO 1897, c 330 which confirmed the reception of Quia Emptores

Property Law Categories

Right in rem: Right against the world
Right in personam: Right against an individual
## Classification of Property – Rob Chambers

Two limitations on traditional methods of classifying property law:

- They become obsolete as property law evolves, and potentially are a source for confusion
- Isolation, difficult to relate some property law components to other fields

### Aboriginal Title

- Assumption of sovereign title does not extinguish aboriginal rights
- Reposing of radical title in the crown, can co-exist with existing aboriginal title (as well as fee simple etc) until those rights are terminated validly
- Rules for recognizing aboriginal title (this nation had this connection to this land)
  - What do these rules confer upon the nation
    - Think of this as a shell (rules of recognition [as identified by different scholars]) that surrounds an array of possible titles. The uniqueness of such titles
      - There are items that are certainly different, i.e. relation of land to intellectual property
      - Similarities:
        - Notions of firm boundaries and exclusionary rights
- Rules of recognition, requirements of recognition are informed not only by common law principles, but also aboriginal principles. (Look for these in future cases we are reviewing)

### Land/Goods

1) Distinction between land and ‘other things’ (goods/chattels)
2) Land is stationary and permanent, whereas goods are relatively transient
3) Civil law classified as: movable (res mobiles) or immovable (res immobiles)
4) Common law: Real (realty) vs Personal (personalty) property

### Personal (things other than land)

<table>
<thead>
<tr>
<th>Chattels Personal</th>
<th>Chattels real: (Hybrid Term)</th>
<th>Unique Interests (Sui Generis)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possible for compensation through award of damages or specific performance (recognizing personhood)</td>
<td>Essentially the only example: lease in land.</td>
<td>Under common law, aboriginal rights were not extinguished by the assumption of imperial sovereignty. Radical title still owned by Crown, however there is an aboriginal right underlying title.</td>
</tr>
</tbody>
</table>

### Real Property (relation to land)

<table>
<thead>
<tr>
<th>Corporeal:</th>
<th>Incorporeal:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights in possession (estates) ie. Fee simple estate</td>
<td>Land rights, even though not possessory rights (i.e easement)</td>
</tr>
<tr>
<td>Restrictive covenants (incorporeal hereditament)</td>
<td>Choses in Action: Intangible personal property right. (e.g. debts, copyright (right to control reproduction)) – A cause of action</td>
</tr>
</tbody>
</table>

### Chattels Personal

- Incorporeal
  - Land rights, even though not possessory rights (i.e easement)
  - Restrictive covenants (incorporeal hereditament)

### Chattels real: (Hybrid Term)

- Originally just a contract between landlord and tenant.

### Hereditament

- Anything that can be passed from an individual to heirs

A corporeal hereditament is a permanent tangible object that can be seen and handled and is confined to the land. Materials, such as coal, timber, stone, or a house are common examples of this type of hereditament.

An incorporeal hereditament is an intangible right, which is not visible but is derived from real or Personal Property. An Easement is a classic example of this type of hereditament, since it is the right of one individual to use another's property and can be inherited.

Reversion: Right of original owners/heirs to repossess property upon end of lease of death of present possessor.

Chattel: Early term for cattle. In early writs, there were no real actions to protect you. You could not have a case to have cattle returned to you, only damages. Protected by a liability rule only (Calabresi-Melamend methodology)

Aboriginal Title

- Assumption of sovereign title does not extinguish aboriginal rights
- Reposing of radical title in the crown, can co-exist with existing aboriginal title (as well as fee simple etc) until those rights are terminated validly
- Rules for recognizing aboriginal title (this nation had this connection to this land)
  - What do these rules confer upon the nation
    - Think of this as a shell (rules of recognition [as identified by different scholars]) that surrounds an array of possible titles. The uniqueness of such titles
      - There are items that are certainly different, i.e. relation of land to intellectual property
      - Similarities:
        - Notions of firm boundaries and exclusionary rights
- Rules of recognition, requirements of recognition are informed not only by common law principles, but also aboriginal principles. (Look for these in future cases we are reviewing)
a) **Realty:** There is a ‘real’ action to recover land from someone who was wrongly in possession
b) **Personality:** No real action available to recover things themselves (although perhaps damages)
c) **Lease:** A property right to land that is not Real property, called a Chattels Real
   i) **Ejectment:** allowed tenants to recover possession of leased land
5) Real & Personal no longer indicate whether a person can recover the actual thing, or just damages
6) Example: Your right to your car is a property right. Your right to be compensated is personal right.

**Legal/Equitable**
1) Modern day: fusion of common law and equitable principles
2) **Equity and mortgages:**
   a) Loan of money, secured by lender, by a right to piece of property
   b) **Mortgagor** = Borrower of money (homeowner)
      i) Providing the security, by transferring title to the bank. (Deed of Mortgage)
   c) At common law, money was to be repaid by ‘law day’. A pre-decided day at which the mortgage was to be satisfied. This meant that if borrower was one day late to make last payment, then the obligation to re-convey had past. The lender could keep the house despite the amount that had already been paid
      i) Recourse: The Courts of Equity. (An equity of redemption)
   d) Bank retains security, homeowner retains **equitable title**
   e) **Mortgagee** = Lender of money
   f) Equity also created a procedure ‘foreclosure’ for wiping out an equity of redemption if loan is never repaid.
3) Always the possibility of conflict between common law and equity
   a) Equity prevails (LINK: Yanner – Equity and beneficial title)
4) **Two main differences be Legal & Equitable property rights:**
   a) Equitable rights: created with less formality than the comparable legal property rights
   b) Equitable property = less durable than legal rights. Easily exting. by competing property rights

**Tangible/Intangible** *(Corporeal/Incorporeal):*
- Tangible: The right to possession of something
- Intangible: The right to possession of something that isn’t a thing

**Property Creating Events**
The rights which people bear, whether in personam or in rem, derive from the following events:
*Wrong* (property rights to bribes)
*Consent* (sale of goods)
*Unjust enrichment* (goods transferred by mistake)
*Others* (creation/destruction of property due to physical changes)
- Origins found in Roman law

**Description of property rights based on functional analysis**
*Beneficial rights:* Owner embraces normal rights of use of ownership
*Security rights:* Designed to ensure some principal obligation performed (e.g. securities)
*Managerial rights:* Owner has control but no general entitlement to exploit object (trustee)
*Remedial rights:* Bare right to apply to court for relief (e.g. rescission of contract)

**Chattels Real Act, RSNL 1990:** declares that all real estate shall be declared chattel reals. Difficult in interpreting this in NFLD, where it was questionable whether existing land was actually ‘Chattels Real’ or ‘Real Property’. Designed solely to affect devolution of land on death?
“It is true that we still recognize estates in land; but is not that a function of its immovability and permanence rather than an inheritance of legal doctrine?”
POVERTY AND PROPERTY

Issues:
- Working poor, rights of tenants and landlords
- Rights on public property
- Trespass, rights of private property exclusionary

J Waldron, “Homelessness and the Issue of Freedom”
- Everything that is done has to be done somewhere. No-one is free to perform and action unless there is somewhere he is free to perform it.
- It is a characteristic of private property that some person has the power to determine who is allowed to be on the property
  - Social rule: removal of unallowed persons from private property can be facilitated by the state
- Each of us has at least one place to be in a country composed of private places, whereas a homeless person has none.
  - This is saved by the fact of collective/public property
- The thought that public property usage must complement that of private property usage (i.e. no urinating in public places – something that is meant to be done in private prop) is disastrous for homeless people who have no private property to complete these functions
- The homeless have freedom in our society only to the extent that our society is communist.
- Public space is essentially the only space available to homeless people to legally act as free agents in order to deal with their predicament and survive
  - Therefore, important not to banish homeless people from this space

R.C Ellickson, ‘Controlling Chronic Misconduct in City Spaces..’
- Focus of article is on managing ‘chronic street nuisance’
- Proposal to implement system of ‘zoning’ on public lands
- Ordinary people must be able to meet in public venues, and enjoy the ‘comedy of the commons’
- Homeless people exemplify the ‘tragedy of the commons’ as
  - they do not pay back into the public space, they only use it
- The ‘Tragedy of the Agora’ – homeless people deter ordinary people from using public spaces
- Harms of Street Misconduct (Nuisance) in General
  - Chronic street nuisance can affect thousands of people per hour
  - Total annoyance accumulates over longer periods of time
  - Triggers ‘broken window syndrome’ i.e. other street misconduct proliferates
  - Homeless people violate informal time limits.
- Propose zoning regime:
  - Red (5%) = similar to red light district, signals extreme caution to ordinary pedestrian
  - Yellow (90%)= some caution, prohibits pan handling
  - Green (5%) = a promise of relative safety
  - Categories based on taste of ‘ordinary person’

“A constitutional doctrine that compels a monolithic law of public spaces is as silly as one that would compel a monolithic speed limit for all streets…”

Victoria (City of) v Adams, 2008 BCSC

Principle: Government cannot determine the use of its property in the same manner as private property owners. They are restricted by application of Charter (specifically s7) to ensure life, liberty, and security of persons in public lands.

FACTS: Bylaws in Victoria do not prohibit sleeping in public spaces, however they do prohibit taking up temporary abode. Homeless people were being told to take down temporary structures etc that protected them while they slept.

ISSUE: Does bylaw violate s.7 charter right to life, liberty, security of person?
**DECISION:** Yes, the effect of the prohibition is to impose upon homeless people (the most vulnerable of City’s residents), significant and potentially severe additional health risks. Sleep and shelter are necessary preconditions to any kind of security, liberty or human flourishing. Overnight shelters are allowed as long as they are packed up in the day.

**REASON:**
- **Statistic** shown supporting homeless people as some of the most marginalized members of society (high drug usage, large aboriginal population, mostly male, significant health issues, and mental issues).
- Insufficient homeless shelter beds for all of city’s homeless population
- **Claim about property rights:**
  - Defendants claimed that homeless actions were tantamount to expropriation of public property for private use
  - Judge reasoned that use of public space does not allow a homeless person to exclude others from using those same resources, or determine the use of that public property.
    - Issue is the prohibition of temporary structures, not the right to camp in public spaces
    - The SCC has previously ruled that the **government cannot determine the use of its property in the same manner as private property owners.** Government cannot prohibit use of public property in a manner that deprives individuals of the ability to protect one’s own bodily integrity

**PROTECTIONS FOR PROPERTY**

**Taking = Acquisition + Removal of Rights by State + No Compensation to owner**
1) There is the taking of a right, called a restrictive covenant, however no acquisition by state
2) Provincial government can legislate in this nature; constitutional powers over P&Civil rights
3) The federal government looks after IP

**Introduction**

**Constitutional Protections for Property**
- US 5th Amendment: "property shall not be taken for public use, without just compensation"
- Australia, "acquisition of property (by state) must be on just terms"
- Property provision in post-apartheid South Africa constitution:
  - **Transformative Constitutionalism:** Social and economic reform can occur and preserve property rights, if that reform is completed as a primary obligation, which is regulated by a democratic constitution based on human dignity equality and freedom.
  - Preferred solution of theorists to attain real transformation via a peaceful negotiated settlement
1) **US:** Constitutional right that compensation be paid if any land is expropriated by the government
   a) The US supreme court determined the following factors as being essential considerations when asking whether compensation is due:
      i) Economic impact of the regulation
      ii) Interference with reasonable investment backed expectations
      iii) Character of the government action
   b) Generally decided on a case by case basis (adhoc), except in categorical (per se) takings:
      i) A permanent physical occupation of the land
      ii) Regulations that take away the **full** economic benefit of a property holding
   c) Justification of property protections in the US constitution:
      i) Fairness: one property owner should not bear the cost of the state pursuing a valid public measure
      ii) An incentive for prudent government action
      iii) Provides peace of mind/insurance to property owners that their property will be compensated if taken

**Canada Constitutional Protections**

Does not have express protection in constitution, however **other protections:**
1) Charter does not explicitly protect private property, however it has been effective in protecting a range of commercial interests and activities:
   a) Protection against search and seizures, prevents seizure of personal property by police
   b) Freedom of expression, prevents regulations affecting commercial advertising
   c) Freedom of religion, prevents commercial trading on Sundays
   d) Equality under the law, prevents discriminatory land entitlements
   e) Restrictions on regulations of **public property**
      i) Charter applies to public property (any limitations of rights on public property)
2) **S35 Constitution Act**: Protect aboriginal rights from state interference - full confiscation not possible

Nonconstitutional protections

d) **The Bill of Rights (1960)** "enjoyment of property, and the right not to be deprived thereof except by due process of law"

i) Only applies to federal level, similar legislation in provinces

(1) *Alberta Bill of Rights*, same exceptions *toothless tiger* as the Canadian Bill of Rights

(2) *Personal Property Bill of Rights* - protects personal property (property that is not land that belongs to you). Same 'expressly stated exception

ii) May be overridden by subsequent legislation, if expressly stated in legislation

*Anderson v Canada (2003 SCC)*

Common Law Doctrine: Government may expropriate property (veterans pension funds) without compensation as long as they explicitly state that they are doing so.

*Manitoba Fisheries v The Queen (1979)*

- Adopted rule of statutory interpretation: Property should not be taken away without compensation, unless statute expressly states no compensation is due

**Constructive Expropriation (CAN) or Regulatory Takings (US)**

- Also known as creeping, de facto, or indirect taking

1) In Canada, the balancing of private rights and public interests (i.e. when to expropriate property) has been mostly managed by the legislature as opposed to the courts

a) The general pattern in statutes across Canada is: if land is acquired by the state, the private owner is compensated accordingly

b) State action that has the effect of gutting the value of property is functionally equivalent to confiscation.

Referred to as: *indirect taking, creeping, de facto or constructive expropriation*.

1) In America, it is referred to a 'regulatory taking'

**US COURTS RE: Takings**

1) **ADHOC Formula**: To determine if regulatory taking has occurred – PENN CENTRAL TEST

(From *Kaiser Aetna v United States*, however affirmed in *Pennsylvania Coal*)

a. Courts must consider a range of case specific factors:

i. Potential Economic Impact of State Action

ii. Extent to which it interferes with reasonable investment backed expectations

iii. Character of the government action

2) Does not apply to *per se (categorical)* takings which occur when (*Lucas*):

a. Direct physical occupation of territory

b. Government regulation has drained property of entire economic value

3) Where impugned action reflects background legal principle of property or nuisance law, constitutional protection is not triggered.

**Pennsylvania Coal Co v Mahon (US)**

**Principle**: Establishes PENN Central ADHOC test (See above)

**Facts**:  
- There is a mining company adjacent to a property owner. The mining company has the rights to mine under the adjacent property, and is not responsible for any resulting damages due to settlement.

- 1921 statue (Kohler Act) prohibits the mining of coal in a manner that caused the subsidence of any structure used as human habitation.

**ISSUE**: Can the state constitutionally nullify the coal company’s right to mine?

**DECISION**: The state power does not allow it take away the coal company’s rights to mine without payment of compensation.

**REASON**:

1) When determining whether a government can use police powers to seize property, consideration must be given to the extent of the ‘diminution’ (reduction in importance of something). Upon a certain magnitude there most definitely must be compensation
To make it commercially impracticable to mine a certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it.

a) If regulation goes too far it will be recognized as taking

**DISSENTING:**

3) The restriction here in question is merely the prohibition of noxious use

4) The state merely prevents the owner from making a use which interferes with the paramount rights of the public

Lucas v South Carolina Coastal Council (1992)

**Principle:**

1) In addition to adhoc inquiry, there are case where courts will find a taking without using the appropriate Penn Central test. This is the *per se*, or categorical taking.

2) Categories of regulatory action that requires compensation (*per se* or categorical claims):
   a) Where a property owner suffer a physical 'invasion' of his property
   b) Where regulation denies all economically beneficial or productive use of land

3) If the measure is merely articulation of background principles/limitations, then there is no taking

**FACTS:** Lucas purchased land on waterfront for development purposes. Shortly after, the state passed a statute that prohibited development on such waterfront properties.

**DECISION:** Majority of the USSC found that this constituted a 'taking' by the state.

**REASONS:**

1) Private property is being put to public service, under guise of mitigating serious public harm

2) **Implied Limitation:** Private property owner's enjoy use of their land under the implied limitation that the state may remove some rights from their property 'bundle of rights'. Given this implied limitation, the private property would not be owed compensation by the state.

3) When 'permanent physical occupation' occurs, the government always owes compensation, no matter what the public interest is

4) Confiscatory regulations (regulations that prohibit economically beneficial use of land): cannot be newly legislated (without compensation), but must already exist within the title itself titles under the state's law of property and nuisance already placed on the landowner.

Marine Real Estate Ltd v Nova Scotia (AG) 1999

**Principle:** To constitute a constructive taking in Canada (no adhoc approach) must be:

1) An acquisition of a beneficial interest in the property, or flowing from it

2) Removal of all reasonable uses of the property

**FACTS:** Nova Scotia beaches act prohibited new development on beaches. P sought compensation under the declaration that their lands had been de facto expropriated. *(A severe restriction on what would otherwise be a plenary bundle of rights.)*

**ISSUE:** Is Marine Real Estate entitled to compensation for restrictions on property by the *Beaches Act*?

**DECISION:** No, Marine Real Estate is not entitled to compensation

**REASON:**

1) Courts may only order compensation where allowed so by the *Expropriation Act*

2) In Canada: owner's 'bundle of rights' may be severely diminished before any compensation
   a) This is not the case in the US or Australia, where land rights explicitly protected by constitution

3) Must have removed virtually all of the rights associated with the property holders interest
   a) Difference between developing on fragile dune land verses residential subdivision

4) The regulatory regime imposed on the land is not actually an 'expropriation', as the actual refusal to develop was not from the Act, but rather from the Minister

5) The loss of interests (taking of the land [uses] in land and the loss of the value (caused by other government activities) of land have been treated distinctly by both the common law and the Expropriation Act
   a) The loss of economic value in land may be evidence of a loss of interest in the land
   b) *Past Canadian cases have required proof of virtual extinction of an identifiable interest in land*

   i) *Tener* - Respondent argues that where public land value is increased, this indicates an acquisition of an interest in the private land in question. Justice interprets *Tener* as being a "reversion of the mineral interests which had been granted by the crown", which do not raise the value of the public land, but rather retake what had already belonged to the crown

   ii) Enhanced value is not necessarily an interest

   d) Stringent regulations did not confer any interest of land on the province. Other similar examples exist:
i) Compensation is not provided whenever zoning moves up or down
ii) Owners caught up in the planning process, but not expropriated must simply accept the loss

**Policy Considerations: Canada vs US law of takings**

1) **In common:** Law should be predictable. Property owners should be able to rely on the fact that the value of their land will be protected from government influence, or otherwise receive compensation, exclusivity to title.
2) **Internalization of the cost:** If the government did not need to pay compensation, they might be more prudent in the actions they take.
3) **In contrast:**
   a) Canada = Effect of property value loss placed on individual
   b) America = Effect of property loss absorbed collectively. Stronger support of individual rights.

**Distinctions between US & Canada Legislative expropriations schemes (identified in Mariner):**

1) In Canadian: deprivation of economic value is not considered a 'taking' of the land. It is in US.
2) American courts have an obligation to prevent the government from "…forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole". No such mandate on Canadian courts re: property expropriation.

**Canadian Pacific Railway Company v City of Vancouver (2006)**

**Principle:** Two requirements to be considered a *de facto* taking requiring compensation:

a. An acquisition of a beneficial interest in the property or flowing from it
b. Removal of all reasonable uses of the property

*There is no adhoc approach (Penn Central) in Canadian law that allows consideration of expropriations that do not fall under de facto*

**FACTS:**
Vancouver granted railway corridor to CPR. CPR no longer made profit, wished to return/sell. Vancouver would not take, also passed bylaw preventing most development in corridor (other than existing use)

**ISSUE:** Is CPR entitled to compensation through a de facto expropriation?

**DECISIONS:** NO

**REASON:**
1) The city has not acquired a beneficial interest in the property
2) The bylaw does not prevent CPR from using the corridor as a railway (its main business) or maintaining that railway
3) *Vancouver Charter* states 'that property affected by a by-law "shall be deemed as against the City not to have been taken". The province has the power to alter the common law rules of taking.

**NAFTA**

**NAFTA (Article 1110):** Countries liable to foreign investors in direct and indirect acts of appropriation.

- In early NAFTA rulings, generally PENN Central test applies, indicating that there is a broader protection available to foreign investors in Canada, than to Canadians!
  a) The function being to protect foreign investors
  b) Not necessary for the foreign investor to seek leave from their state of origin to pursue a claim
  c) NAFTA is considered quasi-constitutional in the sense that it has non-opt-out-able clauses. Parties can only withdraw from NAFTA in whole

**Metalclad Corp v United Mexican States**

**Principle:** Only claim made under NAFTA article 1110 which has resulted in awards being granted to claimant

1) Claimant coordinated acceptance of construction of hazardous waste facility in Mexico with federal and state governments, receiving assurances that they would be allowed to construct the facility. During construction they received a stop work order by local government and were refused BP. The state government then issued a decree making the subject area a protected ecological area.

2) The panel ruled that the representation of the Mexican government, upon which Metalclad relied upon, as well as the absence of a timely process resulted in indirect expropriation. They also commented that the ecological doctrine was tantamount to expropriation per article 1110. This was later held by a judicial review (in BC) to be the only factor that was within the authority of the arbitration board to enforce
Methanex v USA (2005),
1) It was held that California's non-discriminatory regulation was not tantamount to expropriation as there were no specific commitments provided by the California government to Methanex.
2) Expropriation tends to involved the deprivation of ownership rights; regulations a lesser interference. This distinction reduces the risk that government's face as they go about managing public affairs

NAFTA has become a useful threat for those who oppose environmental and land use regulation
1) Pesticide manufacturers threatened to bring claim in response to Canadian ban on certain pesticides
2) Tobacco lobby argued that plain-packaging requirements would expropriate the value of their trademarks
3) Federal government is a signatory to NAFTA, however there could be a violation to Article 11 by provincial statute. Federal government becomes liable for this violation by provincial statute.
4) Obligations between Provincial and Federal Governments Re: NAFTA
   a) The provincial government has simply exercised their constitutional rights
      i) The federal government can dock compensation from transfer payments
      ii) The federal government can also 'disallow' provincial legislation (not used since 19th cen.)

Evolution of Rulings Under NAFTA in US
Greater rights given to foreign investors than American citizens under domestic law
1) In following treaties, it has been made clear that rights will be no more than American domestic law
2) NAFTA rulings have become more sophisticated in understanding takings, and have narrowed in on using American domestic law principles.

FIPA's (Foreign Investment Protection Agreements):
- Canada investment treaties post NAFTA use US expropriation doctrines as standard
  o Direct & Indirect (Penn Central) expropriation accounted for

Ex. FIPA between Peru & Canada.
Expropriation protection clause similar to NAFTA, however with footnote directing to Annexe B that incorporates ADHOC test.
Annexe B.13, utilizes the Penn Central ad hoc method to determining the context of an indirect expropriation
   b) This is a Canadian treaty - however the notion in Annexe B.13 is drawn from American jurisprudence
   c) Exceptions where measures of a party are designed to protect welfare objectives.

Law and Economics of Property and Tort Law
Focus of law and economics is on efficiency:
1. Incentives matter (i.e. criminal deterrence). Will this rule improve efficiency?
2. Gains from trade (i.e. law of secure transactions = secures trade, difficult to have a functioning economy without this). Will this rule hinder or facilitate transactions between parties?

The Coase Theorum:
If transaction costs are zero, then any initial definition of property rights leads to an efficient outcome.
In other words: It doesn’t matter who has property rights, bargaining will occur and an efficient outcome will be achieved
MEANING: Property rights should be assigned so as to reduce transaction costs. Bargaining costs should be minimized.
Calabresi-Melamed:
The law can award the property right to either property owner or to the one engaging in trespassing activity. This is enforced either by injunction, or liability.
Four possible outcomes:
1. Property rule: Property owner has right and can get an injunction to prevent trespass
2. Liability Rule: Property owner has right but can only receive cash
3. Polluter has property right and can enforce by property rule.
   - Free to pollute UNLESS pollution recipient pays polluter to stop or install abatement technology
4. Polluter has property right and can only enforce by liability.
- Polluter has to stop polluting if the recipient of the pollution pays damages for ceasing activity.

Learned Hand Formula (Cost Benefit)

B - Burden of adequate precautions
P - Probably of damage
L - Gravity of resulting injury

B < P*L

Common Critiques:
- Unrealistic Behavioral Assumptions (People do not always act rationally)
- Simplistic
- Extracts morality out of the law

Boundaries
- Land has three dimensions (vertical & horizontal axis)
- In contemporary debates, efficiency is the dominant justification relied on in debates of property systems.

Didow

FACTS: Respondent had installed hydro pole which protruded 6ft into Appellant’s air space. The appellants seek a declaration that cross-arms amount to trespass. Cites: danger associated with lines and location and operation of tall machinery; overhang will restrict use of aerial spraying and seeding on land.

ISSUE: Has the air space been trespassed?

DECISION: Yes, cross-arms constitute a low level intrusion which interferes with appellant’s potential, if not actual, use and enjoyment of land. This amounts to trespass…

REASON: Maxim: Cujus est solum, ejus est usque ad coelom et ad inferos:
1) Owner of surface owns everything above and below to an indefinite extent
2) Lord Bernstein of Leigh v Skyviews & Gen Ltd
   a) TEST:
      i) Height above owner’s land as is necessary for ordinary use and enjoyment. Above that height, no greater rights in the air space than any other member or public
3) Lacroix v R: owner of land has limited ownership of airspace rights. Limited to what he can possess or occupy for the use and enjoyment of his land.
4) US v Causby, USYC 1946:
   a) Landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it is immaterial
5) Two concepts are clear:
   a) Court will not give literal effect to Latin maxim
   b) The proper remedy for interference with a permanent fixture is in trespass as opposed to nuisance

Comment:
- Condominium in the City; Rise of Property in Vancouver
  o Strata Titles Act (1966), BC: A fee simple interest in a strata lot held exactly the same attributes as a fee simple in land
  - Air Spaces Titles Act (1971), BC: allowed severance of fee simple to air space from fee simple to surface lot

Under Coase: The use of the airspace is ultimately determined by the parties’ respective valuations, rather than by legal rule (as long as the parties are free to make a deal).

Is the Didow rule efficient?
- The person who is most likely to value the immediate airspace the most, is the surface owner. That is why it is most economically efficient to provide it to the owner.
- However, it does not make sense to assign high altitude airspace to the airspace owner (they do not value it)
- It is very difficult to draw a boundary between these two levels (above/below)
- The rule that power lines should be built despite farmers objections
- Possibility for Tragedy of the Anticommons
- In Alberta, Admin Tribunal only awards damages to owners whose land must be used for hydro

Edwards v Sims (Kentuck CA 1929)

**FACTS:** Edwards opened a commercial cave that was alleged by Lee to extend 1/3 under his land.

**ISSUE:** Does Lee have the property rights to the portion of cave that extends below his land? (In this case it was a question over whether Sims could order a survey of the cave)

**DECISION:** Yes, based upon the latin maxim, Lee has the right to order a survey to determine whether he has been trespassed on or not.

**Majority:**
1) Latin maxim: To whomsoever the soil belongs, he owns also the sky and to the depths
2) Courts of equity have the power to order surveys where trespass may be an issue
3) Compared inspection of cave to surveying of mine.

**Dissent (Logan):**
4) Rule should be that he who owns the surface is the owner of everything which be subject to his dominion or control
   a) He cannot own something that he cannot use nor is of any benefit to him
5) A cave should belong to the person who owns the entrance
6) Any ruling by a court which brings great and irreparable injury to a party is erroneous
7) Passionate dissent in favor of the principle that landowner show
8) Potential argument of economic efficiency in favor of first occupier

Logan’s dissent may have had several reasons behind it:
1) He was the founder of the Mammoth Cave National Park Association
2) The latin maxim ruling would require that all parties who had property over caves would need to be consulted and could require surveys
   a) Would make it very difficult to acquire caves for the foundation
3) Logan work as lawyer in 1936 for Edwards
4) Argued that Turner (geologist/engineer) was the founder of the Onyx cave and not Edwards

What is the proper allocation of subterranean rights?

**Efficiency approach:**
1) Private property is intended to be an economically efficient resource allocation
2) Coase: If transactions are costless, the initial assignment of property will not affect the ultimate use
   a) Transaction cost = hold ups, fees, clearing up uncertainty
      i) Presumption initial allocation is a neutral event → doesn’t matter who has it to begin with
         1) Bilateral monopoly: Where there is only one person to bargain with i.e. Edwards and Lee
         2) Endowment Effect: Initial holder of item values it more than others without it
      ii) Coase also assumes parties have unlimited resources to gain property they value
3) Property law still plays important role even in Coase:
   a) Courts provide the default position (initial allocation of property rights)
   b) Law should strive to facilitate bargaining process, by reducing transaction costs
   c) If market doesn’t function correctly, then law should establish rules of ownership that compensate accordingly.

1) Epsteins six rules that could be applied to facts of Edwards. Ownership belongs to:
   a) Owner of the surface
   b) First occupancy of the cave
   c) Owner of entrance
   d) Co-ownership of cave based on proportion of surface ownership
   e) Party most willing to buy out other party
   f) The state
- Epstein’s premise is the #3 is most efficient as it avoids problem of holdout of one party which would prevent unification of title. Subject to following constraints:
  o Owner of surface (but not cave) may damage cave be mining rightful resources
  o A cave might have several openings
  o Man made vs natural openings
- First Occupancy (more consistent with J Logan reasoning):
  o Edwards title ripened by developing and discovering cave
  o Can result in wasted effort by losing party
  o Might lead to damage to cave formations
  o Potential for significant information and transaction costs
    i. e. multiple first discoverers
- However majority rule (in Edwards) is likely the most efficient. Cujus est solum provides for clean basis, where no exploration (transaction cost) is required to order to obtain property.
- Cox et ux v Colossal Cavern Co
  o Surface owner was not permitted to take any action that detrimentally affect the cave
  o Cave owner could not undermine the subjacent support of the surface & access could no interfere with surface activities
- Star Energy Weald Basin Ltd v Bocardo, 2010 UKSC
  o Held that diagonal gas wells entering property ~1000 ft below surface belonged to title of surface owner, however cast doubt on cujus est solum maxim.
- Carbon Capture and Storage Statutes Amendment Act, 2010 – Provides title of all pore space to the provincial crown.
  o Result is that companies involved in carbon sequestration will not need to consult various title owners when establishing CCS scheme
  o Provision is not to be regarded as an expropriation and no compensation is payable
- John Sprankling – Proposes 1000ft ‘bright horizontal line’ below which private ownership ceases and it becomes public property (not common). To occupy public property would be a trespass
  o Such property is useless to most surface owners
  o Would remove the ‘specter of holdouts’

Mines and minerals

1) Common law rule is that minerals except gold and silver are part of the land itself and belong prima facie to the owner of the land.
2) Exceptions are frequent → this rule is not an accurate description of mineral ownership in Canada
   a) S35 Public Lands Acts - excludes all mines and minerals and rights to work them via implication
      i) Some 10% of all mines and minerals are owned by property owners (prior to enactment of Act). The rest is owned by crown, and leased out
3) Tests used to define mineral ownership (when not expressly mentioned on title) based on INTENTIONS of transferring parties as assessed by:
   a) Vernacular Test:
      i) Substance is a mineral is so regarded in the vernacular of the industry at the time
      ii) Preference for vernacular meaning over scientific
      iii) Assumed vernacular meaning at time of transaction is same at present
   b) Purpose and Intentions
      i) The leading purpose the deed or statute embodies
   c) Exceptional Occurences test
      i) Minerals categorized as being an ‘exception or rare substance’
4) Classifications of Minerals in RSA statutes:
   a) Mines and Minerals Act, p33, s1(1)(p)(i)
   b) Law of Property Act, P24 statutes: s56(1) ‘has at all times been a mineral’

Access: If owning mineral rights, but not surface rights
1) In common law, there is an implied right of access: An Easement of Necessity (s 1, 12)
2) Must receive consent of owner, and set out a separate consideration for right of entry
a) Could be as little as a ‘peppercorn’
b) All about ensuring that the land owner has proper notice, and it should be clear they know what they’re doing.

3) Also, the operator can apply to the right of entry board for access.

Lateral boundaries
1) A township system of mapping under which land is parcelled into squares is the predominant method used in Canada.
2) Surveying system in Alberta = Dominion Land System = Alberta Town System (ATS).
3) In Western Canada, meridians (4,5,6), vertical ranges, township lines, other legal subdivisions.
4) Ex ATS Reference: 4;24;52;17;SE
   a) SE corner of 17th quarter section, 52nd section, 24 range, 4th meridian.
5) Certificate of title:
   a) Should be able to rely on top title of Land Title Certificate.
   b) Historically: would need to do ‘Title Search’ and check up to 40 years of history of title.
   c) Interests/encumbrances on the fee simple are listed on the title.
6) IF Error in Legal Description of Land:
   a) Must be corrected by reviewing the description in a deed, and other extrinsic evidence, including the manner in which the parties occupied the land.
   b) If ambiguous/erroneous, must give effect to those things least liable to be a mistake:
      i) Natural boundaries.
      ii) Lines actually run, and corners actually marked (artificial monuments).
      iii) Adjacent property lines and courses.
      iv) Existing courses and distances, preference prescribed based on circumstances.
7) When neighbours are unable to determine boundary, a boundary can be agreed upon under the conventional line doctrine.
8) Rights of neighbours are otherwise governed by torts (i.e. tort of private nuisance).

Water Boundaries
S3(1): Declares that title to all permanent/natural bodies of water (rivers/lakes) belongs to prov Crown.
UNLESS s3(2) a) Expressly conveyed, b) Previous claim granted by court, c) or belongs to Canada Crown.


If exact measurements included in title: More or less likely means ‘Approximately’. Measurements are not always perfect.
   - Natural monuments trump measurements.

The crown can say that ‘the law of accretion’ does not apply. Likely takes stronger language than ‘here is the size of your lot’.

Riparian rights: Rights placed on owners with land adjacent to water
   - Right of access to water and right to take emergency measures to prevent flooding.
   - Common law: Riparian owner make take an unlimited amount of water for ‘ordinary uses’ (domestic needs).
   - Water may be extracted for ‘extraordinary purposes’, as long as water is not diminished as to its quality or quantity.
   - Alberta: right of an owner to use water for household purposes: human consumption, sanitation, fire prevention, water animals, gardens, lawns. No permit required.

Accretion:
   - Law of accretion regulates the transformation of land adjacent to water.
   - As boundary between water and land changes due to erosion, or dereliction of water.
   - Retraction of water (alluvion) works to benefit or riparian owner.
- Encroachment of waters edge (diluvion) works to advantage of water owner (crown)
- Change must be imperceptible, not ‘avulsive’
- **Why not tolerate avulsive increases?**
  1) Want to ensure that any change which occurs is effectively permanent or long time.

**Nastajus v North Alberta (Land Registration District), 1987 ABQB**

1) Laid out general principles of accretion in Alberta
2) **Accretion may occur either by gradual deposit of soil or by permanent recession of water**
   a) Applicable except in cases where substantial changes has suddenly taken place
   b) Title extends to land that is added to or subtracted from due to accretion
3) Whether or not the process is gradual or imperceptible is a question left to the judge
4) **A newly formed island will belong to the owner of the lakebed (usually the crown)**
5) Right to accretion depends upon whether property extends to shoreline. If crown owns a thin stretch of property along shoreline, then any accretion will be to their benefit.

**Southern Centre of Theosophy Inc v State of South Australia**

1) **Rationale for accretion:** *de minimus non curat lex* = the law does not care for trifling matters
2) Another explanation: rule is required for permanent protection of property, and recognition that the riparian owner may lose as well as gain from changes in the water or boundary level.

**Robertson v Wallace, 2000 ABQB**

**F:** Oxbend in river broke, changing flow of river (agreed upon dividing line) around 20 acres of land

**Held:** River was no longer the boundary, it was where the river originally ran (the original boundary). Land certificates were updated to reflect this new, permanent boundary

**Cox v FS Prestress, Miss SCC 2001**

**F:** River originally ran around peninsula and was boundary between two properties. At some point, river broke through ‘neck’ of peninsula and portion running around peninsula dried up.

**Held:** that while some accretion was involved, the ‘thalweg’ (river through neck) formed very quickly and was thus consider an avulsion. Therefore original property owner continued to own land (former peninsula)

- “The rationale for the law of avulsion is to mitigate the hardship of a change in title resulting from a sudden movement of a river…”

**FIXTURES:**
When a chattel becomes a fixture, it ceases to be personal property and the title becomes realty.
Good Examples of Drafting a Clause:
“All fixtures shall pass, including, but not limited to, the following…and excluding among other things…” [non-exhaustive list]

La Salle Recreations Ltd v Canadian Camdex Investments Ltd, 1969 BC CA
Demonstrates how items are transformed into fixtures

FACTS: Carpet purchased conditionally. Hotel mortgaged and defaulted. Personalty v Realty.
(Today: personal property security interests [PPSI] If prospect that goods will be affixed to land, need to register security interest at land titles office.

ISSUE: Had the carpets become fixtures?
DECISION: Carpet is part of realty. Object of annexation was the better use of the building.

REASON:
1) Court reviewed settled law (essentially the basic Canadian Law of fixtures):
   a) Articles not attached to land = Not Realty, unless circumstance show otherwise
   b) Articles affixed to land (even slightly) = Realty, unless circumstances show otherwise
   c) Circumstances = must show degree and object of annexation (to append or attach, an addition)
   d) Intention of the person affixing the article to realty is material only so far as can be presumed from the degree and object of annexation

To determine object of annexation (Ref Haggert v Brampton (Town), 1897 SCC):
  i) Consider the purpose of the fixture
     (1) Is it to enhance the value of the premises?
     (2) Does it increase the usefulness of the property?
     (3) Are they even slightly affixed? (remaining for as long as it serves a purpose)
     ii) If so, then considered party of realty

1) In this case, court considered following factors:
   a) Plywood floor was unsuitable
   b) Not ‘proper’ if not attached
   c) Required for completion of the floors
   d) Carpeting periodically replaced
   e) Used carpet can be resold.

2) Considering facts of case:
   a) Degree of annexation = slight
   b) Were the goods affixed to the building for either?
      i) Better use of the goods as good
      ii) Better use of the building as a hotel building

3) The objective was a better and more effectual use of the building. Therefore carpeting was annexed to the land to constitute fixtures (realty).

Basic principles of ‘Tenant Fixtures’:
1) Tenants return fixture to chattel by removing it before end of lease (Carabin v Offman 1998 NSCA)
2) Must be removed without damage to realty (Stack v Eaton, 2012 ONCA)
   a) Rule extends to: fixtures for purpose of trade, ornament or purpose of domestic convenience

Diamond Neon (Manufacturing Ltd) v Toronto-Dominion Realty Co, 1976 BC CA

FACTS: D purchased property from third party. P is owner of sign on property (had previous contract with former owner). 6 months following sale of property, D sold sign assuming it was part of realty. P claims that sign was chattel and not property of D to sell.

ISSUE: Was the sign considered realty or chattel before defendant had bought the land?
DECISION: Had become part of realty before sale

REASON:
Whether something is a fixture or not, is a question of law, not a question of contract.
However, parties can agree whether one might have a right of removal to restore fixture to chattel status.
Majority (Robertson JA):
- Notice of claim 6 months following sale (by P) could not affect the status of the signs, as title had already been passed off to the defendant
- Did not see merit in argument that Defendant should have recognized signs as chattels and inquired
- D could not have been responsible to respect a contract (between P and former owner) that it was not aware of

Dissent (Carrothers JA):
- Purchaser ought to have inquired about ownership of sign, and whether that was conveyed in realty
- Analogy of two brass plates, where personhood is apparent:
  1) One plate bears the address of the location (obviously realty)
  2) Another plate bears the name and professional information of former tenant (in the absence of abandonment, obviously a chattel)

Notes: Both plaintiffs in La Salle Recreation, and Diamond Neon sought to retain an interest in goods for valid commercial purposes, only to be thwarted by the law of the operation of fixtures.

When did Diamond Neon lose their right to retrieve the sign?
As their contract was with the tenant, they would have lost their right once the tenant was unable to revert the fixture to chattel status. That would have been once the tenant vacated the land (term expiry)

Transformation of Chattel Ownership
When two chattels belonging to separate owners become connected
Admixture: When fungibles are combined. Items are comungled.
Accession: Items that are inextricably fused. When one item becomes attached to another chattel.
  Ex. Paint is stolen and sprayed onto car. What has acceded to what?
Alteration: Item is changed in form
  Ex. A’s corn is turned into Whisky by B through adding of labor

Rule for confusion:
- If I wrongfully intermix goods, such that they cannot practically be separated out. Old common law; Wrongdoer loses wrongdoers share.
  1) Contrary to goal of Tort law: punishment of defendant vs compensation of plaintiff

Glencore International AG v Metro Trading International Inc, 2001 QB Comm Ct
Contributors recovers based on quantity and value of oil they submitted to the blend. Any discrepancy shall be resolved in favor of the plaintiff. Plaintiff allowed to recover any damages resulting from misuse of oil.
FACTS: D comingled oil from separate producers into batch. D went bankrupt with a disputed amount of blended oil on accounts.
ISSUE: How to determine share of oil remaining.
DECISION: Contributors recovers based on quantity and value of oil they submitted to the blend.
REASON:
- In the absence of agreement to the contrary, mixed bulk will be owned in common by those whose goods have contributed to it, each depositor becoming an owner in proportion to the amount of his contribution
  1) No property passes to warehouse keeper. He is the bailee
- If the warehouse keeper can treat the goods as his own, the contract will be regarded as one of sale and property will pass on delivery, subject to any agreement to the contrary
- Distinction between blending and comilnging: in blending, the resultant product is different in nature from both of its original constituents
- India Oil v Greenstone Shipping,
  1) “Where B wrongfully mixes his goods with A, and they cannot practically be separated, mixture is held in common and A is entitled to receive goods out of the mixture equal to his initial contribution. Any discrepancy is held in favor of A”
- Property in chateels is not lost simply because they are processed into another form
- *Jones v De Marchant*: Plaintiff's husband took some of her beaverskins and made a jacket he gave to his mistress. Court held that the coat belonged to the plaintiff, despite transformation of the chattels.

- *Re Oatway* (1903) “the true owner is entitled to seize it in its new shape if he can prove the identity of the original material”

  1) *Ex Silsby & Caulkins v McCoon & Sherman*: Whisky that was made from wrongfully obtained corn was held to belong to the owner of the corn

  2) In this case, the work performed by the wrongdoer is treated as attaching to the goods by accession.

  3) Position would probably be different if the new commodity substantially represented work or materials provided by wrongdoer.

- Blending of oil – two cases for consideration:

  1) Wrongdoer blends oil belonging to two others = two contributors form common ownership of blend (apportioned based on quantity & value originally submitted)

  2) Wrongdoer blends A’s oil with his own. = apportioned back to A based upon quantity and value contribute

McKeown v Cavalier Yachts

*Principles of accession discussed.* If separable, then restored to rightful owner or compensation paid. If inseparable, defendant entitled to compensation for added value to principal chattel.

**F:** D performed work (20K) on hull of ship (worth $2K). Claimed right to hull by accession. P requests specific restitution of hull. Had previously traded in other boat to pay for work.

**I:** Does P have a right to specific restitution? Is compensation owed to D?

**D:** D must restore chattel to P. P must pay for incremental value added beyond what was paid.

**R (Young J):**

1) If minor chattel can be physically detached, then it may be returned to original owner (or damages)

2) If cannot be conveniently detached, then compensation may be imposed as a term or repossession (for the case where person innocently things they have the right to modify principal chattel)

3) In this case, to remove the accretions would destroy the boat. Therefore Doctrine of Accretion apply

   a) **Principle chattel:** Determined to be P’s hull. Each layer of D’s coating accreted to the hull

   i) Not based on whole values of each chattel, as the value of D’s additions was more

   b) **Judge’s discretion: specific restitution vs damages depends on unique nature of chattel**

   c) **Compensation to Defendant:**

   i) TEST: Did work completed by D confer on P an incontrovertible benefit?

   1) If so, then P must pay compensation for specific restitution = amount of benefit

   ii) Or if P is suing for damages, then D is entitled to compensation for value of improvement.

   d) In this case, P may transfer value (indemnify) of trade-in from 1st Def to 2nd Def

   e) For determining compensation to D, must determine ACTUAL value of work done, rather than cost of work done (which includes profits etc).

**TESTs for whether accession has occurred (Thomas v Robinson):**

1) **Injurious removal** – minor chattels cannot be removed without destroying the principal

2) **Separate existence** – complete incorporation so original identity is extinct (ex brick in house)

3) **Destruction of utility** - no longer useful after removal

4) **Degree & Purpose of Annexation** – Consider deg. of annex. + intentions of parties + nature of chattel

**Animals:** General rule is that owner of mother owns offspring, exception for swans → divided up between cock & hen (*Case of Swans*)

**Gidney v Fuerstein**

Equity may complement principle of accession, where it forms the basis of a juristic reason to find that an unjust enrichment has not occurred.

**F:** P acquired D’s stolen canoe. P repaired it, however it was then seized and returned to D.

**I:** Is P entitled to damages on a claim of ‘unjust enrichment’ of D?

**D:** No damages award from D. He did not consent to enrichment → equitable juristic reason.
R (Huband JA):

1) Three requirements for unjust enrichment:
   a) An enrichment + Corresponding Deprivation + Absence of Juristic Reason for enrichment

2) **Juristic Reason** = If there is an explanation based on law for enrichment at detriment of other

3) **In present case**, the juristic reason is **based on equity**. There was no relationship between P&D when enrichment took place.
   a) D did neither consent nor acquiesced to the betterment of his canoe

**Chose in Possession** → **Chose in Action**: Ex if trustee comeslingles trust into bank account and buys asset.

**The Concept of Possession**

“Possession is 9/10ths of the law” Prior to deeds, possession was a claim to ownership.

Possession composed of two elements:

- Animus: Intention to control
- Factum (corpus): Physical manifestation of dominion

**Possession is a malleable concept, interpreted to promote relevant policy function.** *(Pierson v Post)*

For Popov, there is a difference in rules of possession for acquisition versus retention.

**Constructive Possession**: An owner does not need to be in constant contact with land to be in possession of it.

   a) Similarly one might be considered to have intention to possess something even if that intention is unknown at the time.

**Popov v Hayashi, 2002 Cal SC**

**FACTS**: Popov initially caught valuable baseball at MLB game, however was immediately swarmed by surrounding crowd. Popov lost control of ball, and it was picked up by Hayashi who retained possession.

**ISSUE**: Did Popov achieve possession or right to possession as he attempted to catch the ball?

**DECISION**: Yes, Popov had a pre-possessory right in the baseball which entitled him to 50% of value

**REASON** *(McCarthy J)*:

1) ‘Possession’ is a vague concept → single definition of possession would be impractical *(policy)*
2) Possession requires two elements: Physical control and intention to possess
3) Ref to Hunting & Fishing cases where it is recognized that a hunter acquires possession by wounding the animal, not the eventual capture
4) In baseball context, it is possible to acquire unequivocal dominion and control over an abandoned baseball. Fans generally expect this from claimant. This is customary.
5) **Gray’s Rule**: Actor must retain control of the ball after incidental contact with people and things
6) “Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.”
   a) This is a new ‘pre-possessory’ right doctrine
   b) This can support an action of conversion
7) **Equitable division**: Where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim.
   a) Popov and Hayashi have an equal and undivided interest in the ball.
8) **Note**, it was not evident that Hayashi was a wrongdoer, was not a cause of Popov losing the ball

**Abandonment**:

- No intention to retain control of the ball (no animus)
- There is an indifference to the fate of the object, coupled with a sufficient act of relinquishment
- The fact that the object was abandoned (or not abandoned) in the context of the dispute between A & B is irrelevant based on *jus tertii* *(infra)*.
1) Generally, third party (with greater right than A or B) can place an action as long as within statute of limitations.

General rule for wild animals: Entitlement to wild animal secured by capture. Title lost if wild animal escapes.
1) Exception: Animus revertendi, where a wild animal has the habit of returning to the owner. Why? You can retain possession of an animal by a leash – animus revertendi is just a metaphysical leash.
2) Yanner v Eaton: only qualified property rights can be conferred over wild animals. Why?
   a) The crown always maintains a right in the wild animal. (ex Right to collect hunting tax on pelt)

Pierson v Post, 1805 SCNY
General Rule: To possess wild animal, must have captured, or mortally wounded animal, or be in ‘not pursuit’. When animal is killed it is no longer wild, or technically an animal.
F: P was pursuing a fox when D intervened and killed it.
HELD: D had right to fox as P had not mortally wounded it.
1) To maintain possession, must have captured, ensnared, or wounded the animal, and be in ‘hot pursuit’. When an animal is killed, it is no longer wild or technically an animal.
   a) Rationale was that allowing hunters such a right (interest without having wounded or ensnared the animal) would lead to excessive quarrels/litigation.
Dissent: Right should be based upon whether hunter had a ‘reasonable’ prospect of capturing the animal. Policy reason would be to promote hunting of foxes, as they were a pest

Domain names: Like the fox in Pierson v Post, domain names are generally subject to first possession. Replication of real world inequities in cyber space

Clift v Kane, 1870 NLSC
Application of General Rule (from Pierson) + Right to Salvage Fee
F: P killed approx. 3000 seals on seal hunt and left them on pan of ice. Ice flow drifted seal carcasses away from P towards D. D then salvaged approx. 1000 of the seals.
ISSUE: Did D violates P’s ownership right over the seals?
Majority:
1) Application of general rule (Pierson v Post)
   a) The seals having been killed and marked (penants on ice), were to be treated as property in precisely the same manner as any other kind of inanimate personalty.
   b) If the other ship came along and recovered carcasses that were likely to go to waste, then they would be provided a salvage fee.
Discussion/Function: Most efficient function would be to kill as many seals as possible, and then return to get them later. Under majority rule, various incentives to overkill
Dissent (Robinson J): General rule not applicable to seal hunt where carcasses still could ‘escape’ due to ice flows. Killing the seal is only the first of many steps in reducing the pelt into possession.

Doyle v Bartlett
(Robinson J):
The moment the hunter abandons pursuit of dead animal, either from inability to reach them or incapacity to stow them, that moment they revert to common stock
   - As long as the killer of seal has the ‘animus revertendi’ combined with the potential to recuperate, no one has the right to legally interfere.
   - If the original ship lacked the ability to recover the pelts they were deemed to be abandoned.
   - Normally in law, abandonment requires a subjective decision to relinquish title
Discussion/Function: Most sustainable approach, as once abandoned, the seals could be recovered by others.

EXAMPLE: Nakhuda v Story Book Farm Primate Sanctuary
1) Pet owner was not entitled to recover monkey
2) Is the monkey ferae naturae (a wild animal)?
3) Does the doctrine of animus revertendi apply?
   a) Title would be retained
4) Does the doctrine of immediate pursuit (by owner of the animal) apply?
   a) Similar to *Pierson v Post*, still pursuing monkey
5) Does the monkey have to regain its natural liberty before the owner loses title?

**Adverse Possession**

**Meaning:**
Squatter’s rights → Claim of paper title holder statute barred (following 10 year period in AB).
Based on proposition: against a wrongdoer, possession is title.

**Rationales:**
1) **Prevents stale claims** (e.g. law suit hanging over defendant’s head forever)
2) **Quiets Title:** Renders certain the vendors right to assure title
   a) Title was not always determinative. Needed to be able to prove past possession for 40 years.
      i) Even if there was a ‘flaw’ in record of past possession, owner of title could claim exclusive use of land for 
         past 10 years and that would satisfy
            (1) In modern day, there is a ‘top title’ that assures ownership.
   3) Exception to modern title: If legal boundary error → rectified by claim of adverse possession
3) When people rely on boundaries for years, it makes sense to protect this reliance interest
5) **Policy:** Not to reward adverse possessors, but rather to excuse someone using someone else’s land.

**Basic Elements:**
1) Certificate of title issued should be a representation of all interests bearing on the title
2) **Limitations Act:**
3) **S3(8)** - Limitations period does not reset if the land is transferred as a ‘gift’.
   a) Impliedly, if land is not given as a gift, then limitation period resets at transaction.
4) **S3(6)** – Claimant may only attempt to retake property before 10 years adverse possession
5) Even if 10 year period has passed, if someone purchases property, without any recognition on title of the adverse 
   possession, then statute of limitations resets
   a) Title must be ‘mirror’ of property possession
6) To protect adverse possession claim, would need to get adverse possession on title. Would need to file a ‘caveat’, a 
   notice claiming possession in black acre.
7) Once period starts, you can stop it by a) Suing OR b) Break adverse possession

**IF Fixture placed on land, before limitations on adverse possession expires**

Law of Property Act, s69
1) If under belief that land was your own, and you make a ‘lasting improvement/thing’
   a) You can be entitled to compensation if true owner retains land + improvement
   b) You may need to pay compensation and retain improvement + land

**TEST for adverse possession (Keefer ref to Pflug v Pflug):**
1) Actual possession for statutory period
   a) 10 year period in Alberta per s3, Limitations Act
2) Possession was with intention to exclude true owner
   a) Type of possession must be fairly robust (As a general rule)
3) Discontinuance of owner’s possession for full statutory period
Test of Inconsistent Use:

Keefer v Arillota, 1976 ON CA

**Principle:**

**F:** Keefer had right of way on adjacent land for entry/exit. Had also constructed garage into ROW. Previous land owner had also made efforts not to impede Keefer's access.

**I:** Does Keefer have an adverse possessory right to the stretch of land covered under the right of way?

**D:** Sort of — Claim to driveway fails, however land under garage is adversely possessed.

**REASON:**

1) **Note:** 'Test of Inconsistent Use' in Alberta is still unsettled

2) A possessory title cannot be acquired simply by depriving true owner of use of his property that he never intended to make of it. Must exceed right that has been expressly granted to you.

3) **Test for acquisition of possessory title:**

   a) Whether the claimant precluded the owner from making the use of the property that he intended to make of it

   b) Acts relied on as dispossessing the true owner must be inconsistent with the form of enjoyment of the property intended by the true owner.

4) Application of test re: adverse possession above

5) For the true owner, a possession of a part of their title is equivalent to the possession of the whole (**constructive possession**). Therefore, the claimants did not discontinue the owner’s possession of the ROW.

Is the effect of the test of 'inconsistent use' to deny all adverse possession claims in Ontario? No. The claim of Keifer partially succeeded by being able to retain possession of land under garage.

Jewitt v Bil, 1999 NBCA

Just Tertii (Right of Third Person) = In action between X and Y, it is irrelevant that Z holds right that may trump both of theirs.

Teis v Ancaster (Town), 1997 ONCA

**F:** Teis were owners of farm adjacent to Municipal Park. They claimed adverse possession on two strips of land owned by municipality. Public used laneway strip for parking, walking etc during park events.

**I:** Does Teis have an adverse possession claim to the land?

**D:** Yes, but public have right of way to use laneway.

**REASON:**

1) Expansion of test of adverse possession from Keefer:

   a) **Actual possession for 10 year period**

      i) Must show ALL **elements of possession:** Open, Notorious, Peaceful, Adverse, Exclusive, Actual, and Continuous

      (1) **Open:** Claimant is using property as owner might, puts owner on notice that limitations period has begun

        (a) Would a reasonable person know squatter was there? Constructive notice.

      (2) **Adversity:** Being in possession without permission of true owner

      (3) **Continuous:** Depends on type of property. Sometime intermittent = ok

      (4) **Actual:** As opposed to constructive

   b) **Such possession was with intention of excluding true owner(s)**

      i) **In mutual mistake,** infer that claimants intended to exclude all others, including true owner

   c) **Owner's (and others) discontinuity of possession for statutory period**

2) **Rule of inconsistent use:** Where the claimant uses the land in a manner inconsistent with the paper title’s owner’s intentions. This strengthens the claimant’s right to adverse possession.

3) **Test of Inconsistent Use does not apply to mutual mistake about title**

   a) If a true owner mistakenly believes claimant owns land, impossible to have use by claimant inconsistent with true owner’s intentions.

   b) **Innocent trespasser has a better chance of adversely possessing than an intentional trespasser**
4) General rule is to impose Limitations Statutes in strictest manner when equitable to do so
5) It was public land not crown land, as the land was owned by corporation of the municipality.
6) In Alberta, legislation protects all municipally owned land against adverse possession (Municipal Government Act).
   a) In CL, general rule that real property held by municipality cannot be adversely possessed
      i) Despite this, judge allows adverse possession (With public right of way) on basis that argument of
         municipal immunity was not raised by municipality.

JA Pye (Oxford) Ltd v Graham, 2003 HL
Repudiated Inconsistent Use test in UK
1) Held that rule only applies where: squatter who is aware of special purpose of land by true owner, uses land in
   fashion that does not jeopardize that true purpose, and therefore provides support to finding that squatter only had
   intention to occupy land until needed by true owner.
2) Also rejected idea that adverse possession is ineffective if squatter acknowledges title of true owner, say by
   offering to purchase or lease land. “An admission of title by the squatter is not inconsistent with the squatter being
   in possession in the meantime”

Bentley v Peppard, SCC 1903
1) As general rule, under ‘colour of title’ (i.e. erroneous land description on deed), the actual possession of part of the
   land will count as possession of the entire property.
2) Other established land occupancy/possession principles:
   a) All land must be in possession of someone, whether that be the Crown, or a natural/artificial entity. Whoever
      has title assumed to have possession, unless adverse possession shown.
   b) Tenants of land have the same constructive possession granted to them by lease
   c) Squatters have possessory interest only to land which they occupy, cultivate, enclose.
   d) A person who in good faith under written instrument (deed), in absence of adverse occupancy of another,
      retains constructive possession of all of blackacre despite occupying only part.

Notes:
- In Alberta, adverse possession of Crown land is abolished
- In Canada, limitation period for Crown land is 60 years

Personal Property:
Possession of chattels – essentially only need to show that individual (true owner) had possession BEFORE the
wrongful owner obtained it.

Limitation Periods
S3(1) Limitations Act:
Limitation period on chattels is two years following when claimant knew or out to have known that item was taken OR
10 years after the claim arose, whichever period occurs first.
Silent on effective renewal of period for chattels (see Barbaree)

Barbaree v Bilo, 1991 ABQB
As soon as property comes into hands of new owner, limitation action renews since now a fresh conversion has
been committed.

O’Keeffe v Snyder, 1980 NJSC
Limitation period is accumulative - not refreshed with new conversion.
- Period starts at first wrongful taking ➔ after period expires title extinguishes (same in Manitoba)
- Policy: Adopting former common law alternative would undermine intention of statute to quiet statute and
  protect against stale claims
Solomon R Guggenheim Foundation v Lubell, NYCA 1991

- Allowing limitation period to start from time of theft places burden of discovery on owner
- **Policy:** Better rule gives the owner greater protection and places the burden of investigating the validity of an art piece onto the potential purchaser

Finders
1) Prior to advent of land registration and recording, possession services as the primary basis for demonstrating title
2) Prior possession still serves as principal mode of proving title to personal property
   a) Not a system of absolute entitlement but of priority entitlement
3) **General Principle:** A finder of a chattel acquires title good against the world, except for those with continuing antecedent claim
   a) Against a wrongdoer, possession is title
   b) **Rationale** for acknowledging finders right to possession:
      i) Facilitate return of object to rightful owner – finder would need to take reasonable steps
      ii) Not respecting finder rights could lead to ‘free for all’. Not protecting finder from any other ‘wrongdoer’
4) Owner of land may claim antecedent constructive possession of the lost item by virtue of occupation of the property on which the item was found
   a) If chattel is embedded in ground THEN = fixture and part of realty itself
      i) If this is the case how can it ever be returned to true owner?
   b) Cujus est solum maxim applies (for subsurface) however conflict with caselaw that favors finder in surface find
   c) Law generally favors owners, as otherwise finders are disrupting land in some way that violates land owners rights
5) If chattel is mislaid, and not lost, it is held to be in custody of the owner of *locus in quo* (land, a vehicle, or comparable place), on the basis that the rightful owner will retrace steps to find item.
   a) This applies when goods have been cached & not lost
6) **Wrongful finders:** BCCA applied maxim in *Baird:* *ex turpi causa non oritur action* – an action cannot be founded on wrongdoing: wrongful finder could not retain possession

**Bridges v Hawkesworth**
A found chattel (money) lying unattached on land occupied by B held in favor of finder
- Court held in favor of A (not a trespasser, was in public area)
- Chattel was not in custody of B, nor within his protection.
  1) B had no intention of possession, lack of control over area, and lacked awareness

**Parker v British Airways Board, 1982**
**Discussed rights and obligations of finders and occupiers**
F: A found chattel (gold bracelet) on Occupier’s Premise land (airport terminal)
1) Court commented that occupier will prevail where they had a manifest intention to exercise control over an area in which chattels may be found
2) In this case, airport had no intention to control the public access area in which the bracelet was
3) In obiter: When the finder is a trespasser, the landowner will normally be preferred (**Policy**)  
4) **Rights and Obligations of Finder:**
   a) Finder of chattel only acquires rights if:
      i) It had been abandoned or lost
      ii) He takes it into his care and control
   b) Very limited rights if finder = trespasser/dishonest
   c) Order of rights: True Owner > Antecedent Owners (Potentially) > Subsequent Owners > Finders
   d) If items found by finder as a part of his employment, item belongs to employer
   e) Finder required to take all reasonable steps to return item to true owner
5) **Rights & liabilities of Occupier:**
a) Occupier of land has > right than finder where chattel is affixed to, or within land. Same for Occupier of building where items are attached to building, regardless of awareness
b) Occupier has right to chattel > finder, if in building, before chattel is found, the occupier has manifested intention to exercise control over building and things within it
c) In #2 scenario, Occupier under obligation to take reasonable steps to find lost chattels and return them to owners (and to care for them in the interim). Manifestation of intention may be expressed or implied from circumstances, in particular where occupier accepts or is required by law to accept liability for lost chattels.
d) An occupier of a chattel (e.g. ship, car) is to be treated as if he were occupier of a building

Bird v Fort Frances, 1949 ONHC
- Boy found money while trespassing on land. Police took it from him. Owner of land made no claim to money. Court held that boy was entitled to it.

Baird v British Columbia, 1992 BCCA
Criminal finder should not be able to gain from one's own wrongdoing
- Baird stole money however was never criminally charged.
  1) Court distinguished from Bird on basis of criminal culpability in Baird

Clark v Maloney, 1840
Principle: Preference is given to 'prior possession', even if not true owner (absolute possession)
- A lost logs to river. Picked up downriver by B. Held to be A’s.
- ‘Loss of chattel does not change the right of property’
- Preference is given to ‘prior possession’, even if not true owner (absolute possession)

Trachuk v Olinek, 1996 ABQB
Principle: A finder of a chattel acquires title good against the world, except for those with continuing antecedent claim, including occupiers and possessors of land.
P: Four D’s were construction crew (tasked by Signalto) who found a subsurface cache of money while servicing a well head on May 6, 1992. Registered owner of land was Marathon Realty, who leased a surface lease to Amaco, and granted easement to Signalto for pipeline. Trachuk used land under ‘agricultural purposes lease’ for grazing of cattle. Constructed fence (reimbursed by Amaco) around well to prevent his cattle from interfering with its operation. Marathon eventually sold bare legal title of lands (executed on May 19, 1992) to Trachuk on conditions that he continued surface lease to Marathon/Amaco for 25 years. Money was found adjacent to shed, on inside of fence enclosure.
I: Does Trachuk have a greater right to the possession of the cache than the four finders?
D: No, the finders have a greater right than Trachuk
Gallant J:
  1) At time of discovery, Trachuk was lessee under oral arrangement made with Marathon and not yet owner of the land. However, claimed he had de facto possession of land
  2) “Recovery cases”, money was cached ➔ General rule is that possession in locus in quo (to occupier)
  3) Occupation is a matter of fact ➔ sufficient measure of control to prevent strangers from interfering,
     a) For this case, assume possession and occupation are synon. (Trachuk claims de facto possession)
     b) Requires intent to exclude others, especially from articles under/on land
  4) The leasing arrangement did not grant any rights of occupancy or possession of the surface lease to the Tachuk, who was simply allowed to run cattle on the land
     a) Amaco held exclusive possession of wellsit premises, including subsurface
     b) Could likely have excluded Tachuk from entering property
        i) Tachuk could not exclude workmen

Hanna v Peel
Soldier stationed in private house. Soldier found broach and was allowed to keep it. Owner owned house, however had never stepped foot into it
Gifts

Elements of a gift (Nolan)

**Three elements of perfectly constituted gift:**

1) **Intention to donate**
   a) Donor must have mental capacity

2) **An acceptance**
   a) Presumed unless rebutted by donee

3) **Sufficient act of delivery**
   a) Gift must be literally ‘given’ away (or some acceptable substitute)

**Two kinds of exceptions to rule of delivery:**

1) Some kind of alternative form of transfer is recognized
2) Where a factual concession seems warranted (ie DMC = donations mortis causa)
   a) Donor cannot retain means of control
   b) All that can be done has been done to divest title in favor of donee

**Gifts & economy:**

- Law generally assumes contract rather than gift (consideration or delivery req or empty promise)
- Gifts are inefficient. Donor paid a higher price for gift than the donee would value it
- Impolite to resell gift (and therefore reduces its transferability)

**The role of delivery (Nolan)**

Transfer of possession and (by perfecting gift) ownership of chattel to donee.
A valid delivery marks termination of donor’s dominion
   - A donor should no longer be able to control a gift once it is delivered.
1) Allows donors to change mind (after promise of gift) without facing legal consequences
2) Provides tangible proof gift was given
3) Less likely for detrimental reliance

**Constructive v Symbolic delivery**

Symbolic: When instead of the thing itself some other object is handed over in name and deed
- Predominant view is symbolic delivery is not sufficient to make a gift
- IE picture of car instead of car.
- *Wyatt v Wyatt* – Duplicate key as gift not sufficient delivery

Constructive: something that is not a delivery is treated as one. Two possible scenarios:

Scenario #1: No direct handing over, but means of getting at it and controlling it is conferred on donee
   - Not sufficient just to give ‘access’, donee must have power to exclude others (including donor)
   - Restricted to cases where ordinary delivery is not reasonably possible

Scenario #2: No change of possession, but change in capacity in which that person has possession
   - e.g. if donee is in possession of gift before the making of gift

**Alternatives to delivery**

1) For *inter vivos* gift of land- providing donee with all documents necessary to obtain registration = delivery. (*MacLeod v Canada Trust Co*)
   i) deeds
      - A gift may be perfected by a deed, a document under seal
      - Deed becomes effective once grantor demonstrates intention to be bound.
      - A document amount to something less than a deed will not perfect a gift (chooses in action cannot be delivered – they are intangible)
   ii) declarations of trust
      1) A declaration by donor that the property will henceforth be held on trust for the donee will be binding (The donee has equitable title)
      2) A gift, left unfulfilled, will be enforced in equity if donee is named executor (*Strong v Bird*, also in Bayoff)
   iii) others
Gift by cheque = not complete until it has cleared (death of donor intervenes this)
Gift of land, perfected (in equity) if donor has done everything he can do to transfer

donationes mortis causae (DMC)

(i) nature and rationale
- Gift only takes effect on death, reverts if no death
- Somewhere between \textit{inter vivos} transfers and testamentary bequest (will)

(ii) constituent elements
- Traditional rule that DMC does not apply to land
- Impending death from an existing peril
- Peril must be substantial – must be real \textit{apprehension} of death
- Upon death, gift must be sustained as either valid \textit{inter vivos} transfer or as a will

(iii) the delivery requirement
- Delivery sufficient as long as evidence of title handed over which would allow donee to claim ownership
- Even transfer of partial control in DMC may be sufficient (Re lillingston)

(iv) land
- DMC does not apply to land (Dyck v Cardon)

(v) application of principle (Bayoff)
Re Bayoff Estate, 2000 Sask QB
F: Bayoff (dentist) died from terminal cancer, willed all goods to family. Gave key to safety deposit box to Simard, who was also executor of will. Simard was unable to retrieve contents of sdb before death of bayoff. Box was not explicitly mentioned in will.

R Krueger J:
1) Donatio Mortis Causa (DMC)- Three essential elements for transfer of property:
   a) Impending death from an existing peril
   b) Delivery of gift (SUFFICIENT DELIVERY)
      i) Bayoff gave up only means of getting to contents of box. Therefore, he gave up control of it.
   c) Gift only takes effect on death, reverts if no death
      i) No indication by Bayoff that gift was to only take effect if he died.
      ii) Bayoff was terminally ill, recovery was not a possibility. Bayoff was not indicating that death was a condition. He was trying to make an immediate gift.

2) Therefore, \textit{inter vivos} gift: (but INSUFFICIENT DELIVERY if not executor)
   a) Donor must give up control in gift and do everything possible to vest title in donee
   b) Beavis v Adams: Simply completing transfer in an uninformed manner would not defeat gift
   c) Insufficient delivery: Paperwork allowing Simard access to contents was inadequate, therefore gift ≠ fulfilled
   d) Gift will be treated as complete if donee becomes executor under will of the donor and can perfect gift
      (Rule from Strong v Bird)
      i) Donee receives control over donors property and can complete gift

Why was delivery successful in DMC but not \textit{inter vivos}? 
Higher threshold delivery requirement in \textit{inter vivos}, where it is expected person could deliver

(f) Corroboration
S11 – Alberta Evidence Act (RSA 1980 cA-21 s11):
In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party’s own evidence in respect of any matter occurring before the death of the deceased person, \textbf{unless the evidence is corroborated by other material evidence}.

Nolan v Nolan & Anor, 2003 VSC
\textbf{FACTS:} Adopted daughter of famous painter claimed painting was gifted to her mother, prior to death of famous painter, and mother. Claims painting from estate based on document evidence of painters intention to make a gift.
\textbf{ISSUE:} Was the painting a legitimate gift?
DECISION: No

REASON:
1) General principles: Equity will not assist a volunteer → Equity will not complete an imperfect gift
2) Essential elements of a valid gift of a chattel inter vivos:
   a) Intention to make gift.
      i) Usually accompanied by ‘words of gift’ which evince intention
      ii) Although words of gift not always necessary, other unusual circumstances exist
      iii) Delivery must occur while donative intention subsists
      iv) In this case, both donor & donee are dead. Caution necessary when relying on documents to evince intention.
   b) Intention to accept gift (apparent)
   c) Delivery
      i) Transfer of possession and (by perfecting gift) ownership of chattel to donee
      ii) Delivery may be actual or constructive
      iii) In Common Establishments: Delivery still required. Must be Act by donor to transfer possession to donee (otherwise ambiguous)
      iv) “To make effective delivery, must both part with possession of property and relinquish all power of control over it”
      v) Policy: Formal delivery is required – relaxation in delivery requirement would result in proliferation of claims between cohabitants, trustees, etc.
3) Unauthorized appropriation could not constitute valid delivery in any view

Discussion about 'The Castle' (film)
- 51-31 Constitution: Must compulsorily acquire land ‘on just terms’ (constitutional protection), as we do not have in Canada
- Ratio: Sometimes there is no compensation that could be ‘just’ in compulsorily acquisitions
   1) Ratio may only be valid if there is some other realistic option

Common Law Estates and Aboriginal Estates

The Fee Simple
1) General nature (Ellickson)
   a) Fee simple = freehold estate under doctrine of tenures, where immediate overlord is Crown
   b) Idea of estates = Temporal measurement, type of estate = time limit for rights granted
   c) FS = potentially infinite land duration and largest bundle of proprietary rights than other estates
      i) Low transaction cost for inducing mortal land owner to conserve natural resources for future generations (avoiding the tragedy of the commons)
         1) Landowner will want to pass land onto descendants (unborn)
         a) Adopts an infinite planning horizon when considering how to use parcel of land
      d) FS passed down at death through will or intestacy, otherwise it escheats to Crown

(a) creation at common law
To grant fee simple at common law, there is a particular word formula that is required:
“To A and her heirs”

Words of purchase: “To A” (describe recipient of property)
Words of limitation: “and her/his heirs” (denote duration of estate granted)
- Heirs = measuring device only, they receive no entitlement under grant, only a mere hope of succeeding to the land [Spes successionis]. A can do as she like with the property.
- If A dies without will, then heirs are assigned her property via intestacy
   1) No heirs? → Escheats (Unclaimed Personal Property and Vested Property Act)
Under common law, magic words not required in will as long as there is some intention to make it a FS
- If ‘I grant Blackacre to A’ = Life Estate in both (nothing to suggest a fee simple was intended)
- If ‘I grant Blackacre to A in fee simple’ = LE in inter vivos grant, FS in will

Under modern rule: “To A’ = Absolute transfer, transfer in fee simple
S7, Law of Property Act: No words of limitation are necessary in a transfer or conveyance of land…transfer of all the rights unless intention shown otherwise
→ Presumption of fee simple (as a rule of construction), rebuttable by contrary intention of testator
Note: S9, Wills and Succession Act = s7, Law of Property Act, but different statutory authority

Abolition of Fee Tail
S9, Law of Property Act bars the fee tail in Alberta (any provision which creates a ‘tail’ provision is treated as a fee simple)
Hypothetical: Making a fee tail in modern times.
Can only maintain ‘dead hand’ control over fee simple to the limit as allowed by RAP

3. The Life Estate: Generally
“‘To A for life’": Life estate (pur sa vie = for his/her life)
“‘To A for life of B’": Life estate (pur autre vie = for another life). B = cestui que vie, the measuring life
- What interest does B have? Nothing – B is the clock on the wall (a measuring benchmark)
“‘To A for life’”; Assume A then transfers her life estate to B
- The right is alienable, however measuring life is still that of A, reverting to Grantor upon death
- If B was to die, then his grant of the life estate would still be part of his estate → heirs

Interpretation of life estates:
Focus of following cases is whether it is a life estate that was granted in a will (Could also arise in an inter vivos gift as well).
What was given? Interpreting dispositions of property:
- What was the intention of the testator? (Rules of law, rules of construction)
- Can we give effect to this intention? (eg public policy issues might stand in way)
- Conflict between lift estate and remainder

Re Walker
F: Will ‘I give unto my said wife all my real and person property… and also should any portion of my estate shall remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided as follows…’
Held: Fee simple to wife (widow); the remainder is void
I: Does the wife have an absolute right to the property transferred to her by her husband?
D: Yes
R: Court must try and give effect to intentions of testator as is legally possible
- The disposition was ambiguous not clear what was given to wife, and therefore remainder
- Looks like life estate, but looks to allow possibility of nothing being left, fee simple?
- Subordinate intention is repugnant to dominant intention

Three classes:
- Gift to first person named prevails as fee simple, and therefore remainder fails as repugnant
- First-named takes life estate only, and remainder goes to remainderers
- First taker is life estate, but given additional power ‘right to encroach on remainder’ (Ex mortgage land, sell land, etc).

In this case, testator referred to right ‘to dispose of’. The reference to the undisposed of amount (the gift over) is determined as the subordinate intention, and therefore the dominant intention of gift to the widow prevails. Attempted ‘gift over’ (remainder) is repugnant and void.
- Unclear how the court determined the dominant vs the subordinate intention
Re Taylor
Intention to give life interest is not enlarged to absolute interest by allowance of donee to encroach on capital for her own proper maintenance
F: Will ‘to have and us during her lifetime…. Any estate of which she may be possessed at the time of her death is to be divided equally between my daughters’
I: Does the testatrix take an ‘absolute interest’ from will or only a ‘life interest’
Held: Testatrix does not have ‘absolute interest’, but rather life interest + power to encroach on capital for own personal maintenance
R: Establishes very narrow acceptance of ‘absolute interest’ → must be clear intention of testator
1) In this case, effectively he is giving his wife a life estate, but with also possibility to dispose of whole property within her life time (power of encroachment). Power of encroachment was for her maintenance (Read-in by court)
2) Fundamental rule of wills = intention of testator to be ascertained from consideration of will as a whole
3) Where no intention of imposition of ‘life interest’ by testator, then an unlimited right to encroach may be taken as some evidence of intention to give absolute interest
4) However this evidence may be displaced by other evidence of clear intentions of testator
5) Gift over = express intention of testator to give limited interest to testatrix
6) Power to encroach on capital, and resulting possibility that testatrix can spend all assets does not enlarge interest of testatrix to an absolute interest
   a) No power of testatrix to divest assets through inter vivos transfer

Martini Estate
F: Testator owned duplex with wife. Divorced her, and issued will providing life interest to new wife followed by ‘I give to my wife…for her use…when she no longer needs (address) she give said property to [neighbors]’
D: Court interprets intention of testator = life estate + no power of encroachment
R: - Court must give effect to testator’s intentions as ascertained from express language and surrounding circumstances
   - Apparent that testators intention was to benefit both wife and neighbours
   - Therefore most likely interpretation is that testator intended life estate without power of encroachment to wife
   - Absence of words ‘during her lifetime’ not important when lay person drafts will
     1) Held to lower standard than when lawyer drafts will
        - Combination of when ‘gift no longer needed’ and the fact that there was no mechanism list to allow wife to make inter vivos transfer
        1. Interpreted as being ‘life estate’

P186 – Possibilities of interpreting clause 4c:
1) Absolute gift to Martini, with expression of testators hope for transfer of remainder
2) Determinable fee
License of occupation = Not an interest land, but rather permission to do something that would otherwise be a trespass ….. other possibilities

Hypothetical:
Address in Calgary under Martini’s life estate, and remainderers are waiting for her to die. Martini begins chopping down trees, extracting minerals etc. She wants to exhaust mineral estate before she dies.
   - Tragedy of commons? Common pasture = Estate of grantor
   - Analagy verses income &

4. General Rights of Use and Enjoyment (Powers Estate)
Powers v Powers Estate
F: Life estate with power to encroach + life estate + fee simple to remainder. Instructions to trustee were incomplete as how to allocate capital and expense
(a) the settlement concept: the life tenant-remainder person relationship
Life tenant = Person who occupies estate for life
Remainder = remaining estate as transferred to heirs specified in will

(b) income v. capital beneficiary
Difference between apples (income) and the tree itself (capital).
Life tenant → Right to income
Remainderers → Right to capital (Tree)
Ex. $1 million to A for life, and capital to B on A’s death. Likely permissible that trustee’s invest money, and income annually be paid to life tenant. Upon A’s death, trustees write $1 million cheque to B.

(c) possession and the equitable life estate

(d) liability for waste
Waste = An act that causes lasting damage to the land, reducing its value. This loss in value is likely realized upon remainder, and life-tenant can be liable for damages.
Function: to balance the interests of those in present possession (e.g., life tenants) against those in future possession (e.g., heirs)
Any act which changes the character of a property is technically waste.
Damages = decrease in value of the reversion, or injunction to prevent harm, or waste results in profit to life tenant (e.g., through harvesting mines or minerals).

Mines & Minerals Rule: Life tenant may not open mines and commence exploitation of minerals, but they may continue to operate a mine that is already existing.

(ii) ameliorating waste
Changes which result in a benefit to the property, not an injury, and actually improve the inheritance.
Generally not relevant to small changes, but radical changes. Likely in how remainderers interpret change as an ‘improvement’.

(iii) permissive
Failure to act, e.g., allowing a dilapidated building to fall to the ground.
Life tenant generally not responsible, unless required by instrument of grant

(iv) voluntary
Where life tenant commits a positive, wrongful act, such as tearing down a building.
E.g., Cutting wood for timber = waste if resulting in value loss, unless to clear land for cultivation.
Life tenant is generally liable, unless made immune by grant.

(v) equitable
Wanton or malicious acts of destruction that lead to damage of property. Life tenant could be restrained by injunction.

(vi) waiver of liability
These waste obligations are default rules – one may add or subtract to them in the granting instrument. However, equitable waste is not protected by ‘unimpeachable for waste’ statement of grantor, unless grantor expressly absolves life tenant from liability for that specific form of waste.

(vii) other relationships to which the law of waste applies
Also applicable to co-owners, mortgagor and mortgagee, landlord & tenant, and conditional or determinable fee simples.

(e) the balancing of other rights and obligations
One of the ways to manage the following capital/expense payments is to set up a trust, and to give such payment responsibilities to a trustee (legal title to trustee for entire estate) ‘To hold that for A to life, remainder to remainderers in fee simple’. The remainderers would have an ‘equitable interest’.
Ex. Assume property is inherited, and there is a variety of mortgages, taxes, repairs, monthly expenditures required.

Ex. House in Calgary is served with notice of compulsory acquisition, it is ordered that property is to be sold. There is a current life tenant. How are proceeds of sale divied up? How is the life estate valued the sale, as well as the remainder?
ex. Aho v Kelly
- Life estate value = Remaining life expectancy
- NPV is equal to current value of house following life tenancy
- $104K to remainder now (NPV) = $295k in 18.7 years (remaining life expectancy of life tenancy)
- Supported by principle that at the end of life tenancy, all capital goes to remainderer.

(i) insurance, taxes, repairs
Taxes are generally a service expense, paid out of income

Insurance: Premiums should be paid from income, as provided by legislation. However, there are various types of insurance. If primary benefit of insurance is for remainderer, then cost of insurance should be borne by capital.

(ii) others
Major replacements = Capital; Regular care/repairs = Income

(f) general powers of alienation

(g) leases

(h) mortgages
Is life tenant or remainder responsible to make mortgage payment? Life tenant is responsible for the interest payment of mortgage (e.g., expense).

Remainderer responsible for paying of capital portion of debt

Difficulties arise:
- Normally there are ‘blended’ payments
- Bank may foreclose house if capital payment by remainder not made. Life tenant cannot compel this capital payment, and bank does not differentiate.
- If life tenant pays off all of mortgage, in theory they can recoup costs from remainder (trustee)

Life Estate by Operation of Law
By operation of law = rule of law = irrespective of the intention of the landowner

(a) common law dower and curtesy
1) Dower = Widow’s right in husband’s estate (traditionally 1/3 of all lands owned in their time together). Unless dower right was barred, the dower ran with the land (even if sold to new owner).
2) Dower & Curtesy were abolished (same day as torrens title was adopted) in Canada because they impaired the freedom to transfer land, and were inconsistent with the new land titles systems.

(b) the origins and rationale of homestead legislation
1) Following abolishment of dower’s in Alberta, women had very little interest in land owned by their husbands. Dominio Land Act placed all land grants to families in husband’s name. In early 20th century, land boom meant many husbands sold/mortgaged land without sharing proceeds with wives. Upon death of husband, land may have been seized from under families.
2) This led to feminist movement which created homestead legislation (Alberta Dower Act), protecting wives from depredations of the marketplace and irresponsible husbands. Provides counterbalance to efficient alienation of land under modern title system, and promotes security of the home.

(c) Alberta's dower regime
Alberta Homestead Legislation provides the following three elements:
1) Controls over disposition of home
2) Veto over spouse’s sale of home
3) Life Estate following death of spouse
4) Protection from seizure of home by creditor’s (Now dealt with by Civil Enforcement Act)

Dower Act
1) Dower Act restricts ability to one spouse to dispose of homestead without consent of other:
   a) S1(d): Homestead = parcel on which the land is located < four adjoining lots, one quarter section
   b) S1(b): Restricts transfers, sale, lease > 3 yrs, mortgage/encumbrance, inter vivos disposition
2) S1(c): Dower rights (rights of spouse in respect to homestead and related property) include:
   a) Right to prevent disposition of homestead by withholding consent

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b) Right of action for damages in event disposition is made without consent
c) Right to reimbursement from General Revenue Fund (gov’t) in event spouse is broke
d) Right to life estate in homestead of the deceased married person
   i) Plus life estate in personal property, which is exempt from seizure under writ proceedings
3) S2(1): Married person cannot dispose of homestead without consent of spouse, UNLESS
   a) Court allows it per s10
   b) Required by obligation under regulations (eg. s35 Citizenship Act)
   c) Unlawful disposition = fine of max $1000 or imprisonment for no more than 2 years
4) S3(1): Once a homestead, house remains a homestead notwithstanding purchase of another homestead or change in residence of married person (eg husband) UNLESS s3(2)
   a) S3(2): transfer of land is registered in land titles act
      i) Release of dower right by spouse is registered in LTO per s7
      ii) Judgement for damages against married person obtained per s11-17
5) S4(1): Dower right extinguishment consent must be annexed to disposition in LTO
   a) S4(2): Criteria for form of written dower consent by spouse
      i) Spouse must sign both consent and the instrument
      ii) In absence of consent or court order, affidavit may be provided + other evidence
6) S5: Ensures spouse acknowledges significance of waiver of Dower right power when consenting
   a) Court may order execution of consent despite defect in acknowledgement being evident
7) S6: Outlines process transferee must take to complete sale of property following consent
8) S7: Spouse may register a release of dower rights in LTO → land ceases to become homestead
   a) S8: Following release, spouse may register caveat in LTO at any time which cancels release and reassert dower rights. Although these do not retroactively place dower right on any interests in homestead that have been transferred ,per s8(2)
   b) S9: Dower rights can also be released directly to married person through agreement, for consideration (see criteria). S9 consent agreement (usually contemplate separation agreement – once divorced, dower does not apply), just gives you a grounds to make a s10 dispensing with consent claim
      i) Provide a release in register-able form under s7 (Always backup s9 with s7)
9) S10: Procedure for application to dispense with consent where spouse will/cannot give consent”
   a) Once in the door (you qualify for one of the s10 ‘buckets’), you must go the added step and show that it is fair and reasonable per s10(5).
   b) Note, that in event of 2 or more homesteads, the spouse gets to choose their preference s10.4.b
   c) Court may order dispense with consent if it considers circumstances fair and reasonable
10) S11: Outlines damages for disposition of property without spousal consent (1/2 value or sale price)
    a) If married person dies, spouse may recover from estate. Limited by assets of estate.
    b) May also recover from General Revenue Fund (gov’t treasury) per s13
11) S12: Spouse ceases do have dower rights following registration of recovery of damages per s11
12) S14: Outlines evidence necessary to get damages from GRF
13) S15: Upon receipt of necessary evidence indicating insufficient assets on part of judgment debtor, court can order payment from GRF
14) S16: Upon registration of judgement, spouse loses dower rights on homestead, and is reimbursed from GRF
15) S18: Life estate is automatically vested in surviving spouse following will of married person
   a) If more than one homestead, spouse gets to elect which homestead to choose (s19(1))
      i) No homesteads can be disposed of until election of spouse is made & registered
      ii) In event spouse does not make election, executor can apply to Court
   b) Once homestead election made, other property can be transferred (s20)
16) S21: Dower rights still persist following death of married person, ie homestead cannot be disposed of without consent of surviving spouse.
   a) S22: Court order providing consent may be applied for by administrator of estate
17) S23(1): Surviving spouse is entitled to personal property of life estate, provided such personality is free from seizure per Civil Enforcement Act during spouse’s lifetime
18) S24(1): Dower right of consent prior to disposition extends to mines and minerals on homestead
   a) S24(3): No reimbursement to spouse from GRF for wrongful disposition of mines & minerals
i) Order for reimbursement from GRF shall be based only on surface rights of GRF

19) S25(1): Dower Act does not apply when 3rd party is involved as TiC or JT.

20) S25(2) – If spouses are co-owners, execution of disposition by them = consent of them to release of their dower rights. (ASK – What happens in
a) Joint tenancy → Survivor takes all tenancy by survivorship

What if property is used by spouses as a rental property?
1) S3.1: Once land becomes homestead, it continues to become homestead (subject to s2), notwithstanding change of homestead or change in marriage of title owner.
2) However, under the Act, if there is more than one homestead, the surviving spouse must elect to choose which of the properties becomes their homestead (s19)

If husband changes lock excludes locks and lives with lover. Dower to the rescue?
1) No, other protections (such as order of occupation of matrimonial home) outside of Dower. Part 2 of the Matrimonial Property Act

Assuming consent is required, what counts as perfect form?
2) Includes both consent signature and acknowledgement by appropriate officer
1) What if no acknowledgement?
   a) Can be replaced by proof that spouse was aware of her rights at time of signing consent
2) What if consent is forged, or false affidavit is sworn?
   a) Quasi-criminal offense. Not unique to dower. There are times where forged transfer can still give good rise of protection to an innocent purchaser, who did not realize illegality in documentation. Same protection as of other purchasers in Land Titles Act.
3) Does Dower apply to non-married cohabitants? No
   a) Matrimonial property act and dower act excludes co-habitant couples
4) Why bother with Dower Act? (Most rights covered under Matrimonial Property Act)
   a) Not invoked very often, but is still the final fall back. One thing to say ‘spouse will be protected’, it’s another thing to kick a widow out of her house.
   b) Veto on transfer- cannot allow one spouse to transfer house and defeat right of occupation for other spouse.
   (This was adopted into some provinces Matrimonial properties Act)

6. Estates in Personalty

basic rules
1) At common law there is no recognition of temporary gifts. An inter vivos gift given for short duration, under common law lasts forever
2) However, chattels may be ‘loaned’ (bailment) for a short duration.
3) Cannot have a life estate in ‘consumables’
4) Estate in personalty can be created by statutory provision: Dower Act → If life estate in realty, then you get a life estate in accompanying personalty as well.

Aboriginal Property Rights

Cultural appropriations – Use of aboriginal items in offensive setting not contrary to common law trademark laws. Ex. Drug derived from ancient amazon arrow poison (not patent for poison).

(b) nature and sources of Aboriginal title
1) Sui Generis type of fee simple (of its own kind)
   a) Aboriginal title cannot be placed into any conventional pigeonhole
2) Inalienable except to the Crown - Cannot be sold, mortgaged or leased, or surrendered to an other party (Easterbrook)
3) Title is held communally by the members of an aboriginal community
4) Aboriginal title pre-dates the assertion of colonial sovereignty
5) 1763 Royal proclamation – affirmed/declared the existence of an aboriginal right that preceded the assumption of sovereignty (in contrast to CL estates, which were granted following sovereignty)

6) The use to which the land is put must be consistent with the nature of the group’s historic attachment to the land (Delgamuukw).
   a) Designed to preserve the aboriginal connection with the land
   b) Aboriginal title normally includes mineral rights, however minerals may only be exploited where not inconsistent with historic attachment to land (e.g. hunting)
   c) Para 130 Delgamuukw– Equates limits on aboriginal title to ‘wanton and equitable waste’
   d) Critique: Is strip mining consider equitable waste? Not voluntary or ameliorating waste?
      i) The court is silent on the issue as to what happens if aboriginal groups use land irreconcilable with traditional uses

(c) rules of recognition

1) First Occupancy: Exclusive occupation, up until sovereignty, demonstration of continuity
   a) Not fatal to claim if discontinued since contact
   b) Occupation made out if it is proven if that connection with land is substantially maintained (intentionally loose standard)
   c) Facts must demonstrate an element of continuity, generously understood (Hamlet of Baker Lake) – eg. in theory hunting grounds can demonstrate occupation, as much a village

2) Exclusivity:
   a) Proof of title should be consisted with the property interest acquired
   b) Prevents the chance of conflicting and adverse claims being recognized.
   c) Other tribes asking permission to enter land strengthens perceived exclusivity claim. Also treaties for access. Intermittent trespassers not enough to discount exclusivity

3) Land claim - sui generis type of fee simple: Focal concern = fair recognition of ancient land rights. Based on personhood (or grouphood) values: the connection between ancestral lands and Aboriginal conceptions of self and spirituality should be front and centre.
   a) Proof of occupancy ground in both CL and Aboriginal concepts (exclusivity must be applied with caution)
      i) With no rival claimants, minimal control of territory at issue is all that should be demanded (similar to true owner in adverse possession claim – minor acts of ownership shown to demonstrate possession was not discontinued)
   b) Shared exclusivity is possible – collectively title is good against the world (Delgamuukw)
      i) Note, shared title need not resemble CL form of co-ownership

(d) extinguishment and infringement (Loss or alteration by state action)

1) Under CL, extinguishment could result from unilateral sovereign act (‘clear and plain intention’)
   i) Following s35 of 1982 Constitution, ‘Clear and plain intent’ is no longer enough
   ii) Such rights can no longer be extinguished, but may be justifiably infringed (Sparrow)
      1) Derogation of aboriginal rights, similar to s1 Charter.
      2) S35 – recognition of Honor of the Crown and aboriginal peoples

2) Second method of extinguishment is surrender to the Crown, bilateral process usually through treaty

3) Chippewas of Sarnia: Bona fide purchaser rule, and doctrines governing acquiescence can apply in order to subordinate aboriginal title. E.g. if band too late in claiming title follow innocent possession

4) Regulations that go too far in circumscribing an Aboriginal entitlement may amount in substance to an extinguishment, just as regulatory takings can equal direct expropriate under the general law.
   a) Likely would be sui generis, that is more protective than a de facto taking (in line with honour of Crown) (As seen by criteria in Mariner).

5) What is meant by ‘occupation’, how would one show occupation?
   a) Relation to adverse possession. R v Marshall specifies criteria in Keifer case
   b) What do we require of squatter to show true possession vs right of true owner?
      i) What is the analogue to aboriginal title? Likely sui generis interpretation in light of honour of crown -
   c) Title goes to the House of First Nations as a larger unit, not to individuals

6) Constraints on Crown infringing aboriginal rights:
   a) In dealings between gov’t & aboriginal’s, honour of the Crown is at stake (Van Der Peel)
Protective provisions must be given a generous and liberal interpretation and ambiguities resolved in favor of aboriginals.

Crown must act in good faith in all dealings and negotiations, and treaty obligations.

Duty of consultation, even where state aware state action could affect unclaimed (claim pending) aboriginal right:
1) Minimal impairment of weak claim = notice, disclosure, dialogue
2) Strong impairment of strong claim = extensive consultation, and interim plans

Duty to accommodate: Bona fide effort must be made to reach agreement. A 'process of balancing interests, of give and take' (Haida Nation)

State also has a fiduciary duty to aboriginals when representing their interests.

S35: Existing aboriginal treaty rights are hereby recognized and affirmed
a) If it is shown that law infringes aboriginal rights, then Crown must justify the infringement
i) See Van der Poot test in constitutional CAN

(e) rights short of title
1) The practice, custom or tradition for which recognition is sought must have been a central and significant party of the Aboriginal group’s distinctive culture at the time of first European contact.
a) Right may assume present day attributes

(f) legislative rights
- Aboriginal rights can be altered, subject to the constitution, through unilateral state action.
- Prior to 1982: Possible for Parliament, being supreme, to abolish aboriginal rights
- Also possible for aboriginal rights to be surrendered via treaty

The Origins and Nature of Equitable Interests
S16 of Judicature Act: Rules of equity prevail over common law

**Historic advantages of 'uses':**
1) Evade tenurial incidents on inheritance → Joint feoffees do not pay incidents upon death (no seisin), as the legal title would reside in feoffee (would move sideways)
2) ‘Uses’ could be disposed of through wills according to conditions stipulated.
a) Bypassed common law prohibition against devises of land
3) Overcomes rigid rules of common law conveyancing

Equity bound the feoffee to uses to hold the land in benefit of the feoffor. It would be unconscionable to assume otherwise. A donee could not claim greater interest in land than the donor.
- The ‘conscience’ of the feoffee was bound by equity, not the estate → Equity acts in personam

**Doctrine of Notice:** A purchaser of land is bound by the equitable title, unless they are a bona fide purchaser of the legal title without notice of the equitable title

**Example of roles in Trusts:** O: ‘To X (in fee simple) to the use of Y (in fee simple)’
(i) O: feoffor to uses = Grantor of title
(ii) X: feoffee to uses = Holder of legal title (Trustee)
(iii) Y: estui que use = beneficiary

**The Statute of Uses**
→ Purpose was to divest legal estate from feoffee and vest it into the cestui que use (the beneficiary)
- This would revive feudal incidents.
- Modern conveyance practices are dependent on existence of statute, therefore assumed that Statute of Uses still evident in Alberta.
- “Executing the use” = took the legal title that had been granted to the feoffee to uses and reunited it with the equitable title that had been granted to the cestui que uses

‘To X and his heirs [fee simple] to the use of Y and his heirs [in fee simple]’
Before statute → Legal title to X, and equitable title to Y
After statute → Legal and equitable title to Y

‘To F [fee simple] to the use of A for life, with remainder to use of B [fee simple]’
Before statute → Legal title to F, equitable life estate to A, equitable title to B
After statute → Legal life estate to A, legal and equitable remainder title to B

Resulting Uses
‘To F [FS] to the use of A for life’
Before: Legal title to F, equitable life estate to A, equitable resulting use to grantor
After: A receives legal life estate, resulting legal title to grantor

Avoiding the Statute of Uses
In Alberta, assuming statute was incorporated into law on the date of reception
The term ‘uses’ is still used to get around the technicality of the statute of uses

(a) the imposition of active duties
“To X [in fee simple] to hold the property, and to manage it, and pay the rents and profits to the use of Y [in fee simple]”
Where trustees are given active duties, still respected by statute.

(b) grant to a leaseholder
“To X for 999 years to hold for use of Y”
X is not seised of blackacre, but has a very long leasehold

But the statute does apply where feoffee is seised of the land, so would apply in following situation:
‘To F to the use of A for 21 years’ ➔ F is seised [legal title]
 ➔ Statute would execute use, giving legal LE to A and reverting title to grantor

(c) Not seised to own use
‘To F and his heirs to the use of F and his heirs’
Statute only applies where person was seised to use of another person
Demonstrates that both legal and equitable title are vested in F

(d) Use upon use
‘To F [FS] and his heir to the use of A [FS] to the use of B [FS]’
Before: F = legal title, A = equitable title, B = nothing
After: F is executed out, A = legal title, B = equitable title
(note, after 1660 (abolition of incidents of tenure) the court of chancery began to enforce the use upon a use)

(e) property held by a corporation
“To X Co [in fee simple] to the use of Y [in fee simple]”
- avoids the statute, therefore corporation can hold in trust for Y

5. Exhausting the Statute of Uses
1) 1660 – Doctrine of Tenure abolished incidents of tenure
2) Conveyancers continued to practice ‘use upon a use’ for the purpose of creating equitable ownership, not to avoid feudal incidents, but to take advantage of the freedom the use allowed in manipulating beneficial interests.
3) ‘In trust for’ = employed to indicate creation of equitable interest
4) "To the use of" = reserved for uses executed by statute

To X in [fee simple] to the use of Y [in fee simple] to the use of Z [in fee simple]
- Y became legal title holder, Z retained equitable title
- Exhausts the statute applicability after ‘on use to X’

To X in fee simple to the use of X [in fee simple] to the use of Y [in fee simple]
= Unto and to the use of X [in fee simple] to the use of Y [in fee simple]
= Unto and to the use of X in trust for Y
= To the use of X in trust for Y
≠ To X in trust for Y (no trust created) Statute does not operate as X seised to his own use

Note: the exhausting of the Statute occurs only after one full fee simple has been executed.
Ex. To B in FS to the use of C for life, remainder to use of D in FS
Results in: B executed out, C has legal & equitable life estate, D has legal and equitable remainder (FS)

To X in trust for Y?
→ In statute of uses world, X is executed out, Y has both legal and equitable title (uses = trust, statute executes out first use)
- However in most cases, the trust is setup to have active duties and will therefore not trigger the trust

Bars to equitable relief: Equitable right will trump a legal one, so long as equity considers that justice is served by doing so
1) Misconduct of P; equity requires clean hands
2) Doctrine of Laches: Party attempting to enforce equity may be precluded from doing so following an unjustifiable delay in pursuing the right
3) Bona Fide purchaser: Protected by equity, where they made reasonable inquiries prior to purchase of legal title, equity will favor their claim to title where they did not have notice of equitable title.

Land trusts: Alternative mechanisms for achieving same goals as a conservation covenant or easement, to ensure land will be protected from development.
- Organisation acquires land and holds it ‘on trust’ for specified uses, with the general public as a beneficiary

Some Incidental Effects of the Statute of Uses
1) Revolutionized conveyancing practices: Deed of land as mode of transfer and the current law of land registration can be traced to the Statute of Uses, as a result of ‘bargain and sale’ practice to replace livery of seisin ceremony.
   (Bargain and sale = raised a use in equity → statute transferred legal title)
   a) This led to Statute of enrolment, which required all interests be registred
2) Led to introduction of a power to devise property
3) Created hybrid type of property called legal executory interest

Modern Equity and the Trust
1) Equity focuses binds the conscience, therefore should be against the person (in personum)
2) However, by recognizing the rights of enforcement of the cestui que trust (the beneficiary of an equitable trust), it appears that an equitable interest in property is created → a proprietary interest (good against the world – in rem)
3) However, right of equity is relatively fragile, being dependent on availability of equitable remedies

Categories of Resulting Trusts:

1) Equitable entitlements have not been fully or properly doled out by settlor
   a) The remainder ‘results’ back to the settlor
b) Can also arise if transfer is ineffective (ex. Trust contrary to public policy, or created through fraud/duress)

c) **Ex:** To Acme Trust in trust for A for life
   i) Statute of uses not invoked because it was given to a corporation
   ii) Acme trust (trustee) has legal title, A has equitable life estate
   iii) Residual goes to Settlor (Grantor), any remainder in the equitable interest.

d) **Ex:** To Acme Trust in trust for A for life, remainder in trust for B if and when B marries
   i) Assume B dies without having married
   ii) Condition not met, title ‘results back’ to settlor
   iii) If B never marries, then condition is never met, and it stays with the estate
   iv) Once B marries (fulfills condition) equitable title springs forward ‘springing trust’
      1) B can then request legal title from trustee, once A’s life estate ends

2) **Gratuitous transfers**
   a) Presumption of a resulting trust which can be rebutted by showing that intention was to confer gift. (Legal title goes to transferee who holds it in trust for Grantor [who retains equitable title])
   b) **Ex:** A purchases property and directs that title be taken in the name of B
      i) Legal title in B, equitable title in A (presumption of resulting trust
      ii) Same presumption if A transfers property to B gratuitously
   c) **Why:** Equity is presumes bargains, not gifts
      i) Presumption that A did not wish to divest itself of equitable title
   d) **Spousal transfers:**
      i) **Traditional rule:** asymmetry in spousal presumptions
         1) If Husband purchases property in name of wife ⇒ presumption of advancement
            a) Such a rule is ‘at death’s door’ (Rathwell v Rathwell)
         2) If Wife purchases in name of husband ⇒ presumption of resulting trust
      ii) **Modern rule:** *Matrimonial Property Act* for a division of property
         1) Presumption of resulting trust generally applies to transfers made between spouses
         2) Only applies to matrimonial property
            a) Exception: assets that are purchases by spouses as joint owners
               i) Presumption of advancement ⇒ both hold shares in equitable title
      e) **Transfers from parents to children:** presumption of advancement (*Pecore v Pecore*)
         i) This does not apply to adult children, even where such is dependent on adult support
         1) Rationale: Older parents may transfer to adult child to manage on their behalf (in trust)
      f) **Transfers for illegal purposes** (*Tribe v Tribe*):
         i) Title to property passes in both law and equity, even if for illegal purpose
         ii) Transferor’s action (claim of restitution) will fail if illegal for him to hold interest in property
            1) However if he does act for illegal purpose, and then opts out before illegal act takes place, still okay
         iii) The only way a man can protect his property from creditor’s is by transferring both equitable and legal interest ⇒ this intention reinforces the presumption of advancement
            1) However can be rebutted if transferor can demonstrate that his intention was only to ‘conceal’ property and retain beneficial interest

**Gifts/transfers from parent to child**:

*Pecore v Pecore*:
1) **Gift to adult children = presumption of resulting trust, rebutted by evidence of actual intention**
2) **Evidence = nature of dependency & relationship, discussions with solicitor at time of drafting will**
3) **A joint account ‘right of survivorship’ = an *inter vivos* gift (not a testamentary gift)**

F: Father had joint account with daughter, D. Father willed that residual of estate was split between D and former partner (P). D claims joint account was not part of estate, and therefore not divisible.
1) **Joint bank account:** D and Dad as holder of account. Title to bank account would pass to Paula by virtue of survivorship. However this outcome may only apply to legal title, and not necessarily equitable title. Where does equitable title lie?
2) **P:** Claims presumption of advancement, joint account was gift to her, therefore not part of estate, and not part of residual in will.

3) **D:** Claims presumption of resultant trust, joint account was not gift, and therefore part of estate.
   a) Presumption of resulting trust can be rebutted by evidence of intention of parties

4) The presumption of advancement, applies equally to mother and fathers (giving gifts to children)

5) Rebuttable presumption of resulting trust for adult dependents, often parents will transfer the assets in order to manage those assets to the benefit of the parent.
   a) However evidence of dependency may prove strong evidence to rebut presumption

6) Rebuttal of presumption of resulting trust (by showing intention):
   a) Letter to bank claimed father was 100% owner → this was only so he paid taxes
   b) While the money was intended to maintain him in his life, it was also intended to be a gift to her (via survivorship) following his death
      i) If ‘gift of survivorship’ is only to arise on death, then it is testamentary gift and would fail as a result of not being in proper testamentary form.
      ii) No, the intention of full access upon death was an *inter vivos* gift - ‘the right of survivorship’
      iii) However, still must rebut presumption of resulting trust on gratuitous transfer:
          1. Dependency of daughter on father demonstrated father was concerned for her wellbeing following his death → supports the notion that such gift was intended
          2. Discussions later on with attorney who drafted will, make it clear that father did not contemplate putting joint account in to will as he saw it as being gifted to daughter
          3. The valid intention is when he created his account. Wanted her to manage property while alive, and then after it was hers.

Madsen Estate v Saylor, 2007 SCC
1) Similar facts to *Pecore*, although siblings contested D’s right to survivorship of account.
2) SCC did consider however that selection of joint account with right of survivorship as evidence of intent, although it was held ultimately to be insufficient to rebut presumption or resulting trust
F: Almost identical facts as *Pecore*, father had joint account with daughter, however daughter’s interest was contested by her siblings (major distinction).
   1) It was held that daughter did provide sufficient evidence of intention of gift to rebut presumption of resulting trust.
      a) Although the SCC did consider the father’s choice of a joint account with right of survivorship as evidence of his intention to make it a gift, however ultimately insufficient.
   2) Major distinction is that sibling contested her right to the gift vs account going to father’s estate

INFAMOUS: Murdoch Case (1973)
F: Ms. Murdoch left with essentially nothing following divorce from husband (who had land title under his name), despite contributing significant to the accumulation of property.
1) SCC found this was not a case of resulting trust as there was not sufficient ‘common intention’ that the resulting property was to be shared (she was only doing the ‘standard duties’ of a farm wife).
2) If litigated approx. 7 or 8 years later, she would have received constructive trust for half of value of estate (based on *Petkus v Becker* ruling)

Constructive Trusts
1) A *constructive trust* is one which is imposed by equity. There are two types
   a) Institutional Constructive Trust
      i) Where one person has acquired property for his benefit at the expense of another to whom he owed a fiduciary duty.
   b) Remedial Constructive Trust
      i) Provided in situations where title holder would be unjustly enriched unless equity compelled him or her to share the property with someone who contributed to acquiring or improving the property
2) Examples of constructive trusts
   a) Ex. If you are an insider to an express trust, and you meddle with property, you will be considered a constructive trustee (constructed by court in response to your actions)
b) Ex. Two joint tenants, one kills the other, takes all property by survivorship. Courts can impose constructive trust on half of the property, and name it in estate of innocent party.

3) Most constructive trusts arise out of equity acting against the unconscious acts of the wrongdoer, however this is not always a necessary conditions
   a) Ex. In between purchase and closing of real estate, the vendor holds the property in a constructive trust for the purchaser who is in the process of securing title.
      i) Vendor retains legal title, purchaser has equitable title
      ii) However, what if vendor chooses to efficiently breach sales agreement and sell to innocent purchaser (recall that equity will enforce the sale)
         (1) Then likely that original purchaser will only receive damages in law.
         (2) The original purchaser can attempt to protect against this by filing a caveat at the land titles office of their equitable interest in land.
         (3) Difficulty: Equity must be willing to grant specific performance in order for their to be an equitable interest
            a) *Semelhago* demonstrates that specific performance for land is not automatic, P must be able to demonstrate land is unique to them

Unjust Enrichment and Remedial Constructive Trusts
1) Following a successful claim in 'unjust enrichment' a court can provide a 'remedial constructive trust' in remedy. (see Kerr).

2) **Elements of UE: An enrichment + Corresponding Deprivation + Absence of Juristic Reason**

3) **Enrichment: Benefit to D from housekeeping**

4) **Deprivation:** No compensation to wife for housekeeping
   a) Must also take into account the ‘benefits’ bestowed on the claimant by the defendant (eg rent free) to offset any claimed deprivation by claimant.

5) **Juristic reason:** Difficult to prove a negative ‘absence of juristic reason’
   i) However plaintiff must prove that one of an existing list of juristic reasons does not apply (Ex. Contract between P&D, statutory mandated disposition, or intended gift by P)
   ii) Then onus shifts to defendant to prove if there is another novel juristic reason that exists
   (1) New categories based on *policy-based arguments and legitimate expectations* of parties
   (2) Legitimate expectations can be evinced by whether deprivation was counterbalanced by benefits flowing to the claimant by D → otherwise mutual benefits addressed in remedy
   (a) Ex. Contract for mutual benefits

6) **Remedies:** (restitutionary in nature)
   a) “Remedial Constructive Trust”: Legal owner holds part of legal title in constructive trust for deprived party
      i) “The extent of trust interest should be proportionate to claimant’s contribution to property”
      (1) Need not be a constructive trust of ‘fee simple’, could simply be a ‘life estate’
      (a) Can be based on percentage as assessed by JVF
   b) Monetary compensation
      i) Not restricted to a ‘fee for service’ (quantum meruit) calculation
      (a) Or a ‘value of service approach’ → The JVF

7) **Remedial Constructive Trust appropriate where:**
   a) “a sufficiently substantial and direct’ link between P’s contribution and property
      i) (Eg P stayed home while D worked to pay mortgage)
   b) Monetary funds would be inadequate compensations
      i) Probability of recovery
      ii) Whether there is reason to grant additional rights flowing from property interest

8) **Two fundamental ways to determine remedy amount** (for either monetary or proprietary award):
   a) Value received (Fee for service approach)
      i) If you had to hire someone to do that work, what would it have cost?
b) Value survived basis: the overall increase in the couple’s wealth during their relationship
c) Either approach can potentially be used when calculating monetary or proprietary (RCT) award

9) Joint Family Venture (JFV) approach incorporates ‘value survived’ approach
   a) Factors to be considered if there was a JVF (Kerr) – not exhaustive or determinative
      i) Mutual Effort (joint contributions towards common goal)
      ii) Economic Integration (sharing of expenses, joint bank account)
      iii) Actual Intent (eg if parties agreed their relationship was ‘equivalent to marriage’)
      iv) Priority of the Family (sacrifices made by each member for welfare of collective family unit)
   b) It is possible for there to be components which fall under JFV (real estate property) and those which are not
      JFV (separate banking accounts)

10) Peter v Beblow: Housekeeping first recognized as valid basis for unjust enrichment claim
    a) Housekeeping (benefit) + No compensation to wife (deprivation) + No obligation for wife to complete
       housekeeping and no other plausible reason to deny comp (absence of juristic reason)

11) Rawluk v Rawluk: Constructive trust merely confirms (doesn’t create) interest. Therefore beneficiary will have an
    interest greater than any creditor’s to the property (but not ahead of an innocent purchaser).

Kerr v Baranow, 2011 SCC
1) Undue Enrichment the best approach to domestic partnership separation claims
   a) Replacing artificial ‘common intention’ approach

2) Value-survived method an appropriate approach for calculating damages (through JVF)

Cromwell J:
F: Non-Married cohabitants (together 25 yrs) outside of Marriage Property Act. Following separation, P (disabled) claims
D’s retention of shared home title would be Unjust Enrichment. D counterclaims that P had been unjustly enriched by
his housekeeping and personal care services.
1) No role for common intention resulting trust in property disputes between unmarried couples
   a) The search for a ‘common intention’ (to share property) may become highly artificial, as it can easily be applied
      from any realist assessment of the actual intention of the parties
   b) Principles of unjust enrichment provide a less artificial, more comprehensive and more principles basis to
      address the wide variety of circumstances re: domestic partnerships

2) See principles above

Kerr v Baranow, 2012 BCSC (outcome of retrial)
1) Cross-over of benefits, entered into JFV and accumulate assets (personal savings + estate)
   a) Kept separate savings accounts
      i) Claimant entitled to monetary award to offset value of wallstreet property, equivalent to 25% of wallstreet
         property (value survived)
         (1) Both parties should retain savings in their name

2) Facts, while they did have separate accounts, they did have mutual power of attorney to access accounts (supports
   notion of JFV)

Equity and Specific Peformance
If equity is not prepared to grant specific performance, then you do not have an equitable interest in land. In common
law, the remedy would be damages.

Semelhago v Paramadevan
Sopinka held in obiter “Specific performance should therefore not be granted as a matter of course absent evidence that
the property is unique to the extent that its substitute would not be readily available”
1) Specific performance is only applicable where damages are not suitable
2) Efficient Breach – may be efficient for vendor to breach contract where they will likely only need to pay damages.
   Damages would essentially be nominal (return of deposit, costs on behalf of plaintiff)
   a) Critique: Is it equitable to allow the vendor to make an efficient breach?
      i) Alberta Law Reform recommended to overturn Semelhago
3) *Cross Creek Timber Traders v St John's Terminals, NBQB 2002*: 800 acres of land was unique and especially suitable for purposes, after vendors had withdrawn from sale for agreement.

4) *Raymond v Raymond, 2011 SKC/A*: Son sued parent’s estate to obtain land adjacent to his. Property held as sufficiently unique.

5) **Contrary example:** Say if there was a condo in the building that was identical to yours? Likely not unique.

**Bulan Bulan v R&T Textiles, 1998 Australian Fed Crt**

**Institutional Constructive Trust:** Equity can impose a constructive trust on property (copyright) held by fiduciary in order to prevent them from gaining an unconscionable benefit or to obtain just remedy.

F: Artist (Bulan) had trust of Ganalbingu tribe, and was granted permission to incorporate traditional ritual knowledge of Ganalbingu into his work of art. He then granted permission for art to be published in book (Bulan was the copyright owner). Textile company (D) printed textiles with Bulan’s print on them. Bulan is suing to prevent reproduction of Ganalbingu traditional rituals.

I: Cultural appropriation – Communal title in traditional ritual knowledge and in particular their artwork?

1) Bulan owned the legal title to the copyright
2) Argument for express trust:
   a) There was no apparent intention to make express trust, as Bulan Bulan had right to commercially sell and reproduce copyright to his own benefit
3) Fiduciary duty:
   a) Equitable relationship, where Bulan Bulan is a fiduciary to the Ganalbingu people
      i) Essential characteristics: fiduciary agrees to act on behalf of another person in exercise of discretion which will affect the interests of the person
         (i) Hallmark = party is at mercy of fiduciary’s discretion
4) Fiduciary obligation:
   a) Not to exploit artistic work contrary to the customs/permissions of the Ganalbingu people
   b) And if he saw that the artistic work was being exploited, then he was obligated as fiduciary to take action to protect the copyright
5) In this case, no opportunity for equity, as Bulan Bulan did take action to prevent copyright, therefore ruling held in favor of D.
   a) However if Bulan had not taken action, the Ganalbingu people could sue him (as a right in personam) to take action as the fiduciary
   b) Equity can impose a constructive trust on property (copyright) held by fiduciary in order to prevent fiduciary from gaining an unconscionable benefit or to obtain just remedy.
      i) This would enable Ganalbingu to sue D directly.
6) If the copyright holder cannot be found or fiduciary rejects duty, then court can impose a **constructive trust** to enable the beneficiaries to bring proceedings to enforce copyright.
   a) Again, this means *Ganalbingu* people have equitable interest in copyright

**Qualified Transfers and Future Interests**

1) Conditional Dispositions: Conferring property rights on someone with strings attached
2) ‘Dead Hand Control’ – Balance of past & future interests

**Condition Subsequent:**

Ex #1: G: I grant BA to A in FS, but should land ever be used for residential, then my estate may re-enter’

1) A obtains a ‘FS subject to a condition subsequent’ (dark cloud)
   a) G retains a ‘right of re-entry’
2) A receives a ‘vested interest’, which is subject to ‘divesting’
   a) G’s ‘Right of re-entry’ = A contingent interest, contingent on CS occurring (Therefore subject to RAP, as it is a contingent interest – uncertain whether it will occur or not)

3) In CL (&S19 Perp Act), if invalid CS → gift is absolute

**Determinable Interest:**

Ex #2: G: I grant BA to A in FS until the land is used for residential purposes
1) A receives a ‘determinable fee simple’
   a) G retains a ‘possibility of reverter’ (a fencepost, that marks out temporal limit)

2) A receives a vested interest (vested in possession)
   a) G’s ‘possibility of reverter’ = A vested interest (bound to happen, natural end), in Common Law, therefore not subject to RAP
      i) BUT, s19 of Perpetuities Act: Det. Interest → becomes a CS

3) Under common law, if DI even is invalid (RAP, Uncertainty, Policy) → gift fails
   a) Following s19 Perp Act changes effect of RAP on DI → makes it CS, gift absolute

S19 Perpetuities Act:
1) Det interest treated as CS
2) Perpetuity period for possibility of reverter, resulting trust, or right of re-entry = 40 years
   a) RAP does not apply to gifts from one charity to another

“The cloud if invoked will cut short the estate. Distinct from the fence post, that once reached indicates the natural end of the estate (temporal)”

How to know CS from Determinable interest?
1) Different in wordage ex ‘but should’ vs ‘until’
2) Ex.2 speaks durationally, with respect to a time limit
3) Ex.1 speaks to the occurrence of an independent event

Caroline (Village) v Roper, 1987 ABQB
1) In CL, RAP doesn’t apply to ‘possibility of reverter’ but does apply to ‘right of re-entry’ (contingent interest). Therefore gift is absolute in CS (contingent interest nullified, whereas PoR is vested. Note: modified by s19 Perpetuities Act, so DI is treated like CS → gift is absolute.

2) If, statutory rule did not apply as instrument was created before statute effective period (S25)
F: Husband allowed P to use land to build community centre. Husband died, town came to widow requesting title so they could do basement addition. D drafted agreement and gave to widow “Shall revert back….if used for other than a community centre”. Eventually D tried to sell land for commercial purposes, and refused to return land.
I: Is the guarantee from D void by the rule against perpetuities?
D: Yes, but court ordered new valid agreement be drafted.
   1) If this was a condition subsequent, the right of re-entry is considered a contingent interest (contingent on CS occurring) and may be subject to RAP.
   2) But if Determinable FS, then at common law, the rule against perpetuities would not apply.
   3) The ‘future tense’ was used and therefore refers to an indefinite future = condition subsequent
   Note: Instrument was created in 1949, s25 of Perpetuities Act only applies to grants that occur after July 1 1973 (only prospective)

S19 does not speak to whether void on public policy or vagueness (just RAP):
If condition is too vague to be enforceable, or contravene public policy then invalid.
1) Ex. Will devise conditional on ‘support a certain political party’. What if against public policy?
   a) Testator #1: Condition must be met or NOTHING
      i) Would use DFS → If challenged and invalid → No gift
   b) Testator #2: Condition must be met, but if not invalid, then still something
      i) Would use CS → if challenged and invalid → Absolute gift

St. Mary’s Indian Ban v Cranbrook, 1997 SCC
Given sui generis nature of aboriginal rights, courts will focus on the original intentions of the parties, not the nuances of formalistic legal language in interpreting instruments (e.g. not focus on whether a CS or a DI)
F: Aboriginal band surrendered land to be used for airport. “that should at any time the said lands cease to be used for public purpose, they will revert back to St. Mary’s Indian Band”
1) SCC held that due to *sui generis* nature of aboriginal’s, there was not need to focus on language of instrument, but rather must look more closely at intentions of Indians and Gov’t at time of surrender.

2) Why? Reason for CL property rules not applying to natives is “to prevent native intentions being frustrated by formalistic and arguably alien common law rules”

3) Held that intention was for land to be an absolute gift.

**Condition Precedent**
Ex. ‘I devise BA to A in FS, but IFF she first obtains a university degree in Enviro Studies’
   a) A has received a FS subject to *condition precedent*
   i) Analogy: CP is like a *bridge* that first must be crossed, before receipt of gift

**Right of Reversion:** G grants life interest to A, residual reverts back to G’s estate

**Contingent and Vested Interests**
Contingent Interest: An interest subject to a condition precedent.

Vested Interest: An interest one is entitled to, essentially without having to meet any condition

*The natural end of a prior estate, is not considered contingent for these purposes*

**Examples:**
1) “To A in Fee Simple” = vested interest
2) “To A in Fee Simple, but IFF…” = contingent interest
3) “To A for life, remainder to B in fee simple” (*Stuartburn v Kiansky*)
   a) A is vested (in possession)
   b) B is also vested (in interest)

**Stuartburn v Kiansky, 2001 ManQB**

**Estate in land = present interest = possession, remainder, reversion = classified as ‘owners of land’**

F: Town reeve needs to prove remainder interest in FS is equivalent to being an ‘owner in land’. His mother currently had a LE in the property

I: Whether remainder interest is sufficient to classify him as ‘owner in land’?

1) There can be several co-existing estates in land, all of which are held simultaneously in ‘present’ time:
   a) Possession: Ex. A grants LE to B. B is vested in possession.
   b) Remainder: Ex. A grants LE to B and remainder to C. C has vested interest in remainder (FS).
   c) Reversion: Ex. A grant LE to B, has vested reversion interest in FS

2) Therefore a remainder interest is present interest in freehold and classifies party as ‘owner of land’

**Note: Re Senate Residency Requirements:**

*Seisin = Full possession,* and right to immediate possession

Therefore, if requirement is ‘seised for own use and benefit’ then mere ‘ownership’ (eg remainder interest) is not enough.

**McKeen Estate v McKeen Estate, 1993 NBQB**

If words of a will do not express a clear intention, then:

1) *Presumption against intestacy ➔ Testator intended to dispose of all property by will*
2) *Presumption of ‘early vesting’ ➔ test. intended to create vested rather than contingent interests*

F: Entire estate held in trust for wife’s life, following her death, residue to be divided between testator’s two sisters, or the sole surviving sister. Both sisters died before wife died.

I: Did the sisters have a vested interest in testator’s estate, or was it contingent on death of wife?

1) If sister’s estate did not receive testator’s estate, then intestacy is the outcome (residue divided based upon NB intestacy laws). If however gift vested in sisters at time of will, then property ➔ their estates
2) *Presumption against intestacy:* which can be rebutted based on presumption of testator
3) *Presumption of ‘early vesting’:* Courts inclined that gift was ‘early vested’ rather than contingent, where the language of construction allows it. Gift would vest at time of testator’s death unless otherwise stated.

4) On the death of the testator, sisters were early vested in interest
a) If they both survive, they met the condition and will not be divested
- If one dies prematurely, does not meet survivorship stipulation, they are divested

State Limitations On Private Power

1) Invalid CS $\rightarrow$ Absolute Gift
2) Invalid Determinable Limitation $\rightarrow$ Gift fails (in common law)
3) Invalid CP (Real Property) $\rightarrow$ Gift fails (The bridge is broken, cannot pass bridge)
   a) Gift goes back to the residuary of the estate
4) Invalid CP (Personalty) $\rightarrow$ Gift succeeds, depends on intention of parties (*Unger v Gossen*)
   i) Ex. To Bruce, under the condition that 'hell freeze over'
      (1) Under Feeney Rule gift would still be valid

*Unger v Gossen*, 1996 BCSC

Impossibility of condition precedent does not nullify gift (of personal property) if the dominant intention of the testator was to bestow the gift, as opposed to the dominant intention of fulfilling the condition.

See Feeney's other rules in case.

F: Will left to three nephews, conditional on their immigration to Canada (within 15 years of testator’s death) from USSR, otherwise it would be split between nephew’s children. Became impossible (too old) for nephew’s to relocate due to immigration policies, they lived in Germany.

I: If condition precedent is impossible to achieve (invalid), then does absolute gift stand? YES
1) Intention of grantor that nephew’s receive money, however she had fear that USSR would confiscate it. Could not change will following collapse of USSR due to her dementia.
2) All potential claimants (children of nephews) signed away right to inheritance (no counter-claims)
   a) Should the court care if all potential beneficiaries of estate want property to be divided equally?
      i) The testator dies in 1994. Final distribution to take place 15 years after testators death (2009). The claimants didn’t want to wait until 2009 $\rightarrow$ Let’s split it now!
3) Gift of personal property subject to CP is absolute where:
   a) Testator knows the CP is impossible of performance
   b) Where the testator’s actions make completion of the CP impossible
   c) Where CP made impossible by law, act of cod, or impossibility unknown to testator
   d) BUT, it must be demonstrated that the testator’s dominant intention was the gift
   e) If the dominant intention was the fulfilment of the condition, then gift fails
4) GR: Where condition precedent impossible, the gift should still succeed (as dominant intent)
   a) Traditional rule: That where CP was possible at time of will, and becomes impossible after death (by event not attributable to testator), then both the gift and condition should be struck down
   b) In this case: Knowledge of impossibility at time of drafting irrelevant, intention of testator was to benefit her nephews.

Uncertainty:

1) Stipulations cannot be enforced if they cannot be interpreted with certainty
2) A clear line of certainty not required, as long as one can show which side of the line a claimant belongs on (*Leonard Trust*)
3) Uncertainty arises in following situations:
   a) Condition precedent $\rightarrow$ Whether plaintiff has met condition
   b) Condition subsequent $\rightarrow$ What event will give rise to grantor’s right of re-entry?
   c) Determinable interest $\rightarrow$ What event will cause grantee’s interest to revert to grantor?

*HJ Hayes Co v Meade*, 1987 NBQB

1) In context of gifts of real property: i) If CP uncertain, gift fails, ii) If CS uncertain, gift absolute
2) Presumption of early vesting, especially where gift is land
3) Presumption of CS, as it promotes early vesting, avoiding intestancy
4) **CS Uncertainty TEST:** The recipient of the gift must be able to identify precisely and distinctly from the outset, what actions will lead to the forfeiture of their right

5) **CP Uncertainty TEST:** The wording must be capable of some reasonable meaning

F: Father’s will provided ‘A shall reside on land and cultivate the same’ (uncertain?). If not, B shall have land but must pay A $1000’.

P claims: B took property, as A did not fulfill condition under will (did not cultivate it forever)

D claims: Condition of residency and cultivation uncertain → condition subsequent void for uncertainty

Held: D is correct.

1) **GR:** Where condition subsequent is uncertain it must be void for uncertainty, gift is absolute

2) **GR:** Where CP is uncertain, the gift fails

   a) Unreasonable contingent ‘live on land and cultivate’ → when has A crossed the bridge?

3) Condition subsequent generally preferred, as they result in a vested interested, whereas a condition precedent is more likely to revert the interest to the estate and result in intestacy

   a) Laws preference for a ‘early vesting and presumption against intestacy’

4) In this case, grantor’s intention was also to clearly confer a benefit on each of his sons (in favor of condition subsequent)

5) **CS Uncertainty TEST application:** no period of time specific for the residency requirement, or if leaving the property for any period of time would void A’s interest, therefore uncertain, cs fails, gift absolute

Sifton v Sifton, 1938 JCPC

**Example of ‘result oriented’ interpretation of will in favor of CS over DFS**

F: “The payment to my said daughter shall be made only so long as she shall continue to reside in Canada”

1) Held by the JCPC, as a CS in reading whole Will.

   a) Evidence: There was a defeasance clause later on that cut short gift

   b) More result oriented, if DFS the gift would have failed, as estate has vested reverter right.

2) However wording looks more like a Determinable Fee Simple, giving the ‘as long as’

Kotsar v Shattock, 1981 SC

Condition “when she obtain age of 21, provide she be resident in British Commonwealth”, interpreted as meaning that on her 21st bday she must reside in British Commonwealth country

“Residuary of estate to A, when she obtain age of 21, and provided she be resident in British Commonwealth. In the event this does not happen, then it is my with that it is paid to charity”

1) Interpreted that she must be a resident in a British Commonwealth country on the day she turn 21

The Rule in Phipps v Ackers, Rule of Construction: **preference for early vesting in action where age = CP.**

1) “To the children of A when they turn 21 (CP → CS), but if no child reaches that age then to B (gift over)”

2) The CP (of reaching the age) is now interpreted as a CS, to allow early vesting

3) The early vesting ensures that the gift over does not fail in the event A does not reach the age of 21

4) If donee does not reach required age, then gift is still divested as gift over, not back to grantor estate

5) **Rationale:** Presumed that ‘gift over’ implies that first donee is to enjoy the property first. It is to be given over only if the prescribed condition does not occur.

6) **Rule of Construction, not a Rule of Law**

   a) Allows courts to construe a document that promotes early vesting, however reliant on necessary conditions and attune to express intentions of grantor

   b) Ex. If express stated that ‘rule in Phipps v Ackers does not apply’, then it does not apply! Rule of construction yields to contrary intention

Methods of Drafting to Avoid Uncertainty of Condition:

1) Standalone determinate clause: eg must spend 300/365 days in country to be considered resident

2) **Reference clause:** if considered resident by Immigration Act

3) **Arbitration clause:** if considered resident by Minister of Immigration

   a) **Tuick (Denning):** Jewish person if considered so by Chief Rabbi of England
Public Policy

Leonard Foundation Trust 1990 ONCA

1) Trusts with public purpose (eg charity) may be held contrary to public policy, where the harm to the public is 'substantially incontestable' and not dependent on 'idiosyncratic inferences of few judicial minds'

2) Basis for public policy: Charter, Human Rights Code, International Charters

3) Cy-pres doctrine applied to make trust as close to original intention as possible (without discrimination)

4) Only public trusts will be scrutinized → private trusts or gifts may violate public policy

F: Written trust that had a preamble recitals which allowed only white, Christian students to qualify for trust. Reuben Leonard had beliefs entrenched from the 1920s, with racist preferences (included in recitals). Trust administered by General committee who was also composed of white protestants

I: Is the trust invalid for being against public policy?

Arguments: This is private money, leave it alone + Other trust that favor certain minorities?

1) Was the Leonard Trust covered by the Ontario HRC?
   a) In 1982, code was not broad enough to cover trust. 1985 → Amendments made to code which allowed attack of trust → led to complaint to HRC. Leonard trust referred it to court before HRC complaint could be launch.

2) TJ (McKeown J): Found that the Leonard foundation trust did not violate any laws
   a) Recognize discrimination as abhorrent, but could not recognize and legal reasons against trust

3) ONCA (Robins JA): Trust violated the doctrine of public policy
   a) Public policy defined? Charter, Humans Right Codes, International Charters
      i) Policy argument? Public policy only invoked when harm is ‘substantially incontestable’ (Re Millar)
   b) Normally in trust, recitals are consider preamble only, and not an operative part of the trust.
      i) In this case, recitals are considered as part of the trust
   c) Applies cy-pres doctrine → cuts out the discriminatory clauses, however still retains charitable goals.

4) ONCA (Tarnopolsky Concurring):
   a) Charitable trust → serves public → Only public trusts that violate public policy will be held void → Private trusts against public policy still valid.
   b) Charity test:
      i) Relief of poverty, advancement of education, advancement of religion, other purposes beneficial to community as a whole
   c) To satisfy condition: i) purpose must be one of four above, ii) wholly charitable, iii) promote public benefit

Re Ramsden, 1996 PEI SC

Held that trust to protestant students was not against public policy (not based on ‘blatant racism or religious supremacy’). Where trustee refuses to/cannot hold trust, court may appoint new trustee

F: Public trust to protestant students. University of PEI cannot be trustee because of university’s governing legislation, however trust will not fail for lack of trustee. Court ordered new trustee.

Held: That trust was not contrary to public policy

1) Distinct from Leonard, as that case was based on blatant racism and religious supremacy. This case is not prima facie against public policy.

Charter (beacon of public policy):
S15(1) → Equality for all
S15(2) → Affirmative action allowed

Fox v Fox Estate, 1996 ONCA

1) Court may intervene to prevent trustee from exercising discretion in manner contrary to public policy
   a) Assumedly the fact that their actions contravened fiduciary duty to cestui que trust was significant

2) However, while court has authority of trustees, they cannot prevent testator disposing of private will in discriminatory fashion.

F: Widow of grantor was also executor. Son was granted residual capital from will in event he survived mother. Widow used broad discretionary powers to exhaust the residue because son had married women of differ religions faith. Did mother improperly exercise powers? YES
ONCA:
1) Court acted to prevent trustee from exercising discretion in a manner that offends public policy
2) A testator may dispose of their private will in discriminatory fashion, however a trustee is subject to judicial control.

Kay, NZ
Court upheld discriminatory ‘white babies’ trust as valid. Reason: did not wish to dissuade charitable trusts.
F: Public trust that gave gift to hospital, on condition they only use it towards white babies.

Ziff: Unforeseen Legacies
1) Three categories of conduct in relation to susceptibility to charter scrutiny:
   a) State action
      i) Highest level of scrutiny → duty bound to treat citizens with even hand
   b) Private conduct in public domain (such as private enterprises)
   c) Private conduct outside of public domain (eg family life)
2) If discriminatory practice in private sphere is not illegal, then it is backed by the state. In that sense, all private property dealings have a public dimension.
   a) Property rights = state delegation of decision making power into private hands.
   b) Relying on the distinction between private/public property to regulate where discrimination is allowed is not helpful, as all categories overlap.
      a) “It is not clear that we should tolerate discriminatory action that affects family members to any greater extent that that tolerated in the community at large”

Restrains on Alienation
Ex. Aboriginal title, Restrictive covenants

How much of a restriction on alienation is tolerated?
How to analyze degree of restriction → assess three variables (MacLeay):
1) Time: Lifetime of donee?
2) Mode: Ex. Mode of Sale, Mortgage, Lease Gift
3) Class: Restricted or permitted class ex. Family

Ex. In year 2014, restriction that estate may re-enter upon violation of condition
   - Time is 40 years (s19 of Perpetuity Act) for which restriction may operate

Trinity College School v Lyons
1) Any ‘absolute restraint’ on a grant of land will be void, as alienation is an inseparable entity of a fee simple
   a) Ex. A ‘fixed sale’ price option (Rosher: condition imposing sale price of $3000 for land worth $15000)
   b) However, not the case if the sale price has reference to future increase in sale price (eg inflation)
2) Only applicable where ‘option’ is an interest in land (e.g. runs with land upon transfer) → n/a to contracts
3) Policy: Prevent alienation → reduction in transferability, prevention of improvement of property
F: Post-mortem option to purchase land granted to school (adjacent to land), which came in effect upon death of option offeror. Prior to death, land was transferred to children of option offeror.
I: Is the option, at a fixed price, void as improper restraint on alienation of fee simple? Yes
1) Policy: Alienation restraints are void because they keep property out of commerce and tend to result in an unequal accumulation of wealth.
   a) Also prevent improvement of property, as landowner reluctant to make improvements to non-saleable property
2) Fee Simple Alienation: Alienation is an inseparable incident of an estate in fee simple
   a) Consequently, any condition on grant of land which is an absolute restraint of alienation will be void
3) Any ‘pre-emptive’ provision that fixes a sale price, without reference to future increase in value, is void as a restraint upon alienation
a) *Re Raiser*: Son could not alienate land worth $15,000. Needed to sell to mother for $300. Held condition imposing restraint to be invalid.

4) One conveying an estate to another shall not have the power to alter its character, and to make it something wholly different from what it has been made by law.

5) Rules on restraints only apply when they are held as an interest in land.

6) **The rules governing restraints do not apply to pure contractual bargains**
   a) *Ex.* Where restraint is not associated with transfer of land (e.g., you are promising not to sell your land if other party does something. You are not imposing such a restraint on anyone you sell the land to.

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**The Rule Against Perpetuities**

No interest is valid unless it must vest, if it is going to vest at all, not later than 21 years after the death of some life in being who was alive or en ventre sa mere at the creation of the interest. If no such life in being was in existence at the creation of the interest, then the term of 21 years only is allowed.

**Policy Rationale:**

- Avoid ‘dead hand’ control that limits the freedom of future owners
- Economic:
  1) Preventing the fettering of the marketability of property over long periods of time by indirect restraints upon its alienation (*Rainbow Scurry*)
  2) Property owners more likely to improve the property if they can sell it (*Trinity College*)
  3) Uneven distribution of wealth (*Trinity College*)

**Five-Step RAP:**

1) **RAP applies to contingent remainders and executory interests, not to vested interests**
   a) **Invalidation of interests that vest at too remote time in future**

2) **Perpetuity period runs from date of ‘creation of interest’**
   i) *Will = Death of Testator*
   ii) *Inter vivos gift = Date the instrument takes effect*
      1) If gift is revocable, date commences once revocability withdrawn (sufficient delivery)
         a) Revocation right also expires on Grantor’s death

3) **Four conditions must be met to constitute a ‘life in being’;**
   a) The measuring life or lives must be human
   b) Such person(s) must be living at time of creation of the interest
   c) A class of ‘lives in being’ cannot be capable of growing in numbers
   d) The group used as a measuring life must be ascertainable

4) If at commencement of perpetuity period, it is theoretically possible to construct circumstances in which vesting would occur outside of the period, then RAP is infringed (**REVERSED BY S3 PERPETUITY ACT**)
   a) Not concerned with practical probabilities/possibilities or with actual later events
   b) Males/females can beget/birth children at any age
      i) Eg. Fertile Octagenerian & Precocious Toddler

5) **Are there any statutory modifications to the RAP?**
   a) Ex. S19 Perpetuities Act – makes perpetuity period for right of re-entry, possibility of reverter, and resulting trust = 40 years

**Elements:**

1) **An interest**
   a) General rule → *Interest = All interests in property (real/personal, legal/equitable)*

2) **Must vest**
Interest must vest in interest or possession within the allotted time (perpetuity period)

i) Eg. Right of reversion subject to determinable fee simple
   (1) Not subject to RAP because the right is vested

ii) “Class Gift” → Eg. To all of my ‘children’
   (1) RAP: If there is a class of takers, and it is impossible for one members of that class to accept that gift within the perpetuity period, the whole class gift fails

3) If it is going to vest at all:
   a) RAP does not care when interest vests, as long as it knows it will vest
   b) RAP worries about ‘late vesting’ (Eg. Can draft in will ‘no possibility of late vesting’)
      i) RAP = Must know by a certain point of time whether interest will vest or not.
      ii) Any possibility of a late vesting, renders the gift void ab initio under CL
         (1) Therefore, mere ‘possibility’ renders gift void

4) Within the perpetuity period
   a) Lives in being (people alive) at the time the gift takes effect plus 21 years
      i) Deed: when executed: signed, sealed, delivered
      ii) Will: When testator dies

Ex1. Grant in 1972 “To Acme Trust to hold in trust for Al for life, remainder in trust for all my grandchildren who reach 18 [contingent remainder = RAP LIGHT!]”

1) At the time of the grant, the Grantor has 3 children, Al, Ben, and Daphne and two Grand Children, Blade, who is 12, and Amy, who is 6
   a) Equitable life estate to Al
   b) Equitable fee simple (remainder interest to grand children who reach 18)
      i) Contingent interest must vest within perpetuity period
         (1) Void as G is still alive and can have additional children (class is not capable of growing)
   2) Void, however can draft in a way that ensures there is no late vesting
      a) “This is a gift to all my grandchildren, born of Al, Ben, and Daphne…”
   3) Can define a period → Eg must collect gift before death of all members of 2014 olympic hockey team + 21 years (identified lives in being + 21 years)
   4) Benchmark - Everyone on planet + 21 years → void for uncertainty
      a) Must use a specific class of people

Ex2: Re: Stanley Cup given in trust to the ‘best team in the dominion’
   - There is a relaxed RAP for gifts made in support of charity

Ex3: Will in 1972: “To all my children who reach 25”

1) Perfectly valid bridge that no-one met the requirements to cross
   a) The gift never left the estate
      i) Children are born prior to death of testator, they are a life in being, therefore the clock of 21 years does not start ticking until they die
         (1) Child conceived but not yet born → an avant sa mere. = life in being

Ex4: “To all my children who reach 200” → still valid

   a) Life in being is anyone who is alive
      i) 21 years following the death of the last person alive at the time the gift was given
      ii)

Scurry-Rainbow Oil (Sask) Ltd v Taylor, 2001 Sask CA

1) Policy of top-lease (a profit a prendre interest) does not violate RAP based upon policy reasons
2) ‘Top leases’ increase actual drilling and competitiveness because oil companies have a greater incentive to drill where leases have been ‘topped’
3) This is in accordance with RAP policy reasons – preventing the marketability of property through restraint
4) Where no reference to ‘life in being’, perpetuity period = period in gross = 21 years
F: ‘Top lease’ signed which granted rights to Scurry following lease expiry with Imperial Oil. Lease with IOL specified a 10 year term + however long oil & gas produced from land. Top lease contingent on Scurry commencing drilling within 42 years following execution of the top lease.

I: Can the top-lease violate the RAP and be therefore void? Technically yes, but contrary to policy in this case, so NO

1) **RAP = rule against remotesness of vesting**

2) Imperial Oil acquired a **determinable ‘profit a prendre’** (term for 10 years and so long after that oil was produced [potentially indefinitely])
   a) Profit a prendre: Incorporeal Hereditament → Right to draw natural resources from property

3) Why RAP? Because Scurry Rainbow had a ‘contingent interest’
   a) Contingent on the end of the determinable lease of Imperial Oil.
   b) If the lease runs for more than 42 years, then contingent interest does not occur, and no vesting

4) **Perpetuity Period = Period in Gross:** Just 21 years, without reference to ‘life in beings’

5) **Policy rational of RAP:**
   a) “Preventing the lettering of the marketability of property over long periods of time by indirect restraints upon its alienation” → Prevent tying up property to the detriment of society
   b) RAP cut-out limitations (future interests) that prevent alienability
      i) Controls the extent to which the ‘dead hand’ controls contingent devolution

6) In this case, ‘top leases’ increase actual drilling and competitiveness because oil companies have a greater incentive to drill where leases have been ‘topped’ → This does not offend the policy behind RAP

7) In Alberta, top lease considered ‘option to renew a profit’

8) Option to renew a ‘true lease’, for centuries has been considered not subject to RAP

Perpetuities Act

Alberta 1973: Statute intended to mitigate harshness of RAP prospectively

1) S3: No longer is the mere possibility of late vesting enough to destroy a gift
   a) S4: Must ‘wait and see’ to see if there will be a late vesting.
      i) Contingent interest is valid until actual events establish that interest will not vest within perp period

2) S5: List of ‘who counts’ as being a ‘life in being’:
3) S6: Allows the cy-pres reduction of a specified age to make a vesting possible (no less than 21)
4) S7: Allows ‘class splitting’ to allow vesting to those of ‘class’ who meet the condition required to receive the gift
   a) Members who would make class violate RAP would be omitted from joining to class to save vesting

5) S8: Where grant void on grounds of RAP → cypress doctrine (interpret as close to intention as possible)

6) S9: Capability of having children: Male: over 14, Female: age 12-55 (or as other evidence may adduce)
   a) Court has power to protect rights of children begetted outside of these ages, or adopted children

7) S11: Outlines order of remedial provisions of Act:
   a) S9→s4→s6→s7→s8

8) S17: RAP does not apply to an ‘option’ to acquire a reversionary on term of lease or renewal of lease
   a) RAP does not apply to option to renew a lease of real or personal property

9) S18: In **commercial contract**, perpetuity period is 80 years for interest that may be acquire at future time
   a) Applies to contracts for future sale or lease, options in gross, rights of pre-emption or first refusal
   b) Applies to future profits a prendre, easements and restrictive covenants
   c) S18(3) – does not apply to will or inter vivos gift (must be valuable consideration → an option)

10) S19: Changes CL rule:
    a) Fencepost has become a cloud (Determinable → CS)
       i) Eg. If fencepost violates RAP, the gift becomes absolute
    b) Perpetuity period is now 40 years
    c) Right of reverter (under Det.) is now subject to RAP (now 40 years)

11) S25: Act only applies to instruments granted after July 1 1973 (prospective)
    - If you have a gift that satisfies CL rule, do not need to wait & see, you know that gift will not infringe RAP.
      You only need to ‘wait and see’ if you have a gift outside the perpetuity period.
Bailment
A legal relationship in common law where physical possession of personal property, or a chattel, is transferred from one person (the 'bailor') to another person (the 'bailee') who subsequently has possession of the property. It arises when a person gives property to someone else for safekeeping, and is a cause of action independent of contract or tort.

Core Definition: Founded exclusively on one person’s voluntary possession of goods that belong to another.
Bailor = Giver; Bailee = Taker of possession.

Bailment is sui generis, it is unique in that it combines elements of property, contracts, and torts (Punch).

Categorization of bailments depending on who they benefited (Cogg v Bernard):
1) Sole benefit to bailee → Higher duty of care owed, even slight negligence is actionable
2) Gratuitous bailment: Benefit of bailor → Only liability if gross negligence by bailee
   a) If car stolen from valet parking lot of restaurant. Service was complimentary without any consideration (Martin v Town N Country Delicatessen, ManCA)
      i) Dissent held it was mutual benefit as parking lot was operated for accommodation of guests
3) Mutual benefit (bailment for reward) → Ordinary negligence applies
   a) 'Free' coat check provided accommodation to customers (Murphy v Gart, 1919 NSCA)

Modern Approach: Degree of ‘Duty of Care’ owed may depend on the type of bailment:
1) Sole benefit: Slight negligence by bailee is actionable
2) Gratuitous bailment: Liable for gross negligence
3) Mutual Benefit: Liable for ordinary negligence

Post- Modern Approach (Letourneau): Duty of Care owed depends on the circumstances, facts of case.

Duty and Standard of Care (Letourneau):
1) If it can be shown that goods were lost/damage in course of bailment, onus shifts to bailee to disprove negligence
2) Bailee must show that he had taken reasonable care of the goods (care of reasonable prudent owner taking care of his own chattels), or that his lack of care did not cause loss in question

Contributory Negligence
Does Contributory Negligence Act extend to include bailment? Letourneau appears to consider contributory negligence as if it does apply. Although states that contributory negligence in bailment is rare.

Letourneau v Otto Mobiles Edmonton, 1984 ABQB
‘Bailment’ Duty and Standard of Care (TEST)
1) If shown that goods were lost/damage in course of bailment, onus shifts to bailee to disprove negligence
2) Bailee must show that he had taken reasonable care of the goods (above test), or that his lack of care did not cause loss in question
   a) Standard of care: Obligation of bailee in either case is to take the same care of the goods received as a prudent owner, acting reasonably, might be expected to take of his own chattels
F: P left motor vehicle home in parking lot adjacent to D’s repair shop, according to D’s employees directions. P left key for motor home in water tank and secured vehicle. Vehicle was then stolen in lot.
I: Was D considered a bailee and owed a corresponding duty to P? YES
3) Bailment requirements:
   a) Constructive or actual possession must be transferred from bailor to bailee with latter taking control of chattel
   b) Possession can be inferred when it is a necessary incident of some other function
      i) In this case, P complied precisely with delivery directions of D’s employees
      ii) The fact that the trailer was not on D’s property is not a bar to creating a bailment
4) **Bailee for Reward (Mutual Benefit) vs Gratuitous Bailee (Benefit for Bailor)**
   a) Distinction not important, avoidance of rigid categories

5) **In this case, D breached duty of care by not taking reasonable steps to secure vehicle. This resulted in loss.**
   a) P not contributorily negligent (followed precise directions). CN rare in bailment cases.
   b) Waiver/limitation clause would be effective if involved in bailment relationship (although a contract is not necessary to establish a bailment)
   c) In this case, there was no relevant purchase agreement limiting liability of D

Notes:
1) Bailed goods cannot be dealt with in a manner that falls outside of the terms of the bailment

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**Minichello v Devonshire Hotel (1967), BCCA**

Bailment covers contents of automobile which bailee would reasonably expect to be in car, and contents which the bailee has been made aware of

F: P parked car for service and gave keys to D letting him know there was something valuable in trunk (There was jewellery in trunk). Car was stolen.
I: Is bailee responsible for stolen jewellery from trunk of car? YES

**Biddle v Bond**

Bailee is estopped from denying title of the bailor, unless and until a person with a better right to the bailed goods intervenes

**Exclusion clause validity**

In parking lot case….
Bailee → Licensor, provides license to park there (but doesn’t take possession, not a bailment)
Bailor → Licensee, has license to leave car
**Landlord, tenant, sublessee:** Landlord cannot sue sublease. No privity of contract or estate

**Punch v Savoy’s Jewellers Ltd, 1986 ONCA**

1) **General rule:** Bailee liable for any deviation from terms of bailment (including unauthorized sub-bailment)
2) If goods are damaged or lost while in possession of bailee, must show that he took appropriate care of goods, or failure to do so did not contribute to loss (rebut presumption of negligence)
3) If sub-bailee aware of existence of owner who is not party to contract, they owe a duty of care to owner
4) An owner is bound by conditions of sub-bailment if he expressly or impliedly consented to the bailee making a sub-bailment, containing those conditions, but not otherwise.
5) **Exclusionary (limiting liability) clauses are strictly construed against drafter**

F: Punch (bailor) sent $11000 jeweller to Savoy (bailee) for repair. Savoy sent it to Walker (sub-bailee) for repair). Walker repaired and returned it to Savoy through CN delivery (sub-bailee), however only declared value at $100. CN had clause limiting liability to value stated. Jewellery was stolen by CN driver. Punch sued all three (savoy, walker, CN)

1) **Definition of Bailment**
   a) Bailment = delivery of personal chattels on trust (bailment is its own type of relationship, not a trust), usually on a contract, express or implied, that the contract shall be executed and that the chattels be returned (either in original or altered form) as soon as the necessary time has elapsed.
      i) Savoy = Bailee for reward, Savoy to Walker (Sub-bailee to sub-bailee),

2) **Duties of Bailee for Reward**
   i) Exercise due care for safety of article entrusted to him by taking such care of the goods as would a prudent man of his own possessions
   ii) Bailee is liable for the manner in which servants carry out duties (including theft)
   b) If goods are damaged or lost while in possession of bailee, must show that he took appropriate care of goods, or failure to do so did not contribute to loss (*Morris v CW Martin & Sons*)
      i) Onus on D to show damage occurred without neglect/fault on part of himself/servants
Must show employment of trustworthy servants and that servants exercised due diligence

3) **Application:**
   a) Walker breached duty to Punch: Reasonable prudent owner would insure for more than $100, especially when quality of delivery is unknown.
   b) Savoy breached duty to Punch: Reasonably prudent person would have ensured that ring was insured by sub-delegate Walker. They were not careful enough in negotiating what should have been as ‘essential’ term of carriage, insurance.
   c) CN is liable to Punch for full value of ring
      i) Bailment contains elements of contracts and torts. If sub-bailee carrier is aware of existence of owner who is not party to contract, they owe a duty of care to such owner.
         (1) In this case, CN’s contract of carriage specifically contemplates the existence of an owner to whom a duty of care is owed.
      ii) An owner is bound by conditions if he expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise.
         (1) While Punch had consented to the sub-bailment to CN, she had not consented to the exculpatory clause (she was not aware of it), and therefore cannot be bound by it.
         (a) Critique: If agreeing to a bailment, should accept it, warts and all!
   d) But! NO! Unless a clause excluding/limiting liability exempts a bailee from liability for loss resulting from theft of employee (stipulated precisely), the bailee remains liable for such loss.
      i) **Exclusion clauses are strictly construed**
         (a) The CN clause was too general and did not cover theft
         (i) Therefore provides no protection from indemnification from Walker.

**Tercon Contractors Ltd v British Columbia, 2010 SCC**

**TEST for when exclusionary clauses (of all kinds) are applicable:**

1) The clause must cover the breach in issue (courts interpret such clauses strictly).
2) Clause will not be upheld if negotiated in unconscionable circumstances.
3) Clause must not offend an important aspect of public policy.

**Leaseholds**

**Nature of the Interest**

1) Exclusive possession for a certain term (*Falac v Commissioner of Inland Revenue*)
   a) At the completion of the term, the landlord (reversioner) has a ‘reversion’
      i) The landlord remains seised of the estate.
2) **Term:** May be fixed term (any duration, which must be ascertainable) or may be periodic.
3) **Purpose:**
   a) A commercial lease is governed entirely by the common law.
   b) Residential leases are heavily regulated by legislature (Ex. Residential Tenancies Act)
      i) Why? Severe consequences of eviction + unbalance in power between LL & Tenant.
4) **Essential Elements of Lease**
   a) Description of parties, of property.
   b) Demise of the premises for a certain term.
   c) Date of commencement.
   d) Rent, if any (rent is not required for it to be a lease, just suggests that it is).
   e) Written requirements.
5) **Effect of a lease done without a written contract**
   a) Same as a lease with a written contract (expand on from note in reader).
6) **License is merely a privilege to occupy with permission**
   a) Really just a defense against trespassing.
   b) License may be revoked at any time, whereas a lease may only be withdrawn under special circumstances.
   c) Lease is an interest in land, in contrast a license is just an arrangement between two individuals. This means that a lease runs with the land, even if transferred between owners, whereas a license does not.
d) Tenant in possession has rights good against the world.
e) England: Landlords would attempt to introduce terms into contract to negate exclusive possession, so that court would view it as a license instead of a lease (no protection for lessor).

Metro-Matic Services v Hulmann

Exclusive right to install fixtures (both tenants and owners limited by reasonable times) was held as enjoying exclusive possession ➔ prereq for lease (held in favor of tenant)
F: Agreement with owner of building to exclusively operate laundry room. Owner sells new building to new owner, who does not wish to work with metro-matic.
I: Does MM have license (can be kicked out) or a lease?
Arguments for lease:
1) Referred to as ‘lease’ in document, as well ‘landlord and tenant’
2) Meets all of the essential elements: name of parties, in writing, specifies term, has a rent amount, specifies the laundry room to be leased
3) 6a: sole and exclusive right to install equipment
4) 6b: authorized employees are restricted to access based on reasonable times
5) 6c: other tenants shall have access, but that is merely to facilitate the nature of their business

Fatac Ltd v Commissioner of Inland Revenue, 2002 NZCA

Factors distinguishing lease/tenancy from a license:
1) Major distinction of lease, is that lessor has exclusive possession
2) Whether parties intended there to be a lease or not (any limitations of exclusive possession?)
3) Landowner may be limited by statute from granting a tenancy
4) Nature of landlord's right of re-entry, e.g. to provide services
5) If tenancy can be terminated pursuant to some matter extraneous to lease relationship
   a) Ex. Employee-occupiers who are evicted when they are fired
F: Distinction between tenancy and license. Whether right to mine quarry on part of land was lease or license
6) Tenancy = Interest in land conferring right to possess it for a limited period (Estate in land)
7) License = mere permission to be on land with or without permission to perform additional acts
8) Distinctions: Tenants enjoy statutory protection from eviction, forfeiture, proprietary interests against third parties, assignability, and liability to pay local body rates
9) Major feature: Tenant enjoys exclusive possession.
   a) Tenancy terminable at will be owner would be possession in name only, therefore term required
      i) Term may be fixed or periodic
      ii) Rent is an indicator of lease, but no rent does not *per se* negate a tenancy
   b) Limitations upon purposes tenant can use land does not necessarily negate tenancy, unless they interfere with exclusive possession
   c) Terminology used by parties in document (ex. Calling it license) is irrelevant unless it speaks to the right to exclusive possession.

Rogers v National Drug and Chemical Company

Statute of Frauds made writing of lease a necessity, however equity preserved the notion that a verbal agreement of a lease was as good as a lease
1) Default = tenant from year to year, upon terms in lease

Nature of Landlord’s and Tenant’s Interests
1) Lessee obtains leasehold interest in land that is good against even the lessor
2) Lessor retains right of reversion at end of term
3) Assignment (lease transfer): Tenant can transfer lease to another tenant. There is no privity of contract between Landlord and L2, but there is a privity of estate.
4) Sublease: Tenant (T1) conveys part of the unexpired term of the head lease to a subtenant (T2).
   a) There is neither privity of contract of privity of estate between Landlord and T2.
In practice it does not matter, if T1 is in breach to landlord, landlord can terminate head lease, and the sublease fails with it.

Spencers Case 1583: Establishes rules of covenants

Covenants that touch and concern the land run with the land and are binding upon the successors

Merger v DME Foods

Tradition TEST for a lease covenant to run with the land:

- a) The covenant must ‘touch or concern’ the subject matter of the lease?
  - i) Eg. Not applicable if the covenant is extraneous to the lease interest
- b) Does it affect the nature, quality, or value of the leasehold?
- c) Does it affect the value of land at the end of term?

F: Merger is tenant in shopping mall. Bonanza is in freestanding building in same lot. Bonanza wants exclusive parking rights and Lakeview (landlord) wants to take parking space rights away from Merger and give to Bonanza. Merger’s parking space rights came from agreement between previous tenant (Hospitality) and previous landlord (BrousseauBros).

I: Is the term of parking considered a covenant that ‘touch and concern the land’? YES

2) Application:
   - a) Availability of parking spaces in shopping plaza will directly affect the nature and quality of land
   - b) Parking so essential to the operation of Merger, it cannot be considered collateral to the lease

Sundance v Richfield, 1983 ABCA

1) Refusal of sublease = reasonable where it would preserve landlord’s economic interest
2) CL rule: Landlord may rely on ‘any reason’ if genuine for refusal, whether or not earlier told to tenant, however this may be modified by contract (etc – “based upon objections to nature of business”)
3) Dissent: Court should interpret leases in favor of reducing restraints on alienation (& allow sublet)

F: Terms of lease gives landlord right of approval on sublease, as long as consent is not unreasonably withheld (based upon objections to nature of business). P wishes to sublease portion to Swiss Chalet. Beaver lumber (other major tenant) opposed sublet, because entrance to Swiss Chalet will result in many SCC customers taking Beaver Lumber parking spaces. “not deemed unreasonable on part of landlord to withhold consent if other major tenant objects to ‘nature of business’ of sublessee”

I: Whether consent for sublease was unreasonably withheld by lessee? YES
1) If clause in lease, burden of proof is on tenant to show landlord unreasonably withheld consent
   - a) Modified however in this case by conditions of lease
2) Therefore, consent not unreasonably withheld if Landlord’s financial interest at stake
3) Non-trivial parking loss to Beaver lumber would have result in financial loss to landlord
4) Test of reasonableness – Reasonable landlord would not make poor business choices

Dissent:
1) The objection of Beaver does not go to the ‘nature of business’ as anticipated by the terms of the lease contract → cannot be extended so far to include something inherent in every business
   - a) No tenant had exclusive rights to any particular area of parking
   - b) Beaver Lumber only objects to location of SC’s parking lots, and not the nature of their business
   - c) ‘Nature of business’ is vague. Interpretation should reduce restraint on alienation (subletting)
     - i) Restricts Richfield to subletting to likely unsuccessful subtenants who do not require parking
2) Examples of ‘reasonable’ objections:
   - a) Competition, Emissions of unpleasant odour, Reputation of subtenant

Welbow Holdings, 2003 ONSCJ

Principles speaking as to whether landlord has unreasonably withheld consent:
1) Burden of proof on tenant to show refusal was unreasonable
   - a) Test: Whether a reasonable person would have withheld consent
2) Reasonableness based on information available to and reasons given by landlord at time of refusal
   - a) Landlord does not need to justify refusal if refusal was reasonable
3) Limitations on subject matter of assignment:
a) Landlord not entitled to require amendments to lease that provides more favorable terms
b) May reasonably withhold consent if assignment would diminish value of reversion
c) Refusal will be unreasonable if intended to achieve a collateral purpose
d) Probability of assignee defaulting in obligations may be reasonable grounds for refusal
e) Financial position of assignee is relevant consideration

4) Ultimately a question of fact dependent on surrounding circumstances (market conditions etc), not subject to precedents from previous cases (as to what dictates reasonable/unreasonable consent)

**Termination and Remedies**

1) Lease may come to an end under the following conditions:
   a) If lease is frustrated (e.g. force majeure – hurricane)
   b) Tenant buys freehold (smaller interest merges into greater)
   c) Third party acquires leasehold and freehold entitlements (although lease still runs if freehold just acquired)
   d) Tenant surrenders the lease (under express agreement or impliedly)
      i) Ex. Tenant abandons premises and landlord retakes possession
   e) Tenant breaches ‘condition’ of lease \(\rightarrow\) Leasehold + CS that allows re-entry right
   f) If landlord fails to take appropriate steps for recovery of possession, or actions of lessor indicate he is not repossessing, this may preclude landlord from terminating
   g) **Surrender:** Where one party repudiates the lease (notice by word or conduct)
      i) Other party accepts repudiation
      ii) Surrender can never be effected unilaterally
         1) Landlord can also insist lease is still in force

**Covenants of lease:**

1) To pay rent, insure, repair etc.
2) Covenants are independent of the lease
   a) Failure of one party to perform a covenant does not give right to termination by other party
   b) Unless, a covenant is framed as a ‘condition’ of the lease
      i) Ex. Lease for 7 years, **provided** that the tenant pay rent
3) On breach of condition, landlord may:
   a) Re-enter the premises, or
   b) Maintain the lease and sue for damages
   c) Levy Distraint (sell goods of tenant to pay owed rent)

**Highway Properties v Kelly, 1971 SCC**

1) **Landlord has the ‘election’ of the following remedies following tenant repudiation (Goldhar):**
   a) Do nothing, but simply insist on performance of terms and sue in damages for lease payments, plus any whatever ancillary payments that occur.
   b) Accept the surrender of lease. All terms and covenants obliterated. Sue for arrears only. Find new tenant.
      i) Two types of conduct by landlord which assents to surrender of old lease:
         1) Landlord takes control of premises or Landlord signs new lease with third party
   c) Notify the tenant that property will be re-let on tenants account (new tenant = assignee), landlord acting as agent for tenant. Still retain right to sue for losses occasioned by breach.
      i) Such action is not inconsistent with the continued existence of the lease (not actually surrender)
   d) Landlord may accept surrender (end lease), serve notice on tenant that action may be brought to recover for prospective losses caused by tenant’s repudiation.
      i) Actually a surrender, but right to sue comes from contract right (not property)
      ii) Contrary to traditional rule: that surrender ended tenant’s estate and right to pay rent vanished

2) **Notice requirement:** Notification is required in advance of repossession (following repudiation), in order to trigger right to sue for prospective losses
3) Under option #1 (as held in *Highway*), the duty to mitigate is not required, however duty to mitigate may be required for option #4 (as it is more of a right based in contract than property)

F: Repudiation of unexpired 15-yr-lease by tenant in shopping plaza, and subsequent seizure by LL.

1) Landlord has the ‘election’ of the following remedies following tenant repudiation (*Goldbar*):
   a) Do nothing, but simply insist on performance of terms and sue in damages for lease payments
      i) LL dilemma: Tenant might become insolvent during repudiated period. Store is empty in mall, loss of traffic, insurance requires occupation
   b) Accept the surrender of lease. All terms and covenants obliterated. Sue for arrears only. Find new tenant.
      i) Two types of conduct by landlord which assents to surrender of old lease:
         1) Landlord takes control of premises or Landlord signs new lease with third party
            a) Signing of new lease obliterates all covenants of old lease
            b) Cannot have two leases valid at one time
         2) Notify the tenant that he will re-enter property to try and sublet property on tenants account (new tenant = assignee). Sue for arrears and any shortfalls when due. (Unilateral Agency)
            i) If this happens, new lease is not inconsistent with original lease
               1) Previous tenant liable for difference in rent collected
   c) Notify the tenant that he will re-enter property to try and sublet property on tenants account (new tenant = assignee). Sue for arrears and any shortfalls when due. (Unilateral Agency)
      i) If this happens, new lease is not inconsistent with original lease
         1) Previous tenant liable for difference in rent collected
   d) + PROPOSED (contract law addition): Terminate lease, but provide notice that damages will be recovered for losing the benefit of the lease over its unexpired term. (Uses contract law to do same as option #3)
      i) In this case, notice not required prior to re-entry, but notice of damages collections
         1) No longer need to pretend that a commercial lease is merely an interest in land. A commercial lease is a contract and parties should have availability of contractual remedies.

2) Additional principles:
   a) Landlord has no obligation to mitigate loss to tenant from their repudiation of lease
      i) Contrary to duty to mitigate in contract law
   b) Insistence on lease/refusal of lease only speaks to the range of damages available, it does not obliterate claim for prospective loss
      i) By terminating lease, landlord does not limit amount he is able to recover
   c) Notice requirement: Notification is required in advance of repossession (following repudiation) to notify tenant they are on the hook for prospective losses
      i) Timing, content of notices addressed in subsequent provincial law

**Efficient Breach of Lease**

Interest ends up in hands of party who values it the most
Standard remedy in common law = damages

**Evergreen v IBI, BCCA**

Allows efficient breach imported into leasehold, however not entirely settled (appeal to SCC allowed, but parties settled)

F: Evergreen = Landlord, IBI = Commercial Tenant. Evergreen notifies IBI that they will breach their lease. IBI claims that they have an estate in land, exclusive possession for remainder of lease.

1) **Traditional:** Nothing can deprive tenant of possession, unless they are in breach of condition of lease
2) **BCCA:** Imports more contract law, allows Evergreen to conduct efficient breach
   a) This parts with tradition of property law as leasehold being a proprietary interest
3) **SCC:** Allows appeal, however parties settle before it gets to their level

**TMG Acquisitions, ONCA:**

Unless landlord accepts tenant’s repudiation, the lease is still in effect. (Therefore efficient breach not allowed, as lease cannot be surrendered unilaterally)

**Proprietary Status of Licenses**

A license is a permission to do what would otherwise constitute a trespass
**Bare license:** Implied permission (unsupported by contract) that can be revoked.

**Irrevocable licenses:** If implied that this license could not be revoked, then theoretically impossible to revoke license even with payment of damages. Could theoretically get specific performance to allow individual to stay at concert.

**Davidson v Toronto Blue Jays, 1999 ON GD**

When a license impliedly or expressly precludes or limits revocation, the licensor may be prevented from revoking contrary to the agreement. Ex. May not revoke BJ game ticket holders license arbitrarily if they are complying with rules → Terms of license interpreted strictly against drafter:

F: D refuses to show ticket to staff arbitrary demand and refuses to leave. Escorted by police out. Ticket has fine print on back which indicates ticket is a personal, revocable license

Held: Defendants are not allowed to revoke at will the license granted to the plaintiff, and to treat the plaintiff as a trespasser after he refused to voluntarily leave.

1) Nothing in rules that fan must present tickets upon demand once on premises
2) Clauses are read strictly (contra preferentum exception). Ticket is only validly revocable if licensee is acting contrary to established rules. *(Think of minor peevee ticket class example)*

**Licenses as interests in land:**

1) **GR:** An irrevocable license is not necessarily an interest in land → would not bind purchaser of the land over which license is exercised
2) There are situations in which a license alone has been held as being an interest in land in equity:
   a) **Estoppel:** Ex - License by estoppel may be imposed when owner of land allows another to spend money under an expectation the investing party will be able to remain there
   b) **Unjust Enrichment**
3) Remedy of **constructive trust** may also be imposed where it would be unconscionable to allow a new purchaser to take the land without the license

**Court may impose constructive trust enforcing validity of an existing license on land against new owner if (Lloyd v Dugale):**

1) **GR:** court will not, by default, impose constructive trust on purchaser to give effect to prior incumbrances or interests on land
2) UNLESS it is shown that conscience of estate owner is effected so that it would be inequitable to allow him to deny the claimant an interest in property.
   a) Test: Whether new owner has undertaken new obligation to give effect to relevant encumbrance or prior interest. Ex. Reduction in price due to account for existing incumbrances may = ‘new obligation’
3) However, contractual license ≠ proprietary interest in land that binds innocent third party buyers

**Licenses ‘coupled with an interest’ can bind third parties in some circumstances:**

1) **Profit a Prendre:** A license (to extract minerals) will bind subsequent owners of servient land, over which profit is exercised
2) Under *Spencer’s Rule,* a license to use a parking lot may run with a leasehold interest
3) Key: License depends on nature of interest to which it is coupled. If such an interest cannot bind third parties, neither will the license.

**Toronto (City) v Jarvis, 1895 SCC**

Equity will recognize an irrevocable license as being an interest in land, unless the new buyer did not receive notification of said interest (innocent buyer)

F: City previously had interest (license, easement?) in land to access and build drainage line. When land was eventually transferred to present, he was unaware of such interest (not recorded on title).

1) Registry laws apply to both easements and to mere licenses in land
2) For a license in land, the license would have been revocable up until the point money was expended on the licensed purpose (building drainage ditch), then it would have become irrevocable.
   a) Enforced by equitable doctrine of proprietary estoppel
3) However in this case, there was no notice of interest, so new owner is not encumbered by it (innocent purchaser

Residential Tenancy Act:
Not a complete code, just modifies the common law preserving rights of tenant and landlord
1) S1: Term exclusive possession was not used when describing a basic tenant
   a) Therefore, licensees are included, unless specifically excluded by the list in s2.
2) S2(1): Only applies to residential tenancies
3) S2(2): Lists living arrangements of which RTA does NOT apply”
   a) Ex(e): 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 a self-contained dwelling unit
      i) Self-contained dwelling unit (?) = where you would have all the facilities required for self-sufficient exclusive possession
4) S3: Cannot contract out of the Residential Tenancy Act (not voluntary)
   a) Bargaining situation generally depends upon vacancy rate in City
5) S5: Notice of termination of periodic tenancies
   a) Weekly lease: one week, by either tenant or landlord
   b) Monthly lease: one month by tenant, 3 month by landlord
   c) Annual lease: 60 days before end of year, by tenant; 90 days, by landlord
      i) Being late a couple days doesn’t mean year auto-renews, the couple days just move into second term
6) S6: A landlord cannot terminate without a valid prescribed reason (regulation)
   a) Personal use by landlord or purchaser
   b) Undertaking renovations
   c) Employee relationship
   d) Student no longer becomes student
   e) S12: 180 days notice if converting unit to condo for sale
7) S14: Notice required to increase rent. However, landlord may increase it by any amount. Is this just another way of getting around the s6 reasons required
   a) 3 months required for monthly tenancy or greater periods – may only increase rent once per year
8) S16: Landlords covenants, implied into rental lease.
   a) Promise of peaceful enjoyment and possession for tenant
9) S21: Terms, tenants obligations, that are implied into rental contract
10) S22: Assignments and subleases - Changes to common law
    a) Where commercial lease is silent, the tenant has the inherent right to alienate their leasehold (assign or sublease)
    b) Under the Act, the landlord has a right of refusal provided they supply a valid written reason.
11) Remedies s29, s37
    a) S26: If tenant breaches lease (ie not paying) landlord may apply to sue for arrears, and damages from breach
    b) S27: Statutory version sort of the Highway Properties ruling
       i) S27.1.a: Landlord may accept repudiation, and sue for arrears, and any prospective damage OR
          (1) Similar to Highway #4 option, although no mention of notice requirement
       ii) S27.1.b: Landlord may not accept repudiation and allow tenancy to continue, suing for accrued rent
           (1) Similar to Highway #1 option
           (2) However, landlord accepts repudiation once they rent to new tenant, and then may also sue for prospective damages per s27.6.b
       iii) S27(4): Imposes a duty to mitigate loss of benefit on the landlord who accepts repudiation
        iv) S27(5): Imposes duty to mitigate on landlord who also accepts repudiation, although unclear how
    c) S28: Termination for substantial breach by landlord
    d) S29: If substantial breach of lease, landlord may apply to court or issue 14 day notice to tenant prior to date of termination. Tenant may object to 14-day notice in writing and provide reason, if other than failure to pay rent
    e) S31: if tenant abandons goods
    f) S33: Notice to vacate someone who is not tenant (48 hours)
    g) S37: Tenant remedies, if breach: damages, rent abatement, compensation for doing LL job, termination of lease
    h) S40: Frustration of tenancy- where tenancy unfit to live/destroyed
Shared Ownership
Private ownership rights are shareable and infinitely divisible

Basic Concepts
Distinguishing feature between a Joint Tenancy and Tenancy in Common is the right of survivorship

**Joint Tenancy**: when two or more people together own the same interest
1) **Function**: JT never forms part of a will, as the house or property will simply shift over to the survivor.
2) **Four unities**:
   a) **Possession**: each tenant is concurrently entitled all of land subject to joint tenancy
      i) Equal rights of possession over the same four corners of land
   b) **Interest**: Interest of each joint tenant is same in extent, nature, duration.
      i) Ownership in JT must be of equal internship
   c) **Title**: Each joint tenant’s title must be derived from same document or occurrence
      i) Exception: joint tenancy created by will or by a conveyance employing a use
e) **PLUS the intention** to make a joint tenancy
      i) There can be a TiC that has all four unities, however is absent intention of JT
3) **Right of survivorship**:
   a) Right of joint-tenant to take to take interest of pre-deceased joint tenant
4) **JT may be converted to Tenancy in Common by process known as severance**
   a) However **severance may not be enacted via a will**

**Tenancy in Common**: Distinct, separate interests, united in possession. No reason for unity of interest, title, or time
1) Only ‘unity of possession’ required
   a) TiC have equal rights over whole of the land
2) **TiC do not have right of survivorship**
   a) Interest forms part of estate and passes in accordance of will or intestacy rule

**Coparcenary**: Form of co-ownership between daughters under rules of primogeniture

**Tenancy by Entireties**: Stylized form of joint tenancy sometimes held by spouses
   - SS of the Law of Property Act, abolished tenancy by entireties in Alberta
     1) Any Tenancy by Entitlies as of July 1979 becomes a joint tenancy

**Methods of Creation**:
1) **In CL, presumption of JT, provides 4 unities were satisfied and intention to create TiC not established**
2) **Equity however provided for TiC in the following sets of circumstances**:
   a) **Where two or more persons advance money on mortgage (title as mortgagees = TiC)**
   b) **If a partnership property = presumed by equity as TiC (changed by Statute, s23 Partnership Act)**
   c) **Where the purchase price for the property is provided unequally**
      i) If A pays 75% and B pays 25% and title is in B’s name (Eg. “To A and B” (each paying dif amounts)
      ii) Equity will presume B holds resulting trust for A and B as tenants in common, with A having 75% of equitable title.
      iii) Under s13 Conveyancing and Law of Property Act, A and B would be joint tenants at common law but hold equitable title as tenants in common based on purchase proportions
   d) **Equitable tenancy in common is presumed to be created when interests are created under a resulting trust, whether those interests are unequal or equal. (S8 Law of Property Act)**
   e) **Where ‘words of severance’ are used. Words which indicate intention of TiC**
      i) E.g. “To A and B in **equal shares**” “equally amongst them”, “share and share alike” etc
Statutory Modifications

3) S8 of Property Act reverses the default rule of common law, except for executors or trustees
   a) Creates a presumption in favor of tenancy in common via wills, letters patent, assurances
   b) Does not apply to personalty
   c) Ex. Where there is a composite gift to two or more persons consisting of both land and pure personalty, there
      will be a presumption of JT for personality and TiC for the land.
   d) S12(1)(d): A who owns BA in JT, can transfer that land to A to hold in TiC (same effect as severing JT)

4) S25 of Partnership Act treats Partnership Property as ‘personalty’ and therefore presumption is still JT for
   Partnership property.

5) S36(2)(a) Matrimonial Property Act: When property placed in name of both spouses as joint owners, JT results.
   a) Rebuttable presumption however upon intention of TiC
   b) Only applicable to acts under the Matrimonial Property Act

Ex1. “To A and B” (each paying different amount)
Law presumes JT, however equity presumes TiC
1) If A dies, legal title goes to B, however B holds equitable title in resultant trust for A’s estate.

Ex2. 2014: will “to A and B, to manage the land and to collect rents and profits on Whiteacre, and to hold these
(and the land) in trust for my Children C,D,E”
1) S8 of Property Act reverses the default rule of common law, except for executors or trustees
2) Trustees/executors remain JT as one needs to survive the other to manage estate
3) They hold the estate in trust for the child, who have equitable TiC
4) Statute of Uses does not execute where trust involves active duties

Ex3: A and B purchase property, and title is taken in the name of A alone
1) A holds legal title ➔ Presume A is holding a resulting trust in equity for both A and B
2) If not rebutted, A and B hold equitable title as TiC

Ex4: W purchases real property and places it in the name of “H and W as joint owners”
(Assume provisions of matrimonial property act relevant to this question)
1) S36(2)(a): When property placed in name of both spouses as joint owners, JT results. Rebuttable presumption
   however upon intention of TiC:
   a) Different from CL, that equity would have presumed a TiC
   b) JT both in law and equity where express intention of JT is clear
   c) Only applies to Matrimonial Property (under Matrimonial Property Act)

Ex 5: W purchases property and places it in the name of “H and W”.
1) S8 of Property Act: H & W will appear on legal title, holding it as TiC
2) Equitable title rests with W, the wife
3) There is no language of ‘joint owners’, as required by S36 of Matrimonial Property Act

Summary - TiC can result IF:
1) Express creation
2) Statutory Presumption
   a) S8 Law of Property Act: Rebuttable presumption of TiC where land granted/willed, unless to trustee/executor
3) If ‘words of severance are used’ in grant – “equally”, “respectively” etc
4) By virtue of a failed attempt to create a JT – Ex. Invalid Unities
   a) Ex. A and B purchase unequal shares in property – JT requires equal shares to both
5) By operation of law (In Ontario, s14 Conveyancing and Law of Property Act – Two or more adverse possessors = TiC
6) Substantively, unity of possession is required
Severance of Joint Tenancies

1) Words of severance = whether JT or TiC has been initially been created (e.g. ‘share and share alike’)
2) Acts of Severance = process of transforming exiting JT into TiC

Joint tenancy may be severed in three ways:

1) **Unilateral action** of the persons interested may create a severance as to that share
   a) **S12, Law of Property Act**
      i) S12(1)(d): Can transfer JT interest in land to yourself as TiC
         (1) Assumedly subject to s65(c)(j), in order for transfer to be registered on title.
         (2) But will S12 operation make it a transfer in equity?
            a) Equity will not perfect an imperfect gift. If insufficient notice is given per S65.
   b) **Subject to providing notice, under S65, Land Titles Act**
      i) S65(c)(i) – Notice is the minimum requirement to unilaterally sever, otherwise the registrar will not register the severance
         (1) This applies to ANY transfer which would sever the JT, unless executed by all JTs
         (2) Therefore the legal title will not pass in TiC, without the registration
         (3) What about equitable title? Not entirely clear. Equitable title may pass (see Sorenson)
   c) A JT cannot be severed by will (right of survival trumps)
   d) Granting of easement or rentcharge does not sever JT. Doesn’t destroy unity of title, merely encumbers it
   e) Mortgage: where mortgage involves passing of title to bank → disruption of unity of interest if one mortgagee
      i) Land Titles Act S103 – mortgage = a ‘charge’ on the land, not a passing of title. Therefore JT not severed

2) **Mutual agreement** between JTs (operates only in equity)
   a) Ex. If A and B agree to make tenancy in common, then this will be reinforced in equity, they do not need to go to the land titles office.

3) **Course of conduct** - as constituting a TiC (operates only in equity)
   a) **Failed Negotiations:**
      i) Havlik v Whitehouse: Courts are more willing to find negotiations regarding severance constitute a ‘course of dealings sufficient…’ in the context of marriage breakdown, than in other context.
      ii) Mere negotiations may be sufficient to constitute a ‘course of dealings’ (Re Walters)
      iii) Williams v Hensman: There may be any severance of JT by and course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common”
      iv) Historically, CL took liberal view in interpreting conduct of JTs intending a TiC as constituting Acts of Severance, given that JT was presumed in CL. Now however, statute presumes a TiC and parties need to expressly intend JT. In modern era, courts should not be so eager therefore to readily accept conduct as being an act of severance.
      v) How much is enough to satisfy the courts that there is a course of conduct???
         (1) On exam, do not accept that everything is understood as being a course of conduct
      vi) Denning: A simply refusing B’s high ball price does not constitute TiC course of conduct
   b) **Mutual or joint wills:**
      i) H and W created wills providing everything go to survivor for life with remainder to children
      ii) Is jointly held property included? Not always clear, because jointly held property is not ordinarily disposed of by will, usually goes to survivor.
      iii) Clear intention for survivorship not to govern = course of conduct
      iv) **Note that JT cannot be severed via will intention (unilaterally at least)**
   c) Ex. Note that on death of husband, wife gets JT property by survivorship and control of property. However if it is dispensed to wife in will, then it is subject to conditions of will.

4) **Other means:**
   a) **Bankruptcy:** Kantra v Kantra: Bankruptcy gives rise to severance of all jointly held property of bankrupt. Title is transferred by law to trustee in bankruptcy.
   b) **Murder** Schobelt v Barber: Murder of one JT by other results in ‘severance in equity’. Victim’s share is held on an institutional constructive trust for the benefit of the victim’s heir.

Ex1. A,B,C hold as JT.
A sells to B. B now holds 1/3 as tenant in common (no unity of title). The remaining 2/3 is held by B and C as JT. If B dies, 1/3 goes to B's estate and remaining 2/3 go to C as right as survivor. B's estate holds as TiC, and C holds as TiC (because now amounts are unequal).

Re Sorensen & Sorensen, 1977 ABCA

1) Life-lease does not destroy unity of possession (required for JT), as unity of possession is ALSO required for TiC
   a) Therefore Unity of Possession likely only applies to the right to possess 'the same four corners'
   b) But destruction of interest? (Wife now has leasehold interest on top of JT) Not considered.
2) Severing act must be inconsistent with chief characteristic of JT, right of survivorship
   a) Ex. Husband still has right to survivorship following end of wife’s life
3) A partition does destroy Unity of Possession, only once partition has been granted under s19 LPA
4) S103 LTA: Mortgage doesn’t destroy unity of interest as it is only a ‘charge’ on the land (an encumbrance)
5) Unilateral wills may not sever JT, however mutual/joint wills may be considered course of conduct/mutual agreement to sever.
6) Express intention to sever insufficient, without acceptance by other party or any other act (in equity)
   a) In law, also requires notification to be registered on title - s65c LTA
7) Intervivos gift between adult & child could be adequate severance, although requires sufficient delivery
   a) NB 1) Land cannot be gifted DMC, 2) Presumption of advancement in gifts from adult-child (Pecore)
8) A declaration of trust will sever a JT in equity, provided delivered to trustee

F: Divorce. JT over title to three lots. Husband provides life lease of matrimonial home to wife (Settlement Agreement). Wife decides to sell part of her JT interest and place capital in trust for benefit of son. Wife then brought motion to partition lots but died before this happened. Husband then claimed sole ownership by right of survivorship under JT.
I: Whether there has been a severance of the JT titles of the three lots?

5) Joint tenancy may be severed in three ways:
   a) Unilateral action of the persons interested may create a severance as to that share
      i) Each JT is at liberty to sever share, however they lose right to survivorship
   b) Mutual agreement between JT
   c) Any course of dealings sufficient to intimate that the interests were mutually treated as constituting a TiC
      i) Mere negotiations may be sufficient to constitute a ‘course of dealings’ (Re Walters)
6) Onus to prove severance rests on the claimant
   a) Conduct of wife (commencement of partition) indicated she thought more had to be done
   b) Does ‘life lease’ destroy unity of possession, therefore effecting a severance? NO
   c) No, partition required to sever unity of possession
   d) Act must be inconsistent with chief characteristic of JT, right of survivorship
      i) Unity of possession may be destroyed, but unity of possession is required for both TiC and JT
      ii) Therefore Unity of Possession likely only refers to the same four corners of the property (not actual possession)
      iii) The life lease did not interfere with right of survivorship (interest still goes to survivor)
      iv) Destruction of the Unity of Interest? She would have a freehold (leasehold)
8) Does mortgage by one joint tenant result in severance? NO
   a) Charge on property (mortgage) does not affect right of survivorship, as upon death of wife or husband the mortgage security would not continue as a charge on the property
   b) S103 LTA: Mortgage or encumbrance acts as a security but does not operate as a transfer of land charged by it. Therefore it clamps onto the title, but doesn’t take away from the unity.
9) Does will of wife affect JT? NO
   a) No, will does not sever a JT, but recall that mutual or joint wills may
10) Incomplete action for partition of sale? NO
    a) No; see now s19 LPA “The order upon being granted severs the JT”
11) Notice of express intention of severance? NO
    a) Not sufficient unless there is notification to the other party and registered on title.
12) Intervivos gift between adult & child? YES, although requires sufficient delivery
    a) This was a gift of equitable title to son which if delivered severs the JT
i) Presumption of advancement (adult to child) takes place and equitable title would have vested in son
b) However there was no effective inter vivos delivery (As trust document stayed with solicitor)
i) JTs cannot be severed in wills
c) Interests in land cannot be delivered via DMC

13) Declaration of trust? YES
a) Placement of the mothers legal title in trust for the son
b) This was a severance in equity only
c) The equitable interest, a TiC (50% interest in property) was given to son
d) Delivered to trustee

Termination of Co-Ownership of Land
1) Provided there is cooperation between co-owners, land may be partitioned and owned/sold individually
2) Co-owners could also sell together and divide proceeds
3) Or one co-owner could sell interest to the other, or to 3P (although may not be much incentive for 3P to join co-ownership → may as well partition first)
4) Note: Partition and sale by court order is not available in Alberta for chattels

Part 3 of the Law of Property Act
1) S15: A co-owner may apply to court for an order terminating co-ownership
   a) S15(2): Court may, partition, sell all land (and divide proceeds accordingly), or sell co-owners interest to another co-owner
      i) Does not appear like co-owner can sell interest to 3P
   b) S15(4): Court will fix value of interest for sale, provided it goes for market value
2) S17: Court may order compensation paid between parties upon unfair division/contributing to land
   a) Factors considered by court in doing accounting of contributions of parties (see s17(2)
      i) Exclusion by one co-owner of another
   ii) If occupying co-owner was tenant, bailiff, or agent of another co-owner
   iii) If co-owner has received from 3P more than their just share of rents from removal of natural resources
   iv) If co-owner has committed was by unreasonable use of the land
   v) If co-owner has made improvements/capital invest that increase realizable value of land [value survived]
   vi) If any non-capital expense payments made which should be compensated
      vii) An occupying co-owner, claiming non-capital expenses, should be required to pay fair occupation rent
      viii) If co-owner entitled to any compensation under Dower Act for dispensing with consent to compensate
3) S18: If there are obligations/conditions on interest (other than FS), court will impose such obligation
4) S19: Court order to terminate co-ownership severs JT
5) S20: A termination of co-ownership means land is no longer a homestead
   a) As such, termination of co-ownership dispenses with required consent under Dower Act
6) S21: If there is ongoing proceedings under Matrimonial Property Act, court may stay proceedings to allow resolution of that first
7) S22: Court may refuse application to terminate co-ownership where it would ‘unduly’ prejudice other co-owner
8) S23: If encumbrance registered against entire interest, and interest of co-owner is to be sold, an amount (the vendor's liability) will be deducted from sale amount to compensate new owner for liability of encumbrance
9) S24: If encumbrance is against a particular interest (not entire interest)
   a) If land partitioned, encumbrance stays with only the land of co-owner who had encumbrance registered against (eg. if only one of them had a lien)
   b) If all land sold to 3p, court may order encumbrance be discharged, and compensation paid to encumbrance from proceedings
   c) If land sold to other c-owner, court may order encumbrance be discharged, and compensation paid to encumbrance from proceedings of selling co-owner
10) S27: Court may order termination of co-ownership where the continuance of it will cause undue hardship to one or more of the co-owners
Resolving Concurrent Ownership Disputes

Rights and responsibilities of owners: Both TiC and JTs have right to possession of whole of co-owned property, regardless of the size of ownership share.

Accounting for benefits of occupation:
1) **GR**: One co-owner does not have obligation to account to other co-owner for benefits derived from possession. E.g. cannot make a claim against a co-owner who also has equal rights to the property
2) Exceptional circumstances where one co-owner may need to account to the other co-owner for benefits of occupation (“occupational rent”) (s17(2) factors):
   a) **Ouster**: When one co-owner has unlawfully ousted another. (Both co-owners entitled to unity of possession, even if they own 1%, they own 1% of the whole)
      i) Actual expulsion (changing locks), violent or threatening conduct, intolerable for other to remain
      ii) Constructive Ouster: conduct of one co-owner is so egregious, other co-owner is forced to leave
         (1) Where one parties conduct made ‘conditions intolerable’
         (2) Where circumstances (whether or not fault is attributed to either party) make it intolerable for parties to jointly hold property. Ex. Court order in favor of exclusive occupation to one spouse
   b) **Agreement**: agreement which makes one co-owner liable to account to the other, two types:
      i) Co-owners may have agreed to sole possession, on terms of rental or other payment
      ii) One co-owner acts as agent (or bailiff) to other, with responsibility to split/share profits
   c) **“Statute of Anne”** equivalent: 1704 Statute which accounted for accounting in certain circumstances
      i) Co-owner needs to account to other for benefits received from third party, but not benefits which are taken from the soil as a result of his own exertions
      ii) Within the scope: rental, removal of natural resources, must compensate other individual
      iii) *Henderson v Eason*: One co-owner not liable to split profits from farming the land
      iv) *Osachuke*: Husband and wife co-owned two apartments, then separated. Husband not liable to account for his sole occupation or for rents potentially attainable from vacant apartment
   d) **Waste**: liable where ‘waste’ constitutes an ‘unreasonable use of the land’.
      i) Co-owner less responsible for waste than tenant for life
         (1) Co-owner may use land same as sole owner, but subject to duty to act reasonably
         (2) Can develop and operate mines (but must pay 3P rent to other party), cut ornamental timber
         (3) Excludes conduct which would unreasonably diminish value of land (equitable waste [malicious’]
   e) **Equitable Accounting** (Improvements): equitable jurisdiction for allowances between co-owners
      i) Generally only applies in partition, sale, or analogous proceedings where one party makes claim relating to expenditures on behalf of property
         (1) Cannot disagree with swimming pool, and then benefit from increased land value at sale. Allowance made would be
         (2) S17(2)(e): Improvement [payments that have increased the realizable value of the land (value survived)]
      ii) *Mastron v Cotton*: JT entitled to credit for mortgage payments, taxes, repairs if submitted to allowance for use and occupation. Payment of mortgage principle gave rise to liability for occupation rent.
   iii) **Other circumstances must be considered**:
      (1) If tenant claims for upkeep and repairs, court usually requires claimant submit to allowance for use and occupation
      (2) Improvements leading to increase in land value ➔ allowance for improvements
      (3) Payment of greater share of encumbrances ➔ allowance for such surplus
      (4) If improvements = gift, no allowance provided
   iv) Special treatment for paying off mortgage principals, as this increases capital value of land ➔ inconsistent with rationale where other capital improvements do not result in liability for occupation rent (only non-capital expenses do)
   f) **Non-capital expenses**
      i) In some circumstances one co-owner can be reimbursed other for certain expenditures:
         (1) Mortgage payments, improvements, taxes, fire insurance premiums, upkeep & repairs, and expenses from litigation with third parties
      ii) Where expenses = joint obligations of parties, claim for reimbursement can be made at any time
(1) Otherwise, claims can only be made in proceedings for partition/sale/analogous
(2) Rationale: Co-owner should have say as to whether they wish to finance improvement to property e.g.
should not reimburse by default
(3) Accounting will take place at partition to prevent ‘unjust enrichment’ of one party

**g)** Occupation rent when non-capital expenses are being claimed

i) Occupying owner claiming non-capital expenses should be required to pay occupation rent

(1) Usually courts interpret occupation rent as half the cost of non-capital expenses

**b)** Dower rights

### Some Alternative Visions of Shared Ownership

1) Corporations, condos, co-ops, communes
2) Aboriginal title: rights on reserves; aboriginal conceptions
3) Hutterite and other communities

#### Termination of marriage (co-ownership of land/personalty in theory)

1) Rules governing resulting and constructive trusts help us answer questions ‘who owns what’
2) On marriage breakdown, the court has the power to reallocate all of rights regardless of who is on title, regardless of what the general law says is ownership

a) **It does so by imposing a presumption of ‘equal sharing’ on assets accumulated during marriage**

b) First, figure out who owns what under the general rules of ownership

c) Second, if there is a differential, then the act shifts over the ownership to make equal

### GPL and related issues

1) GNU General Public License (Open Source Software), brainchild of Richard Stahlman
2) The source code is often the protected/not disclosed by proprietary organizations
3) The GPL ensures that source code remains open source
4) The Linux operating system is governed under the GNU GPL

a) Anyone may modify the software, however (the catch!) they have to maintain the new creation as being open source (they must attach the license to it)

i) The creation must be open source

ii) And it must be available on the same terms as the original software that was modified

(1) This propagates the terms of the license to any creation from an original GPL entity

a) Makes it viral – it spreads creating the cyber commons

i) If anyone does not disclose the source code of their creation, they are in violation of the original license

b) Who is going to want to invest time in a modification, or starter program under GPL if they are not going to be rewarded or their labor? E.g. have the exclusivity benefits of property?

i) It’s not necessarily the money you make from Linux, but the money you save from it

ii) If IBM develops software from Linux, and put it back on the market, then they must use same license.

iii) They can still charge for the IBM software, or for the service of making open source software.

5) Creative Commons: same principle as GPL, but applies to other entities outside of software

a) 6-8 kinds of software (Share Alike)

### Servitudes over Property

**Easements, Covenants, Profits a prendre**

1) Alternatives: could be a lease, a license
2) Distinction: An easement is more permanent/durable than a license, it is an interest in land and will run with the land, as opposed to a license, which does not necessarily run with the land (unless enforced by equity)

**Profits a prendre:** Incorporeal hereditaments

1) **Can have a profit a prendre in gross,** or in relation to dominant land
Eg. Oil & gas leases are in substance profit a prendre (lease of subsurface? Exclusive possession?)

Characteristics of Easements (Re Ellenborough):
1) Dominant and servient tenements
   a) But S69 LTA: Allows utility ROW to exist as easements in gross
   b) In CL, cannot be an easement in gross – an easement unconnected with dominant tenement.
2) Easement must ‘accommodate’ the dominant tenant
   a) Easement must truly be able to benefit the dominant tenement
      i) Some notional proximity element, that it must be able to benefit some other land
3) Dominant and servient tenements must be in hands of different owners (NULLIFIED BY STATUTE)
   a) Under CL, cannot own easement on your own land
   b) BUT s68 LTA: Allows owner to place easement or restrictive covenant both against and for benefit of land that the owner owns
   c) S68(2): Upon acquisition of either servient/dominant land, the easement still exists (doesn’t merge)
   d) Ex. Leasing an apartment in building, easement (access in common area) runs over freehold of landlord
4) Must be capable of forming subject-matter of grant
   a) Reasonably defined
   b) Non-possessory
      i) Easements are incorporeal hereditaments
   c) Caution on novel easements
      i) Law is reluctant to acknowledge formation of new easements
         (1) Ex. An easement to use the toilet

Modes of Creation
1) Express grant and reservations
   a) Express sale of dominant property with allowance of easement (eg ROW) over adjacent property
   b) Sale of servient tenement, where seller (grantor) reserves ROW through property being sold (in favor of dominant tenement)
2) Implied grant and reservation
   a) Easement of Necessity
      i) Must be necessary for the alleged dominant tenement, not merely one that would make the property more convenient or enjoyable
         (1) Court will imply an easement of necessity, if such an easement is practically required to get to dominant tenement and if not contrary to intention of original easement grant.
      ii) The owner of the alleged dominant tenement must be able to trace the title of property back to the grant whereby an owner subdivided property which had been an original parcel, but failed to include easement of necessity in grant
      iii) “Necessity is the measure of intention”
   b) Intended Easement
      i) Easements which are required to give effect to the intention of the parties
         (1) A necessarily incidental part of the grant
         (2) Will imply both by way of grant, and even by reservations
         (1) Held: Given purpose of demise (grant of lease), it must have been intended that a right of ventilation was implied (up the side of the building)
   c) Wheldon v Burrows (only applies as implied grant, not an implied reservation)
      i) In situation for quasi-easement (Ex. Path on own property which one property is sold) can bloom into easement (as you cannot have easement on own property, but can once sold)
      ii) In use at time of grant PLUS (e.g. walking along path)
      iii) Continuous and apparent i.e. physical evidence of its existence AND/OR
      iv) Necessary to reasonable enjoyment of property
3) **Proprietary Estoppel**
   a) Where equitable to enforce easement (e.g. detrimental reliance on promisor)

4) **Prescription**
   a) S69.3 LPA: Prescription has been abolished in Alberta as a method of creating easements

5) **By operation of Statute**
   a) *Ex. Condominium Property Act (AB):* Easements to run wires and pipes are implied by statute in favor of the units 
   (the dominant tenements)

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**Nelson v 1153696 Alberta Ltd**

1) **Test for public highway:** subjective intention of owner to dedicate + accepted/used by public
2) **Being blocked in by water gives rise to Easement of Necessity → necessary ‘practical’ acces**
3) **The necessity must exist at the time of the grant of the dominant tenement land**
4) **Need to be also capable of identify the servient tenement with certainty (the plot of land blocking access)**

F: Nelson brought property North of Dale and Don’s Seltzer’s land (two lots). Road to access Nelson’s land runs through Dale Seltzer’s land. Proznik purchased Dale Seltzer’s land, and prohibits Nelson from using it.

1) **TEST for ‘Public Highway’**
   a) There must be on part of the owner the subjective intention to dedicate
   b) It must appear that intention was carried out by being open to public, and public must accept it
      i) Held: No dedication of a public highway. No subjective intention to dedicate. Use of the highway by the 
         public itself is not enough

2) **Easement of Necessity**
   a) In order for an easement of necessity to be found, the necessity must exist at the time of the grant of the 
      putative dominant tenement.
      i) All of the relevant land was once held by the crown
   b) Not practical in this case to treat water access as access that obviates necessity
      i) Although, *Bower:* Water access negates the claim of necessity
   c) Where would the easement of necessity be?
      i) In whichever piece of land was granted last in order to block the access to the third portion of the land
   d) In this case, the evidence of the date of the Crown grant was not correctly submitted. Therefore the court 
      could not decisively state in which section the easement of necessity would be.
   e) *Gardner v Horne:* A way of necessity is not superceded by a subsequent construction of a public road which 
      provides more convenient access.

3) **Proprietary Estoppel**
   a) The ‘holding out’ of an easement to an inequitable detriment to Nelson
   b) Nelson was using the way for years, without any form of positive restriction
      i) This was held as not giving rise to estoppel.
   c) Nelson spent significant amount of money to improve resort
      i) Detrimental reliance?
         (1) Most of the money was spent at beginning
         (2) Facts indicate that he knew he didn’t have a firm right to use roadway (easement)

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**Transfer of Easement (& sub interests) after creation:**

S7 LPA: Every transfer of title is an **absolute transfer** of all interests

1) Ex#1: A owns BA + and easement over Whiteacre, owned by B. Does easement run with dominant lands?
   a) Easement is not noted on title
   b) A sells black-acre to C
      i) Easement would be transferred along with all of A’s other interests
      ii) See s7 LPA: Every transfer = absolute transfer

2) Ex#2: A owns BA + easement over WA, owned by B. B sells to D. Does burden on servient lands transfer?
   a) Depends on how easement was created:
      i) If created by express grant → needed to be registered on title to be transferred
ii) If created by other basis ⇒ an implied easement will run as overriding interest

iii) Unclear whether an easement created by estoppel needs to be registered on title
    (1) Nelson; indicates that this remains to be answered another day

b) See s61(1)(f) LTA
   i) S61: some interest will run with the land even if not noted on title (overriding interests)

Petro Canada v Shaganappi Village Shopping, 1990 ABCA

1) Granting of express easement obviates future possibility of implying easement of necessity on servient tenement under s61(1)(f) LTA

2) Express easements should be registered on servient land title in order to run with land.

F: Gas station in parking lot of mall. In order for patrons to have access to pumps, owners acquired express easement through parking lot, however easement not registered on title. New owner acquired parking lot, not privy to easement. I:

Only way for easement to be binding was if it ran on land. Did it?
1) Applied constricted meaning to s61(1)(f). Does not apply to express grants or reservations of easements ⇒ they must be registered, or do not run with land.
2) Therefore purchaser or servient lands took without notice of easement, and therefore service station had no access.
3) Why no easement of necessity? Only arises as extension of intention of parties. There is no room to imply an easement where it was previously subject of express grant. Should have been protected by registry on title.

Scope of Rights in Easement:
How do you know what rights of easement are conferred?

1) Intention behind the original grant
   a) Properly instructed granted may specify the scope in clear language
   b) If language is silent, deduce intention from surrounding circumstance as at time of grant

Laurie v Winch, 1953 SCC

1) Court will assess circumstances at time of grant to ascertain intention of parties as to the location of the dominant easement and the nature and extend of rights convey in easement

2) The scope of a dominant tenement can evolve over time:
   a) Dependent on what is within ‘contemplation of parties at time of grant’, depending on circumstances
   b) The requirement of approval by a 3P does not bar the evolution of a dominant tenement/easement

3) Upon sub-division of dominant tenement, the easement remains intact for use of sub-divided properties

F: “Grant of perpetual right of way over Lot 33” to neighbor. This is binding on my heirs, executors, and assigns.

Three claims made by Plaintiff:

1) The conveyance of 1925 was nothing more than a personal license
   a) Instrument is silent on specificity of dominant tenement, therefore invalid easement in gross
   b) Also ambiguous as to where ROW was actually intended to run

2) ROW was limited to purposes at the original time of granting (farm equipment passing through)

3) There has been such a change in circumstances, amounting to an extinguishment of easement

What was the scope of the easement?

4) In 1925, the idea of further development was not beyond contemplation of parties

5) Upon the severance of the dominant tenement into several parts, the easement attached to those parts.

Malden Farms v Nicolson, 1956 ONCA

1) Where the burden on an easement is markedly increased, ‘an unauthorized enlargement and alteration in the character, nature, and extent of easement’, such use may be invalidated by courts (via injunction)

2) Legal right of grantee is based upon ascertainment of intentions of parties at time the right was created

F: MF had easement over servient lands for private use and enjoyment. MF eventually bought portion of servient lands, including FS upon which ROW ran.

1) Burden on easement on servient lands was markedly increased upon that which was originally contemplated by grantors.

2) Originally granted for private use, whereas now it is engaged for commercial use.
3) Interpretation of easement right in a fashion that interferes as minimally as possible with other uses of the servient land.
4) In this case, the uses of the servient land is relevant to determination of the scope, because the court did not wish to disturb its purpose/function.

Harris v Flower, 1904 CA
An easement cannot be used colourable to benefit some non-dominant tenement land. However, some mere use of easement for 3P benefit may be tolerable.

Termination

Costa v Janikas, 2001 ONSC
An easement that has been extinguished by abandonment cannot be revived by including it in a registered conveyance made subsequent to abandonment.
- Onus of proving intent to abandon easement and non-use lies with claiming party.

Restrictive Covenants

Tulk v Moxhay, 1848 English Court
F: Promise that Leicester square will be preserved as garden. Court of Chancery enforced this, creating a covenant. Keppell: Equity should not recognize covenants. Talk: I don’t care/I don’t understand Keppell. We should recognize covenants.

The burden of a covenant may run with the land in equity
1) A purchaser with a notice of a covenant is bound that covenant by equity
2) “A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all other subsequent owners with notice, independently of whether it be one that runs with the land…”
3) A matter of contract, even if mere agreement, and no covenant, court will still enforce it

Basic Ingredients
1) Starts life as a contract, and then is capable of running with land
2) Underlying themes:
   a) Property law is intended to promote economic efficiency
      i) Covenants restraint on alienation?
   b) Promoted freedom and to promote personal development
   c) Property can be a ‘dead hand’ control over future owners
      i) In contract, can only bind parties under privity of contract

Burdens in Equity: Burdens may run with the equity in land (Tulk v Moxhay) – Criteria ‘to run’:
1) Covenant must be ‘negative’ in substance – only ‘restrictive’ covenants will be enforced
   a) Ex. You cannot use that property for a supermarket
2) Must have been intended that burden was to run with covenator’s land
   a) Land must be sufficiently described in covenant
3) All general principles of equity apply
   a) ‘Notice’ in binding a purchaser, is a requirement by equity (Talk)
4) It must have been made for, and actually benefit, land retained by the covenantee (touch and concern), and the dominant land(s) must be easily ascertainable from the covenant document.
   a) It is not necessary that properties be adjacent to one another, although proximity is required
   b) Not necessary for dominant tenement to be a freehold.
      i) Lease can support restrictive covenant, as can the interest of a mortgage
   c) The covenant must actually be capable of benefitting the dominant lands.
i) Must ‘touch and concern’ the land → directly affects mode of occupation or value of land
   (1) Prohibiting alienation to particular races does not ‘touch & concern’ the land

ii) Rationale: Requires a good reason for enforce burden once coventee parted with property
    (1) This good reason = actual benefit to dominant tenement
    (2) Ontario law allows conservation and heritage covenants to exist in gross

d) Dominant lands must be easily ascertainable from the deed containing the covenant (Galbraith)
i) Rationale: Servient purchaser shouldn’t need to look to far to see if land bound by covenant

Must “Touch and Concern the land”
1) Where benefits are trivial, why should court enforce it?
   a) Restrictions on a given business can touch and concern the land
   b) Restrictions for conservation (Talk) touch & concern the land

Swan Properties v Irving Oil, 2004 NLSCTD
TEST for ‘benefit’ to competitor: The two were in the same ‘competitive zone’.
F: Covenant = no restaurants on servient land.
Court held that 3.8km or 5.2km was short distance from each other and benefitted the dominant lands by preventing competition within short distance.

880682 v Molson Breweries Properties, 2002 ABQB
Where ‘competitive zone’ is too widespread to be international court will likely not enforce restrictive covenant
F: Dominant tenement is Molson is Edmonton. 300km away is servient in Calgary which had covenant preventing brewery. Argument that brewery in Calgary would compete with brewery in Edmonton. Shipments sent all over.
I: same competitive zone?
H: “If principle argued is allowed, it would not only stand for dominant land in Edmonton, but potentially anywhere in the world”

Ziff Principle (Anti-Competition Covenants):
1) There must at least be an overlap of competitive zones, for there can be no meaningful benefit if that element is missing.
2) Plus – when a substantial part of the commercial advantages of the dominant tenement would also enure to a servient tenement, a non-compete restriction may confer a sufficient benefit on the dominant property. (covenant appropriates competitive advantage)

Some factors to be considered in application of Ziff Principle:
1) Customer traffic
2) Ease of access and parking
3) The location of competitor-businesses
4) The cost of land
5) Plans for redevelopment in the vicinity
6) Availability of alternative sites with the ‘competitive zone’
7) Saturate market already in the zone

Practically: People will likely not incur legal costs to challenge covenants, when they can just go next door

Termination Covenant
LTA, s48.4: Court can discharge covenant under following:
1) To the extent that covenant is inconsistent with municipal bylaw (essentially a paramountcy TEST)
2) If proof is shown that modification to covenant would benefit persons principally interested in enforcement of the conditions or covenant
3) AND the modification is in the public’s best interest
Benefits in Equity: Three means by which a benefit can be transmitted:

1) Annexation
   a) A burden on one land (servient) is made with intention of benefit to other land (dominant)
   b) Benefit of a covenant can be annexed to run automatically with benefited land
   c) Benefit must touch & concern the land, and be intended to run with it
      i) Phrasing of intention = ‘annexation’ or indication that benefit passes to successors in title
   d) Land must be ascertainable from the document
   e) In CL: Notice is not required for transferee of the benefited lands
   f) By extension of Galbraith, there is no ‘implied annexation’ of benefit to lands. Canadian law stresses that it must be clear that holder of burden knows who will enforce promise (beneficiary)

2) Assignment
   a) Benefit under contract may be assigned as an equitable chose in action

3) Building Schemes
   a) Establishes a ‘local law’ where each property owner in development is subject to burdens and entitled to benefits of relevant covenants
   b) Each lot owner may enforce covenants no matter when the individual lots were acquired
      i) Benefit of a covenant under building scheme can be acquired by early purchasers, even where such burden must be taken by later purchasers
   c) Prerequisites required to establish building scheme:
      i) Titles to property must derive from common vendor
      ii) Vendor must have laid out parcels subject to restrictions that could only be consistent with general scheme of development.
      iii) Restrictions must be intended for benefit of all parcels within the scheme
           (I) Must be an element of mutuality
      iv) Affected parcels must have been purchased on understanding that restrictions would enure to the benefit of the other parcels
      v) The area of the scheme must be properly defined
   d) Other:
      i) Positive covenants are not enforceable under building scheme
      ii) Equitable rules remain relevant: notice is a requirement
      iii) Dominant lands must be properly described in the document

Benefits & Burdens under Common Law:
1) Principles of equity dominate covenants for the following reasons”
   a) Primary remedy, injunctions, is an equitable remedy
   b) The common law refuses to enforce a burden against subsequent land owners

2) However, under CL a benefit may be transferred, and CL will allow new benefitor to enforce covenant against burdenor (original covenantor).
   a) This may be achieved through contractual assignment
      i) Although cannot contractually assign burdens

3) A benefit may also be annexed to the land under CL, provided three steps met:
   a) Covenant must touch and concern dominant land
   b) Must be shown that it was intended that benefit would run
   c) At CL, the transferee must acquire the entire interest of the original holder of the benefit
      i) Benefits conferred may be enforced even for positive covenants.
         (I) Only person susceptible to an action at law is the original covenantor

Ex#1: CoventEE sells the land to EE’
Does the benefit run? YES, in both law and equity – pretty straightforward

Ex#2: The covenantor (OR) sells the land to OR’
Does the burden run? Only in equity (as established by Tulk v Moxhay)
Amberwood Investments v Durham Condo Corp, 2001 ONCA

1) Affirmation of principle that positive covenants do not run with land
2) Reluctance to create new interests (numerous clausus) by restricting
   a) Better dealt with by Legislature
   b) Modifying common law could adversely affect existing property interests
3) Only ‘conditional grants’ are methods of allowing positive covenants to run with the lands.
   a) Where the grant is framed as a ‘determinable interest’
   b) Distinct from a ‘conditional benefit’/‘benefit-in-burden’ principal in Halsall

F: Amberwood was a subsequent purchaser of a condo building #1. It shared a recreational facility with condo building #2. Reciprocal agreement between original owners requires distributing of cost of shared services and facilities. When Amberwood refused to pay operating cost of monthly facility, other condo building owner initiated action under Reciprocal Agreement.

I: Does ‘promise to pay’ for shared recreational facility ‘run with the land’? NO, positive covenant

f) GR: Positive covenants do not run with freehold land, either in law or equity (the Austerberry rule)
   a) Rhone: Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. (PC = “one that requires a person to do something on his/her land”)
      i) “Equity supplements but does not contradict the common law”
         (1) Cannot contradict the CL principle that a party cannot be made liable to a contract unless he was party to it
   b) Enforcement of negative covenant deprives owner of rights over property (not contract)

2) Equity will intervene only where there is a negative covenant, express or implied

3) Rationale:
   a) The need for certainty in ascertainment of title and incidental rights
   b) The courts were not ready to change the law, best for legislature, could affect existing property rights
      i) Also in line with restricting recognized rights under numerous clausus

4) Exceptions to rule:
   a) Leaseholds: Spencer’s Rule that “as between landlord and tenant, both the burden and the benefit of a covenant, which touches or concerns the land demised and is not merely collateral, run at law with the reversion and the term of the lease whether the covenant be positive or negative”
   b) Statutory Exceptions:
      i) Planning Act: Burden of certain positive covenants made in favor of public body can run with the land
      ii) Condominium Act: Permits the enforcement of such covenants for condos
   c) Non-statutory methods to circumvent the rule:
      i) Use a chain of covenants to maintain a privity of contract
         (1) In this case, chain was broken by original developers financial difficulties, resulting in power of sale proceedings, and reciprocal agreement not included in sales contract
      ii) Rentcharge: periodic payment annexed to a freehold and is enforceable against the freeholder currently in possession
         (1) Will bind successor even without privity and despite imposing positive obligation
         (2) Amount of obligation can be variable, so long as ascertainable
            (a) Ex. Percentage of value of property
         (3) Failure to pay gives rise to action in debt and right to levy distress
         (4) Can also attach right of entry to rentcharge in event of failure to pay
      iii) Principal of benefit and burden (Halsall v Brizell) – (only original grantee bound by covenant – Tito’s Case & Amberson)
         (1) “The person who claims the benefit of a deed must also take it subject to its burdens”
         (2) F: purchasers of plots on building estate, entitled to use roads, covenanted to pay proportion of cost of maintenance. Were successors bound by such covenant? YES
         (3) “The benefit and burden, although arising from the same instrument, are independent of each other” (Tito’s case)
         (4) If D did not desire to take benefit of the deed, they could not be liable to the burden
      iv) Conditional Benefits (Acceptable under Halsall)
“a function of the creating instrument that in effect attached conditions to the exercise of a right and thereby restricts the scope of the benefit itself” (Tito’s Case)

(2) The benefit and the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit

(3) The condition must be relevant to the exercise of the right (Rhone). Not every condition will be enforceable by simply being attached to a right.

(4) Needs to be proven that there was a correlation between the benefits and burden assigned, for Amberwood to be liable for positive covenant. No evidence that Amberwood used or enjoyed the benefit (the recreational facility).

(a) In Halsall, user should have option to remove self from benefit/burden all together

(b) Co-ownership is irrelevant to covenant liability

v) Conditional Grant: Granting of a benefit or easement was conditional on assuming the positive obligation, then obligation was binding.

(1) Obligation = incident of easement itself and not merely a liability running on land

vi) Requires that grant of easement/benefit be framed as conditional upon the continuing performance of a positive obligation. Not because it would run with the land, but because the condition would serve to limit the scope of the grant itself. (Determiable interest)

(1) However, none of the grants in the reciprocal agreement are framed this way

MacPherson JA (dissent):

1) The courts should accept the ‘burden-benefit’ exception from Halsall with following components:

   a) Assignee of a positive covenant must have notice of it
   b) Positive covenant which imposes a burden, must be accompanied by benefit
   c) Some type of qualitative threshold in the benefit-burden analysis
   d) Need not be a direct relationship between benefit and the burden
   e) Assignee must be able to exercise a choice about assuming the benefits and burden

2) “Since Amberwood had notice of the burdens, since the benefits are ‘real and substantial’, and since Amberwood elected to accept them, it must also accept the burden of paying its share of the costs”

3) Conditional grant: direct and intentional linkage between the benefits of the easements and the burden of the interim costs. Amberwood must pay

Ways to make positive covenants run with land

1) Positive obligations can run with leases (eg payment of rent)
   a) Just need to satisfy rules of Spencer’s case (must touch and concern)

2) Statute exceptions (eg Alberta Land Stewardship Act, s34)
   a) Conservation easement recognized whether ‘positive or negative’ in nature
   b) No dominant tenement is necessary

3) Chain of contracts – ie series of physical contracts, to maintain privity

4) Rentcharges: see above

5) Doctrine of Halsall v Brizell (disapproved of in Amberwood by Ontario Court)
   a) Ex. Granting of easement (benefit), but you must share cost of maintaining it (burden)
   b) If you take the benefit, you are responsible for reasonably related connected burdens
   c) You also must be in a position to withdraw from benefit & burden

6) Conditional grant (accepted in Amberwood)
   a) Conditional grant is where condition can be set up as determinable, so that the condition is essentially only giving limit to the scope of the grant itself.

Thamesmead Town, 1998 EGLR CA

Court of Appeal applied and explained approach in Rhone:

In order for a ‘burden’ to run with the land

1) Must be a nexus between the benefit and the burden

2) New owner must have an opportunity to reject the burden by foregoing benefit

3) Refinement: Owner of burdened land must be able to demand benefit as a right

4) Person claiming burden must actually be obligated to undertake particular burde